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ARCHBOLD'S

PRACTICE

OF

The Court of Queen's Bench,

IN

PERSONAL ACTIONS AND EJECTMENT.

The Seventh Edition,

By THOMAS CHITTY, Esq.,

OF THE INNER TEMPLE,

INCLUDING

THE PRACTICE

OF

The Courts of Common Pleas and Exchequer.

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DEDICATED

BY

THE EDITOR.

ADVERTISEMENT

TO

THE SEVENTH EDITION.

THE urgent demand that has been made for a New Edition of this Work, induces the Publishers to send forth the First Volume. The remaining Volume, which is nearly completed, with the Index and List of Cases, Statutes and Rules (to the entire Work) will be speedily published.

It will be found, on reference to the contents of the present Edition, that considerable improvements have been made, both in the subject-matter and the arrangement of the Work. All the recent Statutes on the subject have been noticed, and their more important provisions inserted in full; and the decisions of the several Courts of Law, up to the latest period, have been stated or referred to. The practical directions throughout the Work have been thoroughly revised. All such parts of the old Practice as have been abolished, or rendered obsolete by recent changes, and are not likely to be of service in explaining or illustrating the modern Practice, have been expunged; and much new and important matter has been added.

The arrangement also of the First Volume has been entirely re-modelled, in order to meet the changes effected by the late important Statute of the 1 & 2 Vict. c. 110; and it is hoped that a considerable improvement has been effected by the insertion of an Index at the head of each of the more important Sections of the Work; which, together with the Marginal Notes introduced for the first time in the present Edition, will considerably facilitate reference to its Contents. In fact, no pains have been spared to render this Edition as complete and correct as possible.

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CHAPTER I.

THE JURISDICTION OF THE COURTS OF QUEEN'S BENCH, COMMON PLEAS, AND EXCHEQUER OF PLEAS.

CHAP. I.

In what Actions.

In general.

In what Actions.] THE Courts of Queen's Bench, Common Pleas, and Exchequer of Pleas have jurisdiction in all *personal* actions (with the exception of penal actions in some particular instances) and in ejectment. The Court of Common Pleas has exclusive jurisdiction in *real* actions (*a*).

In Penal Actions.

As regards *penal actions*, by stat. 21 *J.* 1, *c.* 4, all suits for offences against any penal statute for which a common informer may ground any *popular action*, *bill*, *plaint*, *suit*, or *information* before justices of assize, of *nisi prius*, of gaol delivery, of *oyer* and *terminer*, or justices of the peace, shall be prosecuted before such justices, and not in the courts at Westminster. This statute extends, in the first place, only to such penal statutes as were in force when this statute, 21 *J.* 1, *c.* 4, was enacted (*b*); and, secondly, to such penal statutes only as enable the inferior court to proceed by action, bill, plaint, or information. Therefore, where an action was brought in the Court of King's Bench on stat. 1 *J.* 1, *c.* 22, which gives power to an inferior court to *inquire of* the offence, and to *hear and determine* the same, the court held that an action for the penalties might be brought in that court; for the inferior court had power to proceed by indictment or presentment only (*c*). And in all other cases, not within this statute, where an offence is created by statute under a penalty, an action for the penalty may be brought in either of the superior courts, unless the court be ousted of its jurisdiction by express words in the statute creating the offence, or by necessary implication (*d*).

(*a*) 3 Bl. Com. 42, 43: Bac. Ab. Courts, (A). All real and mixed actions, except the writ of right of *dower*, *dower unde nihil habet*, *quare impedit*, and ejectment, are abolished by 3 & 4 W. 4, c. 27, s. 37.

(*b*) See *Shipman* v. *Henbest*, 4 T. R. 109.

(*c*) See Id: *Jeffery* v. *Coles*, Willes, 634: *Curlewis* v. *Dudley*, 2 L. Raym. 872; 1 Saund. 312 a.

(*d*) *Cates* v. *Knight*, 3 T. R. 444.

By what process such actions commenced.

In personal Actions

By what process such Actions commenced.] By the Uniformity of Process Act, 2 *W.* 4, *c.* 39, *s.* 21, the process for commencing *personal* actions (*e*), in any of the superior courts at Westminster, was—1*st*, a *writ of summons*, in cases where it was not intended to hold the defendant to bail, or to proceed against a member of parliament, according to the Bankrupt Act, (6 *G.* 4, *c.* 16, *s.* 10), and a *writ of distringas*, to enforce the defendant's appearance to such writ of summons, in case he cannot be served with it, and where he has not appeared to the action, and cannot be compelled to do so without some more efficacious process; *or,—2ndly*, a *writ of capias*, in cases where it was intended to hold the defendant to bail, such defendant not being in the custody of the Marshal of the Marshalsea, or Warden of the Fleet; *or,—3rdly*, a *writ of detainer*, in cases where it was intended to detain a person in custody of the marshal or warden; *or,—4thly*, another kind of *writ of summons*, in cases where it was intended to proceed against a member of parliament according to the provisions of the Bankrupt Act. But now since 1 & 2 V. c. 110, s. 2, all personal actions in the superior courts must be commenced by writ of summons. This writ, and the proceedings on it, shall be fully noticed hereafter in its proper place.

In Ejectment. In the action of *ejectment*, the old mode of commencing it by serving a declaration founded, in the Courts of Queen's Bench and Common Pleas, on a supposed original writ issued, (which is most usual), or founded, in the Courts of Queen's Bench or Exchequer, on a supposed bill filed, still prevails (*f*).

In Replevin. In *replevin* also, and other suits *removed* from inferior courts

---

(*e*) Before the 2 W. 4, c. 39, the process for commencing any of the above actions in which the Court of Queen's Bench had jurisdiction might have been by an *original writ*, which issued out of Chancery, and was obtained of the cursitor. Also, although the original design and establishment of that court was to determine criminal matters, frauds, and breaches of the peace; yet if any one had a cause of action against an attorney or officer of the court, or against any person in the *actual* custody of the marshal for a matter within its jurisdiction, he could not have sued him elsewhere, but must have proceeded in that court by exhibiting a *bill* against him. (Bro. Bille, Pl. 6, 31; 2 Saund. 1, n. 1; Steph. Pl. 52. See *Rees* v. *Morgan*, 3 N. & M. 205). A fiction, grounded upon a part of this practice, gave the court nearly an unlimited jurisdiction in all personal actions by *bill*. Upon a defendant's being brought before the court, by bill of Middlesex, *latitat*, &c., for a supposed trespass, (that is, in bailable cases as soon as he had put in and perfected bail, or, in non-bailable cases, as soon as he had entered an appearance, or an appearance was entered for him by the plaintiff according to the statute), he was then considered as in the custody of the marshal; and the plaintiff was at liberty to waive the trespass and exhibit a *bill* against him for any other cause of action he might think proper; (*Foster* v. *Bonner*, 2 Cowp 455; R. E. 15 G. 2, r. 1); for the judges of the Court of Queen's Bench maintained, that when a party was once brought into court, and either in the actual or supposed custody of the marshal, he could not be charged, even for any civil matter, elsewhere; (31 H. 6, 10 b; 4 Inst. 72); and that, being then before the court, the plaintiff might have proceeded against him for any other cause of action, besides the trespass for which he was in actual or supposed custody. By the aid of this fiction, the court long exercised a jurisdiction by bill in personal actions (whether the defendant were in the actual, or merely in the supposed custody of the marshal) in all cases, excepting where the defendant was a peer, or member of the House of Commons, not in the actual custody of the marshal, (*Jackson* v. *Mackreth*, 5 T. R. 361), and except in actions against corporations, or against the inhabitants of a county or hundred, or other like district generally, who could not even be supposed to be in custody. Before the 2 W. 4, c. 39, also, the Court of Queen's Bench had jurisdiction, by *attachment of privilege*, in all personal actions in which the attornies or officers of the court were plaintiffs. (Steph. Pl. 58). It also had jurisdiction by *original bill* and *summons*, in all personal actions against knights, burgesses, and others, being members of parliament. (12 & 13 W. 3, c. 3). As to the process for the commencement of actions in the C. P. and Exch. before the 2 W. 4, c. 39, see Tidd. New Prac. 57, 58.

(*f*) See *Doe* v. *Roe*, 1 C. M. & R. 19; 4 Tyr. 649; 2 Dowl 690, *S. C.*: *Doe Ashman* v. *Roe*, 1 Bingh. 253; 1 Scott, 166, *S. C.*: *Doe* v. *Williams*, 2 A. & E. 381; 4 N. & M. 259, *S. C.*: *Doe Fry* v. *Roe*, 3 M. & Scott, 370.

into the superior ones, the old mode of commencing, and for the most part in proceeding in them, still prevails (*g*).

As courts of appeal.

As Courts of Appeal.] The judgments of all courts in England, inferior to the Court of Common Pleas, (excepting the courts of London, of the Cinque Ports, and of a few other places), if erroneous, must be brought under the review of the Court of *Queen's Bench* for revision and correction: the judgments of inferior courts of record, where the proceedings *are according to the course established by the common law*, by *writ of error;* the judgments of inferior courts of record, where the proceedings are *summary*, or *different from the course* of the common law, by writ of *certiorari;* and the judgments of inferior courts, *not of record*, by *writ of false judgment*. Formerly, also, the judgment of the Court of Common Pleas, if erroneous, must have been revised and corrected in the Court of Queen's Bench, by writ of error; but the statute of 11 *G.* 4, & 1 *W.* 4, *c.* 70, *s.* 8, provides, that writs of error upon any judgment given by either of the three courts at Westminster shall be returnable only before the judges, and judges and barons, as the case may be, of the other two courts, in the Exchequer Chamber, and thence into the House of Lords only. (*See post, Book I. Part I. Ch.* 4, *Sect.* 3).

Queen's Bench.

Common Pleas.

The judgment of an inferior court of record cannot be removed into the Court of *Common Pleas* for revisal (*h*). But suits commenced in inferior courts not of record may, by writ of false judgment (*i*). And suits may, before judgment, be removed from inferior courts generally into that court, and proceeded on to judgment.

Jurisdiction of courts at Westminster extended to Chester and Wales.

Jurisdiction of Courts at Westminster extended to County Palatine of Chester and Wales.] By the Administration of Justice Act (11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 13) it is enacted, that "his Majesty's writ shall be directed and obeyed, and the jurisdiction of his Majesty's Courts of King's Bench, Common Pleas, and Exchequer, respectively, and of the several judges and barons thereof, shall extend and be exercised over and within the county of *Chester*, and the county of the city of *Chester*, and the several counties in *Wales*, in like manner, to the same extent, and to and for all intents and purposes whatsoever, as the jurisdiction of such courts respectively was then exercised in and over the counties of *England* not being counties palatine; any statute theretofore passed to the contrary notwithstanding."

Suits pending in Chester and Wales transferred to Courts at Westminster.

And by sect. 14 (*k*), "all the power, authority, and jurisdiction of his Majesty's Court of Session of the said county palatine of Chester, and of the judges thereof, and of his Court of Exchequer of the said county palatine, and of the chamberlain and vice-chamberlain thereof, and also of his judges and courts of great sessions, both in law and equity, in the principality of Wales, shall cease and determine at the commencement of that act; and all suits then depending in any of the

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(*g*) 2 W. 4, c. 39, s. 19: see *Doe* v. *Grant*, 6 N. & M. 70.

(*h*) Cro. Eliz. 26; Dyer, 250: see 2 Saund. 101 a.

(*i*) See *Overton* v. *Swettenham*, 3 Bing. N. C. 786: *Stratten* v. *Hutchinson*, 4 Bing. N. C. 83.

(*k*) See *Williams* v. *Williams*, 1 C. & J. 387: *Jones* v. *Clarke*, Id. 447: *Williams* v. *Williams*, 2 Id. 55.

INTROD.

said courts, if in equity, shall be transferred with all the proceedings thereon to his Majesty's Court of Chancery or Court of Exchequer, as the plaintiff, or, in default of his making choice before the last day of the then next Michaelmas term, as any defendant shall think fit, and, if in law, to the Court of Exchequer, there to be dealt with and decided according to the practice of those courts respectively, or of the court from whence the same shall be transferred, according to the discretion of the court to which the same shall be transferred, which court shall, for the purpose of such writs only, be deemed and taken to have all the power and jurisdiction to all intents and purposes possessed before the passing of that act by the court from which such sentence shall be removed."

Courts of County of City of Chester preserved.

Sect. 15. "Provided always, that nothing in that act contained shall be construed to abolish or affect the obligations and duties, or the jurisdiction or rights, then lawfully imposed upon, performed, or claimed and exercised by the mayor and citizens of Chester, in the courts of the county of the city of Chester, or otherwise; save and except that such writs of error, or false judgment, as might then by any charter or usage of the said corporation be brought upon the judgments of the said courts, or any of them, before any of the courts abolished by that act, should thereafter be issued, as in other cases from inferior courts, and be returnable into his Majesty's Court of King's Bench."

CHAPTER II.

THE JUDGES AND OFFICERS OF THE COURTS.

SECT. 1. *Judges*—5 *to* 8.

2. *The immediate Officers of the Courts, their Holidays, Hours of Attendance, Privileges, Duties, and Liabilities, &c.*—8 *to* 13.

3. *Cursitors*—13.

4. *Sheriffs*—14 *to* 18.

5. *Attornies*—19 to 89.

SECT. 1.

The Judges.

Judges of Queen's Bench.

THE Court of *Queen's Bench* consists of a chief justice and four (*a*) puisne judges, who are by their office the sovereign conservators of the peace, and supreme coroners of the kingdom. The chief justice is appointed by writ; the other judges by patent. By stat. 12 & 13 *W.* 3, *c.* 2, it is enacted, that the commissions of the judges shall be made (not, as formerly, *durante bene placito*, but) *quamdiu bene se gesserint*, and their salaries (*b*) ascertained and established; but that it may be lawful to remove them on the address of both houses of parliament. And by stat. 1 *G.* 3, *c.* 23, (enacted at the earnest recommendation of the king himself from the throne), the judges are continued in their offices during their good behaviour, notwithstanding any demise of the crown, (which was formerly held immediately to vacate their seats), and their full salaries absolutely secured to them during the continuance of their commissions; his Majesty being pleased to declare, that "he looked upon the independence and uprightness of the judges as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honour of the crown (*c*)."

(*a*) Formerly there were only *three* puisne judges, but Stat. 11 G. 4 & 1 W. 4, c. 70, allows the crown to appoint a *fourth*, in pursuance of which statute an additional puisne judge was appointed in Michaelmas Term, 1830, to each of the three superior courts.

(*b*) As to the salaries of the judges, see the 6 G. 4, cc. 82, 83; 11 G. 4 & 1 W. 4, c. 70, ss. 2, 3; 39 G. 3, c. 110; and 49 G. 3, c. 127.

(*c*) Com. Journ. 3rd March, 1761; 1 Bl. Com. 267, 268. In the *Articuli super cartas*, 28 Ed. 1, c. 5, it is provided, that the justices of the Court of King's Bench shall follow the king, "so that he may have always near unto him some that be learned in the laws." For some centuries past, however, they have usually sat at Westminster, an ancient palace of the crown; but they would of course be obliged to follow the queen into any part of the kingdom, if she should think proper to command them to do so: and there is even an instance, in the reign of Edward the First, of this court having sat at Roxburgh, in Scotland. (M. 20, 21 Ed. 1; Hal. Hist. C. L. 200).

Of Common Pleas.

The Court of *Common Pleas* consists of a chief justice, created by writ, and four puisne judges, created by patent. They hold their offices, like the judges of the Court of Queen's Bench, *quamdiu bene se gesserint*, removable only on the address of both houses of parliament.

Of Exchequer.

The Court of *Exchequer* consists of a chief baron, and four puisne barons, created by patent (*d*). They were formerly barons and peers of the realm (*e*). They hold their offices like the judges of the other courts.

Of Common Pleas at Lancaster.

In the *Common Pleas at Lancaster*, by stat. 4 & 5 *W*. 4, *c*. 62, *s*. 24, reciting, that it would tend to further the administration of justice, if more of the judges of the superior courts at *Westminster* were appointed justices for all manner of pleas within the county palatine of *Lancaster*, it is enacted, that "it shall and may be lawful for his Majesty, in right of his duchy and county palatine of *Lancaster*, from time to time, to nominate and appoint all or any of the judges of the superior courts at *Westminster* to be judges of the Court of Common Pleas of the county palatine of *Lancaster:* Provided, nevertheless, that the judges before whom the assizes for the said county palatine of *Lancaster* shall from time to time be held, and their respective officers, shall alone be entitled to the fees and emoluments heretofore received by the judges of the said county palatine, and their officers." Under this enactment a commission has issued, making all the judges of the superior courts at Westminster judges of the Court of Common Pleas at Lancaster (*f*).

Their privilege of Suit.

The judges have privilege of suing and being sued in their own court (*g*). But if the chief justice of the Court of Queen's Bench, for instance, bring an action there, the *placita* must be before the other three judges, omitting the chief (*h*); otherwise it would be error (*i*).

Their Power to make general Rules.

By the 11 *G*. 4 & 1 *W*. 4, *c*. 70, *s*. 11, (the Administration of Justice Act), in all cases relating to the *practice* of any of the three superior courts at Westminster, in matters over which they have a common jurisdiction, or of or relating to the *practice* of the Court of Error in the Exchequer Chamber, the judges of such courts jointly, or any eight or more of them, including the chiefs of each court, may make *general rules and orders* for regulating the proceedings of all such courts; which rules and orders are to be observed therein: and no general rules and orders respecting such matter shall be made in any manner, except as aforesaid. Also by the 2 *W*. 4, *c*. 39, *s*. 14, (the Uniformity of Process Act), the judges of such courts may, and they are required to make general rules and orders for the effectual execution of that act, and for fixing the costs in respect of the matters therein contained. And by the 3 & 4 *W*. 4, *c*. 42, various powers are given to the judges, *viz*. to alter the present mode of pleading, &c. (*s*. 1); to make regulations as to the admission of matters, documents, &c., in evidence, &c. (*s*. 15); to make regulations as to the officers for taxing costs, (*s*. 36); and as to paying money into court in certain actions, (*s*. 21); and the judges of each court may

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(*d*) 4 Inst, 117.

(*e*) 4 Inst. 103; Com. Dig. Courts. D. 10.

(*f*) See *Terns* v. *Fitzhugh*, 3 Dowl. 78.

(*g*) 3 Leon. 149.

(*h*) *Reg*. v. *Rogers*, 2 L. Raym. 778.

(*i*) 8 H. 6, 81; *Wood* v. *Mayor of London*, 1 Salk. 398.

make rules for the conduct of their officers relating to the distribution and performance of the duties and business to be performed in the execution of that act (*s.* 18), (*j*). The 1 & 2 *V. c.* 100, continues for five years the powers given by the first section of the 3 & 4 *W.* 4, *c.* 42, subject to certain limitations.

Jurisdiction of, at Chambers.

The course of the proceedings of the judges in court and at chambers will be considered hereafter, when noticing the routine of the business of the court (*post, Chap.* 3, *p.* 99). Any judge of either of the three superior courts may attend, and transact such business, at *chambers* or *elsewhere*, depending in any of such courts, as relates to matters over which such courts have a *common jurisdiction* (*k*), and as may, *according to the course and practice of the court*, be transacted by a *single judge* (11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 4). And the rules and orders made by a single judge in causes and business depending in the court to which he belongs, are declared by the act to have the same force and validity as if made by the court sitting in banc. The jurisdiction of judges at chambers has been further extended by 1 & 2 *Vict. c.* 45, *s.* 1, which enacts that every judge of the Courts of Queen's Bench, Common Pleas, or Exchequer shall have equal jurisdiction, power, and authority to transact out of court such business as may, according to the course and practice of the court, be so transacted by a single judge, relating to any suit or proceeding in either of the said courts of Queen's Bench or Common Pleas, or on the common law or revenue side of the said Court of Exchequer, or relating to the granting writs of *certiorari* or *habeas corpus*, or the admitting prisoners on criminal charges to bail, or the issuing of extents or other process for the recovery of debts to her Majesty, or relating to any other matter or thing usually transacted out of court, although the said courts have no common jurisdiction therein, in like manner as if the judge transacting such business had been a judge of the court to which the same by law belongs. And by *s.* 2, it shall be lawful for any judge of the said Courts of Queen's Bench, Common Pleas, or Exchequer, with respect to any such process issued out of any of those courts, or for any judge of the said Court of Common Pleas of the county palatine of Lancaster, or Court of Pleas in the county palatine of Durham, (being also a judge of one of the said three superior courts), with respect to process issued out of the said courts of Lancaster and Durham respectively, to exercise such powers and authorities for the relief and protection of the sheriff or other officer, as may by virtue of the said last-mentioned act be exercised by the said several courts respectively, and to make such order therein as shall appear to be just; and the costs of such proceeding shall be in the discretion of such judge.

Where a rule *nisi* was obtained for an attachment against a defendant for non-payment of money pursuant to an award, and, on argument in the Bail Court, the judge there made the rule absolute, and the sheriff levied for the amount claimed, after which a rule was obtained calling on the sheriff to shew

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(*j*) By the 4 & 5 W. 4, c. 62, s. 17, the judges of the Court of Common Pleas at Lancaster may make rules for altering and regulating the mode of pleading and transcribing records &c., and may adopt the rules of the superior courts at Westminster.

(*k*) The words "common jurisdiction" must be understood with reference to the subject-matter of the application, and not with reference to the court itself. (*Phillips v. Drake*, Exch. 2 Dowl. 45; 6 Leg. Obs. 157).

*

cause, among other things, why he should not retain the sum levied till further order of the court, and upon such rule being discussed in the full court it was admitted that the object in applying for the rule was to obtain a revision of the judgment given in the Bail Court, it was holden that the matter, having been decided by a judge in the latter court, ought not now to be re-heard, and that the proceedings since the attachment did not entitle the defendant to re-open it (*l*).

If an act of parliament, by express words, or by necessary implication, gives only the *court* power over a matter, a judge at chambers has none (*m*).

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SECT. 2.

The immediate Officers of the Courts, their Holidays, Hours of Attendance, Privileges, Duties, and Liabilities, &c. (*n*).

Immediate Officers of the Courts.

THE officers immediately concerned in transacting the business of the Courts of Queen's Bench, Common Pleas, and Exchequer of Pleas, shall form the subject of the present section; cursitors, sheriffs, and attornies, shall be noticed hereafter.

Privileges of.

Summary Remedy for their Fees.

Lien for their Fees.

These officers enjoy the same privilege from arrest that attornies do, (*see post*, 47), and even such of them as do not personally attend to the duties of their offices, but perform them by deputy, are, it seems, equally entitled to this privilege (*o*). Where an attorney indebted to one of the clerks in court for fees to a certain cause died, the court, upon application, ordered them to be paid by the client out of money then remaining due by the client to the attorney's executor (*p*). And if a client, when his business in court is despatched, refuse to pay the officer the fees that are due to him for doing his business, the court on motion will grant an attachment against him, to have him committed until he pay the fees; for, not paying the fees is a contempt of court, and the court is bound to protect its officers in their rights (*q*). An officer of the court has also a lien on the papers in his hands, until his fees are paid him (*r*).

Extortion by.

If an officer of the court be guilty of extortion, or of taking an improper fee, he is subject to an indictment (*s*), or an action (*t*), or an application to the court (*u*). And by 7 *W.* 4 & 1 *V. c.* 30, *s.* 19, masters, clerks, and messengers, appointed by virtue of that act, are not to take gratuities on pain of dismissal.

Holidays.

Holidays.] As regards the *holidays* to be allowed in the

(*l*) R. v. *Shff. of Devon*, 2 A. & E. 296; 5 N. & M. 416 (b): and see R. v. *Archbp. of York*, 3 N. & M. 453; 1 A. & E. 394, *S. C.*: *Parks* v. *Edge*, 1 C. & M. 429; 3 Tyr. 364: *Parker* v. *Ade*, 1 Dowl. 643, *S. C.*: *Todd* v. *Jeffery*, 2 Nev. & P. 443; 7 Ad. & E. 519, *S. C.*

(*m*) See Bagley's Pract. 14: *Jones* v. *Fitzadams*, 2 Dowl. 111: *Shaw* v. *Roberts*, Id. 25, n.: *Ex p. Owen*, 1 Dowl. 511.

(*n*) As to the fees of these officers, see the enactment, ante, 11; Tidd's Supplement, 32 to 53; Tidd's New Pract., published in 1837, p. 37.

(*o*) 2 Sel. Pr. 21.

(*p*) *Waldron's case*, 2 Str. 1126: *R.* v. *Smollett*, 3 Burr. 1313, S. P.

(*q*) 1 Lil. Pr. Reg. 598.

(*r*) *Farewell* v. *Coker*, 2 P. Wms. 460: *Anon.*, 2 Ves. 25.

(*s*) Co. Lit. 363. n. (*b*): *Empson* v. *Bathurst*, Hut. 53: *Hescott's case*, 1 Salk. 330.

(*t*) *Figgins* v. *Willie*, 2 Bl. Rep. 1187: *Woodgate* v. *Knatchbull*, 2 T. R. 148.

(*u*) *Longdill* v. *Jones*, 1 Stark. 345: *Sparrow* v. *Cooper*, 2 Bl. Rep. 1314: *Pater* v. *Croome*, 7 T. R. 336: and see Tidd's Supp. 52, 53.

several offices of these officers, the stat. 3 & 4 *W.* 4, *c.* 42, *s.* 43, after reciting that "the observance of holidays in the said courts of common law during *term* time, and in the offices belonging to the same, on the several days on which holidays are now kept, is very inconvenient, and tends to delay, in the administration of justice;" enacts, "that none of the several days mentioned in the 5 & 6 *Ed.* 6, *c.* 3 (*x*), shall be observed or kept in the said courts, or in the several offices belonging thereto, except *Sundays*, the *day of the Nativity* of our Lord and the *three following days*, and Monday and Tuesday in Easter Week."

R. H. 6. W. 4.

By rule of Hilary Term, 6 *W.* 4 (*y*), it is ordered, that "thenceforth, in addition to the said days, the following and none other shall be observed or kept as holidays in the several offices belonging to the said courts, viz.—*Good Friday* and *Easter Eve*, and such of the five days following as may not fall in the time of term, but not otherwise: the *Birthday* of our Lord the *King*, the *Birthday* of our Lady the *Queen*, the day of the *Accession* of our Lord the *King*, *Whit Monday*, and *Whit Tuesday*."

Extra Fees, or Holidays.

On these holidays, the officers are in the habit of attending at their offices, but are not bound to do so, and before the 7 *W.* 4 & 1 *V.* *c.* 30, *s.* 19, *ante*, 8, they required a gratuity for any business done by them (*z*). As regards their right to this gratuity, in a case upon this subject before that act, Lord Ellenborough said, "If the day in question be a legal holiday, make it a holiday; but it shall not be made a source of profit." The practice, however, of taking it continued up to the above enactment coming in force; and in a case where an officer refused to do business on a holiday unless an extra fee were paid to him, and the business was consequently not done, the court refused to interfere, in a summary manner, to punish the officer, or cause him to make satisfaction for a loss sustained by his refusal to do the business required (*a*).

Hours of attendance.

Hours of Attendance.] Rules of *T. T.* 7 *W.* 4, order that all the offices except the Rule office in Q. B. and *Secondaries'* office in C. P., be open in *term* from *eleven* in the forenoon till *five* in

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(*x*) That act enacted, that "all the days hereafter mentioned shall be kept and commanded to be kept holidays, and none other, that is to say—all *Sundays* in the year, the days of the Feast of the *Circumcision* of our Lord (being the 1st of *January*), of the *Epiphany* (6th of *January*), of the *Purification* of the Blessed Virgin *Mary* (2nd of *February*), (see *Harrison* v. *Smith*, 9 B. & C. 243), of St. *Matthias* the Apostle (24th of *February*), of the *Annunciation* of the Blessed Virgin (25th of *March*), of St. *Mark* the Evangelist (25th of *April*), of St. *Philip* and St. *James* the Apostles (1st of *May*), (see 2 Smith, Rep. 403), of the *Ascension* (see *Sparrow* v. *Cooper*, 2 W. Bl. 1314) of our Lord (which is a movable feast—happening forty days after *Easter*, and ten days before *Whitsuntide*), of the *Nativity* of St. *John* the Baptist (24th of *June*), (see *Sparrow* v. *Cooper*, 2 W. Bl. 1314), of St. *Peter* the Apostle (29th of *June*), (*Tweddale* v. *Fennell*, Tid. 9th ed. 57), of St. *James* the Apostle (25th of *July*), of St. *Bartholomew* the Apostle (24th of *August*), of St. *Matthew* the Apostle (21st of *September*), of St. *Michael* the Archangel (29th of *September*), of St. *Luke* the Evangelist (18th of *October*), of St. *Simon* and St. *Jude* the Apostles (28th of *October*), of *All Saints* (1st of November), of St. *Andrew* the Apostle (30th of *November*), of St. *Thomas* the Apostle (21st of *December*), of the *Nativity* of our Lord (25th of *December*), and the *three* following days (being the feast days of St. *Stephen* the Martyr, St. *John* the Evangelist, and the *Holy Innocents*), and *Monday* and *Tuesday* in *Easter* and *Whitsun* weeks."

(*y*) 6 N. & M. 5; 2 Bing. N. C. 615; 2 Scott, 5; 1 M. & W. 5; 1 Tyr. & G. 237; 4 Dowl. 555.

(*z*) Bail may be put in on a holiday, if not on a Sunday; (*Baddeley* v. *Adams*, 5 T.R. 170); but judgment cannot, it seems, be signed on it. (*Harrison* v. *Smith*, 2 B. & C. 243: *sed vide* *Bennet* v. *Potter*, 2 C. & J. 522).

(*a*) *Martin* v. *Bold*, 7 Taunt. 182; 2 Marsh. 487, *S. C.*: and see *Tweddale* v. *Fennel*, Tidd. 9th ed. 57.

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the afternoon, and not in the evening; and that the Rule and *Secondaries'* offices be open in *term* time from *eleven* in the forenoon till *three* in the afternoon, and from *six* till *eight* in the evening; and that all the offices be open in *vacation*, from *eleven* in the forenoon till *three* in the afternoon, except between the 10th day of *August* and 24th day of *October*, when they shall be open from *eleven* in the forenoon till *two* in the afternoon only.

List of Officers, Places of Office, and Hours of Attendance.

List of Officers, Places of Office, and Hours of Attendance.] The following is a list of the officers of the Courts and of *Nisi Prius*, arranged alphabetically.

Associate.

Associate.] Appointed by the Chief Justices. Office, the Chief Justice's Chambers.

Calendar Keeper.

Calendar Keeper.] Appointed by the Clerk of the Crown.

Chaplain of Queen's Bench Prison.

Chaplain of the Queen's Bench Prison.] Appointed by the Marshal. He must reside within the prison or its rules (*b*).

Clerks in Court.

Clerks in Court.] Appointed by the Clerk of the Crown. Crown Office, King's Bench Walk, Temple.

Clerk of the Crown.

Clerk of the Crown.] Usually called Master of the Crown Office; and in pleadings and other law proceedings styled, "Coroner and Attorney of our Lady the Queen:" he holds his office for life, by letters patent under the Great Seal. Crown Office, King's Bench Walk, Temple.

Clerk of Day Rules in Queen's Bench Prison.

Clerk of the Day Rules in the Queen's Bench Prison.] Appointed by the Marshal. Office, Queen's Bench Prison. He must reside within the prison or its rules (*b*).

Clerk of the Grand Juries.

Clerk of the Grand Juries.] Appointed by the Clerk of the Crown.

Clerk of the Papers of Queen's Bench Prison.

Clerk of the Papers of the Queen's Bench Prison.] Appointed by the Marshal. Office, Queen's Bench Prison. He cannot act by deputy; and, like the other officers of the prison, must be resident within the prison or its rules (*c*).

Clerk of the Papers of Fleet Prison.

Clerk of the Papers of the Fleet Prison.] Appointed by the Warden of the Fleet. Office, Fleet Prison.

Clerk of the Rules on Crown Side.

Clerk of the Rules on the Crown Side.] Appointed by the Clerk of the Crown. Crown Office.

Clerk of the Warrants in Common Pleas, for registering Deeds in Middlesex.

Clerk of the Warrants in the Common Pleas, for registering of Deeds in Middlesex.] 7 *W*. 4 & 1 *V*. c. 30, *s*. 28, continues the Clerk of the Warrants in the Court of Common Pleas, in the office of register of deeds in Middlesex, notwithstanding the abolition of offices by that act.

Commissioners for taking Affidavits.

Commissioners for taking Affidavits.] Appointed in every

(*b*) *Re Bryant*, 4 T. R. 716; 5 Id. 511, *S. C.*
(*c*) *Re Bryant*, 4 T. R. 716; 5 Id. 509, *S. C.*

place of any importance throughout England, by commission from the chief justice and one or more of the puisne judges, for the taking of affidavits in all matters or causes depending or to be depending in the superior courts by virtue of stat. 29 *C.* 2, *c.* 5. They are in nearly all cases attornies of the court. They may be attornies of the counties palatine; (*R. E.* 4 *G.* 4); but not persons practising as conveyancers, unless they be also certificated attornies. (*R. H.* 3 *&* 4 *G.* 4). The 6 *G.* 3, *c.* 50, *s.* 2, extends the powers given by the 29 *C.* 2, *c.* 5, to the appointment of commissioners in the Isle of Man; and the 3 *&* 4 *W.* 4, *c.* 42, *s.* 42, extends such powers to the appointment of commissioners in Scotland and Ireland. The commission for taking affidavits in England must, by the General Stamp Act, 55 *G.* 3, *c.* 184, *Sched.*, be stamped with a 10*s.* stamp. The 11 *G.* 4 *&* 1 *W.* 4, *c.* 43, *s.* 4, enacts, that the commission shall *not* be determined by the death of the crown. *See further, post, Vol. II. Book IV. Part I. Ch.* 36, as to affidavits in general.

Commissioners for the Examination of Witnesses.

Commissioners for the Examination of Witnesses.] Appointed by the Court, upon the application of any of the parties to the suit, for the examination of witnesses, in pursuance of the 1 *W.* 4, *c.* 22, *s.* 4. *See post, Book IV. Part I. Ch.* 2, *Sect.* 6.

Commissioners for taking Bail.

Commissioners for taking Bail.] Persons "other than common attornies or solicitors," appointed in every place of any importance throughout England, by commission from the chief justice and one or more of the puisne judges, for the taking of recognizances of bail, in any action depending in the superior courts, by virtue of stat. 4 *W. & M. c.* 4, *s.* 1.

Court Keeper of the Common Pleas.

Court Keeper of the Common Pleas.] Appointed by the Proclamator.

Crier of the Common Pleas.

Crier of the Common Pleas.] Appointed by the Proclamator.

Crier and Usher of the Queen's Bench.

Crier and Usher of the Court of Queen's Bench.] The chief crier and usher holds his office by letters patent under the great seal for two lives, and executes it by three deputies. The office of deputy, however, is, it seems, distinct and separate from that of chief crier and usher, and not dependent on him; and the deputy holds his office for life, notwithstanding the death or secession of the principal. The fees to the principal and deputy are also distinct (*d*).

Crier at Nisi Prius in London and Middlesex.

Crier at Nisi Prius in London and Middlesex.] Appointed by the Chief Justice.

Deputy Marshal of the Queen's Bench Prison.

Deputy Marshal of the Queen's Bench Prison.] Appointed by the Marshal. He must reside within the prison or its rules (*e*).

(*d*) *Green* v. *Hewett*, Peake, 182.

(*e*) *Re Bryant*, 4 T. R. 716; 5 Id. 511, *S. C.*

Examiner.

Examiner.] Appointed by the Clerk of the Crown.

Marshal and Associate to the Chief Justice.

Marshal and Associate to the Chief Justice.] Appointed by the Chief Justice. Office, Clifford's Inn.

Marshal of the Queen's Bench Prison.

Marshal of the Queen's Bench Prison.] He holds his office under a patent from the crown. However, by stat. 27 *G.* 2, c. 17, the marshal shall hold his office so long as he shall behave himself well in it, and be resident within the prison or the rules thereof, and no longer; and the same of the inferior officers of the prison (*f*). And by sect. 8 of the statute, the Court of Queen's Bench may remove either the marshal, or any of the inferior officers of the prison, for non-residence, or other neglect of duty, or for any such mis-behaviour &c. as the said court shall deem sufficient cause for such removal. By *R. M.* 2 *G.* 4, the marshal must reside in the prison, or its rules, according to the 5th section of the above act, and of his patent (*g*).

Masters.

Masters.] There are now five masters on the plea side of each of the Courts of Queen's Bench and Exchequer, and also five masters of the Court of Common Pleas. They are now appointed by virtue and under the provisions of the 7 *W.* 4 & 1 *V.* c. 30, intituled "An Act to abolish certain offices in the superior courts of common law, and to make provision for a more effective and uniform establishment of officers in those courts." That act (ss. 1, 5, 7, 8, 9) abolished certain offices (*h*), and transferred the power and authorities of the officers to the masters appointed under it. Sect. 2 transferred the duties of clerk of the Exchequer Chamber to the master of the court from which error is brought. Sects. 10, 11, 12, 13, regulate the appointment of masters and their clerks, and messengers. By sect. 14, the office of master may, in case of sickness &c., by leave of the Chief Justice or Baron, be performed by deputy. Sect. 15 provides, that masters, clerks, and messengers shall not act as barristers or attornies, except in certain cases. Their salaries are arranged by sects. 16, 17 & 21. By sect. 19, gratuities are forbidden to be taken, under pain of dismissal; and by sect. 20, the masters are required to render a quarterly account of fees and disbursements to the Treasury. The same statute, sec. 23, empowers and requires the masters of each court to tax costs indiscriminately in all the courts. And sect. 28 continues the master or secondary in the Court of Queen's Bench, in the office of register of deeds in Middlesex.

Attendance of, to tax Costs.

The masters are not compellable to attend at any time between the last day of August and the 21st of October, for the purpose of taxing costs on a judgment signed by virtue of the 1 *W.* 4, *c.* 7, which allows judgment in causes tried in vacation &c. to be signed, and execution issued in vacation. (1 *W.* 4, *c.* 7, *s.* 6).

(*f*) *Re Bryant*, 4 T. R. 716; 5 Id. 509, *S. C.*

(*g*) See R. M. 3, G. 2, respecting the duties of the marshal, and the government of the Queen's Bench Prison; and also, as to the fees to be paid to him and to the other officers of the prison: post, Vol. 2, Book 3, Part 2, Ch. 4. See also 4 Burr. 2183, 2185.

(*h*) The offices abolished are enumerated in Schedule (A.) of the Act.

Proceed on first Appointment.

Upon every appointment to be made by the master, the party on whom the same shall be served shall attend such appointment without waiting for a second; or, in default thereof, the master shall proceed *ex parte* on the first appointment (*i*).

Master of the Crown Office.

Master of the Crown Office.] See *Clerk of the Crown, ante*, p. 10.

Porter.

Porter.] Appointed by the Proclamator.

Proclamator of the Common Pleas.

Proclamator of the Common Pleas.] This office is held in fee by John Walker and his heirs for ever.

Sealer of the Writs.

Sealer of the Writs.] The office of sealer of the writs, both in this court and in the Common Pleas, is holden in fee by patent, and is at present vested in the Duke of Grafton, who executes the duties of it by deputy (*j*). Office, 3, Inner Temple Lane. No printed blanks, or other writs whatsoever, shall be sealed before the same are regularly made out and filled up (*k*).

Secondary on the Crown side.

Secondary on the Crown Side.] Appointed by the Clerk of the Crown. Crown Office.

Secondary of the Queen's Bench for registering of deeds in Middlesex.

Secondary of the Queen's Bench for the Registering of Deeds in Middlesex.] See 7 *W.* 4 & 1 *V. c.* 30, *s.* 28.

Tipstaves.

Tipstaves.] Appointed by the Marshal of the Queen's Bench Prison, and in the Common Pleas and Exchequer by the Warden of the Fleet.

Trainbearer.

Trainbearer.] Appointed by the Chief Justice.

Warden of the Fleet.

Warden of the Fleet.] Appointed by patent. Office, Fleet Prison, Farringdon Street.

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SECT. 3.

Cursitors.

Cursitors.

THE Cursitors are of very ancient institution: they are in number twenty-four, and were incorporated by Queen Elizabeth. They make out all original writs; and the business of the several counties in England, in this respect, is distributed among them by the Lord Chancellor, by whom they are also appointed. They are called Cursitors, from the writs *de cursu;* in stat. 18 *E.* 3, *c.* 5, they are called Clerks of Course. Office, Rolls' Yard, Chancery Lane.

(*i*) R. H. 32 G. 3; 4 T. R. 580, Q. B.

(*j*) By the 6 G. 4, c. 89, the Commissioners of the Treasury are authorized to purchase this office.

(*k*) R. 3 April, 1747; and see the 6 G. 1, c. 21, s. 53; 1 Chit. Rep. 320, n. (*a*); Tidd, 9th ed. 54.

SECT. 4.

Sheriffs.

Sheriffs.

It is not intended to treat, in this place, of the duties of the office of sheriff, who, for some purposes, is considered as an officer of the Court, but merely to notice some of the recent statutes, and give an abstract of the few rules of Court relating to that officer and his deputies. As to the duties of the office, the reader will find that subject, at least such parts of it as relate to the execution and return of writs, arranged under proper heads, in the course of the work (*l*).

Under-Sheriff.

By 3 & 4 *W.* 4, *c.* 99, *s.* 5, "the sheriff shall, within one calendar month next after the notification of his appointment in the London Gazette, by writing under his hand, nominate and appoint some fit and proper person to be his *under-sheriff*, and shall transmit a duplicate thereof to the clerk of the peace for the county, to be by him filed, and which he is hereby required to file, among the records of his office, and for which he shall be entitled to demand and have from such under-sheriff the sum of five shillings, and no more; and such appointment and duplicate shall not be liable to any stamp duty whatever."

The 7 *W.* 4 & 1 *V. c.* 55, for the better regulating of sheriffs' fees, and which is fully set forth *post*, 17, repeals, amongst other provisions, so much of the 42 *E.* 3, "as relates to the time during which under-sheriffs and sheriffs' clerks may abide in their respective offices;" so that now it seems there is no objection to successive sheriffs appointing the same under-sheriff.

Deputy of Sheriff.

Every sheriff shall yearly appoint a sufficient *deputy* in the Queen's Courts of her Chancery, Queen's Bench, Common Pleas, and Exchequer, before they shall return any writs, to receive all manner of writs and warrants to be delivered to them, under the penalties mentioned in stat. 23 *H.* 6, *c.* 10; and every such sheriff or his deputy shall give his personal attendance in Westminster Hall every day during term. (*Id.; and see R. H.* 14 & 15 *Car.* 2, *r.* 2, *C. P.; and see R. M.* 1654, *s.* 1, *and R. E.* 15 *C.* 2, *Q. B.*) And by 3 & 4 *W.* 4, *c.* 42, *s.* 20, it is enacted, "that from and after the 1st of June, 1833, the sheriff of each county in *England* and *Wales* shall severally name a sufficient *deputy*, who shall be resident or have an office within one mile from the *Inner Temple Hall*, for the receipt of writs, granting warrants thereon, making returns thereto, and accepting of all rules and orders to be made on or touching the execution of any process or writ to be directed to such sheriff." Any negligence by the sheriff in omitting to appoint a deputy according to this act, would subject him to an action, if a party sustained damage thereby (*m*).

Transfer to incoming Sheriff.

By 3 & 4 *W.* 4, *c.* 99, *s.* 7, "every sheriff of any county, city, liberty, division, town corporate, or place, shall, *at the expiration of his office*, make out and deliver to the new or incoming sheriff a true and correct list and account under his hand of all prisoners in his custody, and of all writs and other process in his hands *not wholly executed by him*, with all such

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(*l*) See the index at end of Vol. 2, title, Sheriff.

(*m*) See *Brackenbury* v. *Laurie*, 3 Dowl. 180.

particulars as shall be necessary to explain to the said incoming sheriff the several matters intended to be transferred to him, and shall thereupon turn over and transfer to the care and custody of the said incoming sheriff all such prisoners, writs, and process, and all records, books, and matters appertaining to the said office of sheriff; and the said incoming sheriff shall thereupon sign and give a duplicate of such list and account to the sheriff going out of office, to whom the same shall be a good and sufficient discharge of and from all the prisoners therein mentioned and transferred to the said incoming sheriff, and the further charge of the execution of the writs, process, and other matters therein contained, without any writ of discharge, or other writ whatsoever; and the said incoming sheriff shall thereupon stand and be charged with the said prisoners, and also with the execution and care of the said writs, process, and other matters, contained in the said list and account, as fully and effectually as if the same writs and process had been turned over by indenture and schedule; and in case any sheriff shall refuse or neglect at the expiration of his office to make out, sign, and deliver such list and account as aforesaid, and to turn over the process aforesaid in manner aforesaid, every such sheriff so neglecting or refusing shall be liable to make such satisfaction, by damages and costs to the party aggrieved, as he, she, or they shall sustain by such neglect or refusal" (*n*).

Bank &c. Warrants forbidden.

No sheriff shall issue *blank warrants*, upon pain of severe punishment and fine; (*R. E.* 15 *Car.* 2, *Q. B.*; *R. H.* 14 & 15 *Car.* 2, *C. P.*); nor shall he issue a warrant to any of his officers to arrest or attach any person, until a writ shall have first been delivered to him. (*R. M.* 1654, *s.* 2).

Return of Writs.

Formerly, sheriffs, before or immediately after the end of every term, were, by *R. E.* 6 *J.* 1, bound to deliver into court all writs of *latitat*, and all writs thereupon issuing, and were obliged to make oath that the writs so returned by them were all that were directed and delivered to them. Now, however, writs of *latitat*, and writs thereupon, are abolished by 2 *W.* 4, *c.* 39, and in lieu of them, since 1 & 2 *V. c.* 110, *s.* 2, writs of summons are issuable. By the last-mentioned act, and the forms given thereby, it will be found that the sheriff or other officer to whom a writ of *capias* issued in the course of the suit is directed, must, *immediately* after the *execution* of it, return the same to the court, together with the manner in which he has executed the same, and the day of such execution; or if the same remains *unexecuted*, he must return it *at the expiration of one month* from its date, or *sooner*, if ordered by the court or a judge; and if ordered by the court in term, or a judge in vacation, to make such return, and he omit returning it, he may be attached for contempt, the judge's order (if any) being first made a rule of court, and a copy of the rule served. He may also, after the return day of any writ of *capias ad satisfaciendum*, *fieri facias*, or *elegit*, be ruled by the court or ordered by a judge in vacation to return the same, and may be attached in a similar way for disobeying such order (*o*).

(*n*) See *Yaroth* v. *Hopkins*, 3 Dowl. 711.

(*o*) See 2 W. 4, c. 39, and R. M. 3 W. 4, r. 13, and the mode of compelling the return and procuring the attachment, &c. *post.*

Where Rule expires in Vacation.

When the rule "to return a writ expires in vacation, the sheriff shall file the writ at the expiration of the rule, or as soon after as the office shall be open;" (*R. H.* 2 *W.* 4, *r.* 11); "and the officer with whom it is filed shall indorse the day and hour when it was filed." (*Id. r.* 12). *See these rules more fully noticed post, Book I. Part I. Ch.* 1, *Sect.* 5.

Return of Habeas Corpus.

In the case of a *habeas corpus*, returnable *immediate*, the sheriff shall make his return the same day that the writ is delivered to him, and shall bring the body immediately, as is required by the writ, without permitting him to wander abroad by colour or pretence thereof. (*R. M.* 1654, *s.* 7, *post, Vol. II. Book IV. Part I. Ch.* 3).

Bailiff not to take Warrant of Attorney except &c.

If any bailiff or sheriff's officer shall take a warrant of attorney from any person in his custody, unless in the presence of an attorney for the defendant, he shall be severely punished. (*R. E.* 15 *C.* 2; *Q. B. R. H.* 14 & 15 *Car.* 2, *r. IV. C. P.; and see R. H.* 2 *W.* 4, *r. I. s.* 72, *post, Vol. II. Book II. Part IV. Ch.* 2).

Officer not to be Attorney or Bail.

No under-sheriff, or sheriff's bailiff, or bailiff of a liberty, shall practise as an attorney. (*R. M.* 1654, *s.* 1) (*oo*). Also, no sheriff's officer, or other person concerned in the execution of process, shall be permitted to be bail in any action in this court. (*R. M.* 14 *G.* 2).

Interpleader.

As to the proceedings by sheriffs in the case of adverse claims, see *post, Vol. II. Book IV. Part I. Ch.* 11).

Sheriffs' Officers not Officers of Court.

The officers of the sheriff are not the officers of the court; and the court will not interfere in a summary way to compel such an officer to fulfil an undertaking (*p*).

Liability for Misconduct of Officer.

On principles of public policy, a sheriff is liable civilly for the tortious act, default, or misconduct, whether it be wilful or inadvertent, of his under-sheriff or bailiff, in the course of the execution of their duties (*q*). But if the wrong complained of be neither expressly sanctioned by the sheriff, nor impliedly committed by his authority—if it be an act not within the scope of the authority given, the sheriff is not responsible (*r*). And if the plaintiff in an action, or an execution creditor, induce the bailiff to depart from the ordinary course of his duty, without the sheriff's knowledge, it is not competent to such plaintiff or execution creditor to fix the sheriff for the consequences (*s*).

Delay, Extortion, &c., by, Penal.

If any sheriff, under-sheriff, bailiff of a liberty or his deputy, or other sheriff's bailiff, &c., shall wilfully delay the execution or return of any process or execution, or shall take or require any undue fees for the same, or shall give notice to the defendant, thereby to frustrate the execution of any process or writ, or, having levied money, shall detain it in his hands after the return of the writ, he shall be liable to an attachment, &c. (*R. M.* 1654, *s.* 2). So, if he take immoderate or excessive fees for executing a writ of possession or of restitu-

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(*oo*) But *quære*, since the repeal of 1 Hen. 5, c. 4, by 1 & 2 V. c. 55? See Atkinson on Sheriffs, 32.

(*p*) *Brown* v. *Gerard*, 3 Dowl. 217; 1 C. M. & R. 595, *S. C.*

(*q*) *Woodgate* v. *Knatchbull*, 2 T. R. 151; *Peshall* v. *Layton*, Id 712; *Sturmy* v. *Smith*, 11 East, 25; *Crowder* v. *Long*, 8 B. & C. 602; 3 Man. & Ry. 17.

(*r*) *Cook* v. *Palmer*, 6 B. & C. 739; *Crowder* v. *Long*, 8 Id. 598; *Tomkinson* v. *Russell*, 9 Price, 287; *Bowden* v. *Waithman*, 5 Moore, 183; *Stuart* v. *Whittaker*, 1 R. & M. 310.

(*s*) *Cook* v. *Palmer*, 6 B. & C. 739; 9 Dow. & Ry. 723; *Crowther* v. *Long*, 8 Id. 598; 3 Man. & Ry. 17.

tion of possession, the Court will proceed to punish him according to law. (*Id.*)

Stat. 7 W. 4 & 1 V. c. 55, regulating sheriffs' fees, and giving a remedy for extortion.

Stat. 7 W. 4 & 1 V. c. 55, regulating Sheriffs' Fees, and giving a Remedy for Extortion.] By this act, intituled "An Act for better regulating the fees "payable to sheriffs upon the execution of civil process," [15th July, 1837], reciting that "it is expedient to amend the laws relating to the fees payable to sheriffs, under-sheriffs, deputy sheriffs, sheriffs' agents, bailiffs, and others the officers or ministers of sheriffs in England and Wales, and to give the courts of record at Westminster Hall a due control over such fees; and also to provide a summary remedy against such officers and others as shall extort or receive other or greater fees than by law they shall be entitled to: And whereas divers enactments touching the said officers, contained in certain ancient statutes, have become inconvenient, and ought to be repealed:" it is enacted, "that so much of an act passed in the forty-second year of his late Majesty King Edward the Third, [*c.* 9], intituled 'Estreats 'shall be shewed to the party indebted, and that which is paid 'shall be totted: no sheriff, et cætera, shall continue in office 'above a year,' as relates to the time during which under-sheriffs and sheriffs' clerks may abide in their respective offices; also an act passed in the first year of the reign of his late Majesty King Henry the Fifth, [*c.* 4], intituled 'Sheriffs' bailiffs shall not be in the same office in three years after: sheriffs' officers shall not be attornies;' and also so much of an act passed in the twenty-third year of the reign of his late Majesty King Henry the Sixth, [*c.* 9], intituled 'No sheriff 'shall let to farm his county or any bailiwick: the sheriff's, 'and bailiff's fees and duties in many cases,' as relates to the fees to be taken by sheriffs, under-sheriffs, sheriffs' clerks, and other officers and ministers of sheriffs, be and the same are hereby repealed."

What Fees may be taken

Sect. 2. "That from and after the passing of this act it shall be lawful for sheriffs, or their officers concerned in the execution of process directed to sheriffs, to demand, take, and receive *such fees*, and *no more*, as shall from time to time be *allowed by any officer of the several courts of law at Westminster charged with the duty of taxing costs in such courts*, under the sanction and authority of the judges of the said courts respectively." As this act only relates to the regulation of fees deriving their existence from itself, and the statutes repealed by it, or such as had previously been taken by custom, the sheriff's right to poundage, under 29 *Eliz. c.* 14, is altogether unaffected by this section; and therefore where an auction was held under a writ of execution, the under-sheriff was holden to be entitled not only to his auction fees, allowed under the above act, but also to his poundage, under 29 *Eliz. c.* 4 (*t*).

Extortion summarily punishable.

Sect. 3. "That any sheriff, officer, or minister acting in the execution of process directed to any sheriff or sheriffs, or engaged or concerned therein, who shall *extort, demand, take, accept*, or *receive* from any person or persons *any fee or fees, gratuity, or reward not allowed as aforesaid*, or greater in amount than

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(*t*) *Davies* v. *Griffiths*, 4 M. & W. 377.

as allowed as aforesaid, such sheriff, or other his officer or minister, upon complaint thereof made against him to any of the said courts, and on proof being made thereof upon oath, either by the examination of witnesses *vivâ voce*, or on *affidavits*, or on *interrogatories*, to the satisfaction of the court to which the said complaint shall be made, that such sheriff, officer, or minister, as the case may be, hath offended therein as aforesaid, then and in such case every such sheriff, officer, or minister, as the case may be, shall be adjudged guilty of a *contempt of such court*, and *punished by such court accordingly;* and if any person, not being such officer or minister as aforesaid, shall assume or pretend to act as such, and shall extort, demand, take, accept, or receive any fee or fees, gratuity, or reward, under colour or pretext of such office, he shall, on like complaint and proof, be in that respect dealt with by the court in like manner."

Costs of Complaint.

Sect. 4. "That in all cases of summary complaints as aforesaid the court before which such complaint shall be preferred may at its discretion award the *costs* of or occasioned by such complaint to be paid by either party to the other; such costs to be taxed by the master of such court: Provided always, that no such complaint shall be entertained unless made before the *last day of term next following the act* whereof complaint is made."

Complaint to be made before last day of next term.

Fees in Lancaster and Durham.

Sect. 5. "That from and after the passing of this act the sheriffs of Lancashire and Durham, and their officers, shall have and be entitled to the like fees, and no more, upon process issuing out of the *Court of Common Pleas at Lancaster* and out of the Court of Pleas at Durham respectively as from time to time shall be allowed under the authority of this act to sheriffs upon process issuing from the superior courts at Westminster; and that the said Court of Common Pleas at Lancaster and Court of Pleas at Durham respectively, or any judge thereof respectively, being also judge of one of the superior courts at Westminster, shall have the same powers in every particular, with respect to offences against this act upon process issuing out of the said Court of Common Pleas at Lancaster and Court of Pleas at Durham respectively, as are hereinbefore given to the courts at Westminster respectively in respect of process issuing from those courts."

Fees.

A list of the fees now allowed will be found in the Appendix at the end of the second volume.

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1. *Articled Clerks.*

1. Articled Clerks.

Previous to being admitted to practise as an attorney in any of the superior courts, it is in general necessary to serve as articled clerk either to an attorney duly sworn and admitted in one of those courts, or to one of the masters of the court (*a*),

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(*a*) 2 G. 2, c. 23, s. 16; see 7 W. 4 & 1 V. c. 30. The cases in which articled clerks and attornies of other courts will be admitted to practise, without serving as articled clerks to attornies in the superior courts, will be mentioned hereafter. See *post*, p. 41, 42.

or (in the Queen's Bench) to the master of the Crown Office (*b*).

Who may not have.

Who may not have.] No attorney or solicitor can lawfully "take, have, or retain any clerk, after such attorney or solicitor shall have discontinued or left off, or during such time as he shall not actually practise as, or carry on the business of, an attorney or solicitor" (*c*). And no attorney, who shall be employed as a writer or clerk by any other attorney, can, during the time he is so employed, take or have any clerk under articles; and service to such attorney, during the time he is so employed, will not be deemed good service (*d*).

How many.

How many.] No attorney or solicitor can have more than two articled clerks at the same time (*e*). But if two or more attornies be in partnership, each may have two (*f*).

2. *The Articles.*

The Articles.

The Articles.] In order that a person, before he can be admitted an attorney, shall acquire competent skill and knowledge to conduct the business of an attorney, it is enacted, under a penalty of 50*l*., (2 *G*. 2, *c*. 23, *ss*. 12—24), that no person shall practise as an attorney in any court of record, unless he have been bound, by contract in writing (*g*), to serve as a clerk for the space of *five* years from the date prospectively, to an attorney duly and legally sworn and admitted; (2 *G*. 2, *c*. 23, *s*. 5, made perpetual by 30 *G*. 2, *c*. 19, *s*. 75; and see *R. M.* 1654, *ss*. 1, 4); or for the space of *three* years to such attorney, if he (the clerk) have taken the degree of bachelor of arts or of law in the Universities of Oxford, Cambridge, or Dublin, (or by 7 *W*. 4 & 1 *V*. *c*. 56, *s*. 1, of London or Durham), provided he have taken such degree within four years previously, and provided such degree of bachelor of arts has been taken within six years, or such degree of bachelor of law has been taken within eight years after matriculation. (1 & 2 *G*. 4, *c*. 48, *s*. 1, amended by 3 *G*. 4, *c*. 16). These *provisoes*, however, as to having taken a degree, do not apply to persons who have taken such degree previous to the passing of the 1 & 2 *G*. 4, *c*. 48. (7 *G*. 4, *c*. 44, *s*. 5). To be entitled to the benefit of 1 & 2 *G*. 4, *c*. 48, it appears to be necessary that the degree should be obtained previously to the commencement of the service (*h*). Where a gentleman who had taken the degree of bachelor of arts at Cambridge articled himself to an attorney for *three* years, but, having served only *two months*, abandoned the contract, and, after the expiration of the *three* years mentioned in the original articles, he was assigned to another attorney, with whom he served *two years and ten months*, the Court of Common Pleas held, that, as the original articles had expired previously to the assignment, the service under

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(*b*) 49 G. 3, c. 28.

(*c*) 22 G. 2, c. 46, s. 7.

(*d*) R. T. 31 G. 3, r. 2.

(*e*) 2 G. 2, c. 23, s. 15.

(*f*) See as to this, *per* Lord Tenterden, C. J. in *Ex p. Bailey*, 9 B. & C. 691; 4 Man. & Ry. 604.

(*g*) See form, Chit. Forms, 1.

(*h*) This has been so decided in the Court of Exchequer, in Ireland. *In re Colville*, 6 Law Rec. 121.

them was not a service within the meaning of the 1 & 2 *G.* 4, *c.* 48, *s.* 1 (*i*).

Service with Counsel.

The clerk may serve *one* of the five years with a barrister or certificated special pleader. (1 & 2 *G.* 4, *c.* 48, *s.* 2).

Improper Articles cancelled.

Where an attorney took a turnkey of the Queen's Bench Prison as an articled clerk, evidently for the purpose of securing the business of the prisoners, the court ordered the articles to be cancelled (*j*).

Stamp on.

The articles must be stamped before they are engrossed.] (34 *G.* 3, *c.* 14, *ss.* 10, 11). Occasional indemnity acts, however, allow the stamp to be afterwards impressed. (*See* 9 *G.* 4, *c.* 49, *s.* 2). *The stamp is* 120*l.*; *and for any counterpart or duplicate*, 1*l.* 15*s.* (55 *G.* 3, *c.* 184).

Affidavit of Execution of.

Affidavit of Execution.] *Within three months* (84 *days*) *after the date of the articles, an affidavit must be made of their execution, and filed with one of the masters or his clerk;* which affidavit must specify the names of the attorney and clerk, and their places of abode, together with the day of the date of the articles (*k*). This provision extends to the case of a clerk who has been articled to a second master (*l*).

Entry of Affidavit.

The officer with whom this affidavit is filed shall enter in his book a memorandum of the substance of such affidavit, and of the day on which it was made and filed; for which he may take a fee of 2*s.* 6*d.* (22 *G.* 2, *c.* 46, *s.* 6). At the same time he shall make a memorandum, on the back or bottom of the affidavit, of the day of filing the same. (*Id. s.* 3).

Want of Affidavit, how remedied.

As clerks frequently omit, by mistake, to make and file this affidavit, an indemnity act is occasionally passed, to remedy the omission (*m*). A clause of this nature in the indemnity act of 4 *G.* 4, *c.* 1, has been held to be *prospective* as well as *retrospective*; and extended to those who were in default during the time for which it was made, and was not limited to those who had incurred penalties or disabilities before it passed (*n*). Without such indemnity act the omission cannot be remedied: and the court will not allow the affidavit to be filed *nunc pro tunc* (*o*).

Enrolment of Articles.

Enrolment of Articles.] *Within six months* (168 *days*) *after execution, the articles must be enrolled or registered with the officer appointed for that purpose, together with an affidavit of the execution;* and if not enrolled or registered within that time, the service under the articles shall be deemed to commence from the date of such enrolment. (34 *G.* 3, *c.* 14, *s.* 2). The officer with whom they are to be enrolled is now, since the 7 *W.* 4, & 1 *V. c.* 30, one of the masters. Where the articles are lost, the Court will, on application, allow a copy (*p*), or, in some cases, even a draft of them, to be enrolled (*q*),

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(*i*) *Ex p. Unthank*, 2 M. & P. 453; and see *Ex p. Rowle*, 2 Chit. Rep. 61; *post*, 23.

(*j*) *Fraser's Case*, 1 Burr. 291.

(*k*) 22 G. 2, c. 36, ss. 9, 3, 6. See form of the affidavit, Chit. Forms, 3.

(*l*) *Ex p. Joy*, 3 Dowl. 342.

(*m*) See 7 G. 4, c. 44, ss. 1, 4; 7 & 8 G. 4, c. 45; 9 G. 4, c. 47, s. 3; c. 49, s. 2; 11 G. 4, c. 9, s. 7; 1 W. 4, c. 26, s. 6; 1 & 2 V. c. 16.

(*n*) *Re Stevenson & Others*, 2 B. & C. 34; 3 Dowl. & Ry. 599.

(*o*) *Ex p. Joy*, 3 Dowl. 342.

(*p*) *Ex p. Clarke*, 3 B. & Ald. 610; *Ex p. Chapman*, 3 Dowl. 562

(*q*) *Ex. p. Beckenden*, 1 Har. & W. 193.

but they have no power to remedy even an innocent omission to enrol the articles, &c., within the time here limited; for it is expressly enacted by the statute, that the service, in such a case, shall commence from the date of the enrolment only (*r*). Indemnity acts are, however, occasionally passed to remedy the omission (*s*).

3. *The Service.*

3. Service. in ordinary cases.

The Service in ordinary Cases.] The clerk must continue and be actually employed by the attorney or solicitor to whom he is bound, or by his agent, in the proper business, practice, or employment of an attorney or solicitor, during the entire period of service specified in the articles (*t*); and of the time so specified *one year* only may be served with the agent (*u*). If the clerk be bound for five years, he may serve a part or parts of the time, not exceeding one year, as pupil to a practising barrister or certificated special pleader, and such part will be reckoned and allowed him in the five years (*v*). These provisions must be strictly complied with; there must in general be an *actual* and *continued* service under the master's control, during the *entire period of five years*, specified in the articles. Serving a part of the time with another attorney, even with his master's consent, and the remainder of the time with his master, is not sufficient (*w*). And where an articled clerk held the office of surveyor of taxes during the time for which he was bound, although it appeared that this occupied but an eighth part of his time, and that the remainder was devoted to the study of his profession, yet the court held that this was not a service of his whole time, and they ordered him to be struck off the roll (*x*). The clerk, in that case, afterwards bound himself to another attorney, and served him *two* years, at the expiration of which period he was again admitted an attorney, upon an affidavit, that, for more than *three* of the *five* years for which he was originally bound, his service had been given to the attorney to whom he was articled; but on a motion to strike him off the roll, it was held, that his service under the first articles could not be coupled with his service under the second, so as to entitle him to be admitted (*y*). It is not, however, inconsistent with the required service, for the clerk in his leisure hours, after he has completed his master's business, to work for wages with another attorney (*z*); and perhaps, under special circumstances, the court would not be very strict in enforcing the requisitions of the statutes in this respect, if there has been a *bonâ fide* service,—e. g. where a clerk had been unavoidably absent from his master's service for several months during the five years, but had served an equal period after the expiration of the articles, he was ad-

Unavoidable Absence.

(*r*) *Ex p. Pilgrim*, 2 D. & R. 429; 1 B. & C. 264, *S. C.* This was a very hard case, and, *per curiam*, "Much as we lament the hardship of the case, we find it impossible to get over the words of the Act of Parliament."

(*s*) See 1 W. 4. c. 26, s. 6; 7 W. 4. c. 12; 1 & 2 V. c. 16.

(*t*) 22 G. 2, c. 23, s. 8; 2 G. 2. c 23, s. 5. If the clerk be articled for more than five years, it is enough to swear to a service for five years. (*In re Tench*, Chit. Coll. Stat. 67. n. 9).

(*u*) R. T. 31 G. 3, K. B. 4. R. 379.

(*v*) 1 & 2 G. 4, c. 48, s. 2.

(*w*) *Ex p. Hill*, 7 T. R. 456.

(*x*) *Re Taylor*, 5 B. & Ald. 538; 6 D. & R. 428, *S. C.*: and see *R. v. Scrivener's Company*, 10 B. & C. 511.

(*y*) *Re Taylor*, 6 D. & R. 428; 4 B. & C. 341, *S. C.*

(*z*) *Ex p. Blunt*, 2 W. Bl. 764.

mitted (*a*). If the service has been prevented by the act of God, and the applicant has done all in his power to serve, it will be sufficient: and therefore an articled clerk, who had served under the articles two years and a half, when he was prevented by illness from giving regular attention to business during the rest of the term, but attended as his health permitted, was allowed by the court to be admitted (*b*); and the same where the clerk had resided abroad by the advice of his physician during an entire year out of the five (*c*).

Service prevented by act of God.

Service, in case of Death, &c., of Master.

Service, in case of Death, &c., of Master.] If the attorney die before the expiration of the period of service, or discontinue his practice, or if the contract be cancelled by mutual consent, or the clerk be discharged by rule of court, then if the clerk be afterwards (no matter at what distance of time) (*d*) bound by contract in writing to serve, and shall actually serve, *another attorney*, for the residue of the five years, such service will be as good and effectual, as if the clerk had continued to serve the person to whom he was originally articled; provided an affidavit of the execution of such second articles be made and filed within three months after the date of the same, in the manner already specified (*e*). These second articles must have a stamp of 1*l.* 15*s.* (55 *G.* 3, *c.* 114). They should stipulate that the clerk should serve such a new term as will make up, with the prior service, the full and actual service of five years. Where a clerk had served part of his time with a master who had left the country, and, before his articles were assigned to another master, an interval of *ten* months had elapsed, *during which he was serving, but not under any articles*, and under the assignment he served the remainder of the time specified, the court would not allow him to be admitted until he had served out the *ten* months under the new articles (*f*).

In case of Bankruptcy.

Where an attorney, to whom a clerk had been articled, became bankrupt and absconded, the Court granted a rule to discharge the clerk, and directed the rule to be served at the last place of abode of the attorney and on the clerk to the commission, and to be stuck up in the King's Bench Office (*g*). And where the attorney became insane during the clerkship, fresh articles, entered into with another attorney, were declared valid and permitted to be enrolled (*h*).

In case of Insanity.

Refunding Premium where Service deficient.

Refunding Premium.] In cases where the clerk or his parents are in justice entitled to a return of part of the premium given with him, the Court will in general interfere summarily, and refer it to the master to say what sum should be refunded. This has been done, where the business of an attorney so much decreased during the clerkship, that there remained little or nothing for the clerk to do,

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(*a*) *Ex p. Frost*, 3 Dowl. 323; 1 Har. & W. 111, *S. C.*: *Ex p. Hubbard*, 1 Dowl. 438; and see *Fletcher's case*, 2 W. Bl. 734: *Ex p. Tomkins*, 6 Dowl. 3; where the clerk was idle for a part of the five years, in consequence of his master's death, but made it up after the expiration of the articles.

(*b*) *Ex p. Matthews*, 1 B. & Ad. 160.

(*c*) *Ex p. Hodge*, M. 1838, 2 Jurist, 989.

(*d*) *Re Smith*, 1 D. & R. 14.

(*e*) 22 G. 2. c. 46. s. 9; and see *Carter's case*, 2 W. Bl. 957.

(*f*) *Ex p. Rowle*, 2 Chit. Rep. 61; and see *Ex p. Unthank*, 2 M. & P. 453; *Ex p. Johnson*, 2 Jurist, 966; *ante*, 21.

(*g*) *Anon.* 1 Chit. R. 558 n; 2 Id. 62, *S. C.*

(*h*) *Ex p. Darbell*, 6 Dowl. 505.

and consequently he could not gain the necessary instruction in his profession (*i*); so, where the attorney died before the expiration of the service (*j*), and even where the master refused to take back the clerk on account of misconduct (*k*). And where a party was articled as a clerk to one of two attornies in partnership, and paid a *premium*, and acted as clerk to the two partners for *two* months, when the attorney to whom he had been articled died, the Court ordered the surviving partner to refund a portion of the *premium*, although, at the time of payment of such *premium*, his partner was indebted to him, and the premium had been set off in account between them (*l*). An articled clerk to an attorney is not an apprentice within the 49th section of the bankrupt act, 6 *G.* 4, *c.* 16, *s.* 49, and is not as such entitled under that act to a return of a reasonable portion of the premium upon his master becoming a bankrupt as a scrivener (*m*).

4. *Examination.*

4. Examination.

Infant not entitled to.

In case of insufficient Service.

Examination.] After the expiration of the service, and before the clerk is sworn or admitted, he must be examined as to his fitness and capacity, by examiners appointed in pursuance of the recent rule of all the courts. *H. T.* 6 *W.* 4. A clerk under the age of twenty-one has no right to be examined under this rule: the proper course for him is to wait until he is twenty-one (*n*). The examiners ought not to refuse to examine a clerk on the ground that there is a doubt as to the validity of his service under the articles, they ought to examine him *de bene esse*, and the question as to the sufficiency of the service may then be raised (*o*). The Court will not, however, grant a rule calling on the examiners to examine a clerk whose period of service has not expired, though it might be completed before the end of the ensuing term (*p*).

Act 2 G. 2. requiring Examination.

The 2 *G.* 2, *c.* 23, *s.* 6, enacts, that "the judges of the said courts respectively, or any one or more of them, shall, and they are hereby authorized and required, before they shall admit such person to take the said oath, to examine and inquire, by such ways and means as they shall think proper, touching his fitness and capacity to act as an attorney; and if such judge or judges respectively shall be thereby satisfied that such person is duly qualified to be admitted to act as an attorney, then, and not otherwise, the said judge or judges of the said courts respectively shall, and they are hereby authorized to administer in open court, to such person, the oath hereinafter directed to be taken by attornies, and after such oath is taken, to cause him to be admitted an attorney in such court, and his name to be enrolled as an attorney in such court, without any fee or reward, other than one shilling for administering such oath, which admission shall be written on parch-

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(*i*) 2 Barnard, 227; and see 1 Id. 331.

(*j*) *Ex p. Bayley*, 9 B. & C. 691.

(*k*) *Ex p. Prankerd*, 3 B. & Ald. 257; 1 Chit. Rep. 694, S. C. In this case the premium was 400*l.*, the time of service was a year and a half, and the sum ordered to be refunded 196*l.*

(*l*) *Ex p. Bayley*, 9 B. & C. 691. The premium was 200*l.*, the sum refunded 180*l.* See also *Ex p. Haden*, 2 Jurist, 873. S. P.

(*m*) *Ex p. Prideaux*, 3 M. & Cr. 327, reversing the decision in 2 Deac. 158; 3 M. & A. 67, S. C.

(*n*) *Ex p Cragg*, 6 Dowl. 256.

(*o*) The Examiner's Case, 5 Bing, N. C. 70; 7 Dowl. 156, *S. C. nom. Ex p. Masterman.*

(*p*) *Ex p. Barker*, B. C., T. 1839, Coleridge, J.

ment in the English tongue, in a common legible hand, and signed by such judge or judges respectively, whereon the lawful stamps shall be first impressed, and shall be delivered to the person so admitted."

Rules of Court appointing Examiners, &c.

For furthering the provisions of this enactment, and obtaining a better examination of the party to be admitted, it is ordered, by the above-mentioned recent rule of *H. T.* 6 *W.* 4, *c.* 1, that " the several masters and prothonotaries for the time being of the Courts of King's Bench, Common Pleas, or Exchequer respectively, together with twelve attornies or solicitors, to be appointed by a rule of court in Easter term in every year, be examiners for one year; any *five* of whom, one whereof to be one of the said masters or prothonotaries, shall be competent to conduct the examination (*q*); and from and after the last day of [the then] next Easter Term, (subject to such appeal as hereafter mentioned), no person shall be admitted to be sworn an attorney of any of the courts, except on production of a *certificate*, signed by the major part of such examiners actually present at and conducting his examination, testifying his fitness and capacity to act as an attorney; such certificate to be in force only to the end of the term next following the date thereof, unless such time shall be specially extended by the order of a judge. And the examiners so to be appointed shall conduct the said examinations under regulations to be first submitted to and approved by the judges (*r*). And in case any person shall be dissatisfied with the *refusal of the examiners to grant such certificate*, he shall be at liberty to apply for admission, by petition in writing to the judges, to be delivered to the clerk of the lord chief justice of the Court of King's Bench, upon which no fee or gratuity shall be received; which application shall be heard in *Serjeants' Inn Hall* by not less than *three* of the judges" (*r*). And the rule, after reciting that the Hall or Building of the Incorporated Law Society of the United Kingdom, in Chancery Lane, would be a fit and convenient place for holding the said examination, and that the said society had consented to allow the same to be used for that purpose, further orders, that " until further order such examinations be there held, on such days being within the last *ten* days of every term, as the said examiners or any *five* of them shall appoint" (*r*).

Appeal on Refusal of Certificate.

Place of Examination.

Notice of intention to apply for Examination.

It is ordered by the same rule, that " any person not previously admitted an attorney of any of the three courts, and desirous of being admitted, shall, *in addition to the notices already required*, give a *term's notice* to the said *examiners*, of his intention to apply for examination, by leaving the same with the secretary of the said society, at their said hall; which notice shall also state his place or places of residence, or service, for the last preceding twelve months; and in case of application to be admitted on a refusal of the certificate, shall give *ten* days' notice, to be served in like manner, of the day appointed for hearing the same" (*r*). If a person, desirous of being admitted, has undergone an examination, but

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(*q*) See R. E. 6 W. 4, 2 Bing. N. S. 800.

(*r*) R. H. 6 W. 4, s 2, 6 N. & M. 3; 1 Har. & W. 638; 2 Bing. N. S. 612; 3 Scott, 3; 1 M. & W. 3; 1 Tyr. & G. 234-5, 4 Dowl. 552-3: see form of notice, Chit. Forms, 33.

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has failed to obtain his certificate, he must give a fresh term's notice if he intend to apply again to be examined (*s*).

Regulations as to Mode of Examination.

The following regulations as to the mode, time, and place of conducting the examination of the applicant for admission have been approved of by the judges of the courts, and are acted upon accordingly (*t*): "1st.—That every person applying to be admitted an attorney of any of the said courts, pursuant to the said rules, shall, within the first *seven* days of the term in which he is desirous of being admitted, leave, or cause to be left, with the secretary of the said Incorporated Law Society his articles of clerkship, duly stamped, and also any assignment which may have been made thereof, together with answers to the several questions thereunto annexed (*u*), signed by the applicant, and also by the attorney or attornies with whom he shall have served his clerkship. 2nd.—That in case the applicant shall shew sufficient cause, to the satisfaction of the examiners, why the first regulation cannot be fully complied with, it shall be in the power of the said examiners, upon sufficient proof being given of the same, to dispense with any part of the first regulation they may think fit and reasonable. 3rd.—That every person applying for admission shall also, if required, sign, and leave, or cause to be left, with the secretary of the said society, answers in writing to such other written or printed questions as shall be proposed by the said examiners, touching his said service and conduct; and shall also, if required, attend the said examiners personally, for the purpose of giving further explanations touching the same; and shall also, if required, procure the attorney or attornies with whom he shall have served his clerkship as aforesaid to answer, either personally or in writing, any questions touching such service or conduct; or shall make proof to the satisfaction of the said examiners of his inability to procure the same. 4th.—That every person so applying shall also attend the said examiners at the hall of the said society, at such time or times as shall be appointed for that purpose, pursuant to the said rule, as the said examiners shall appoint; and shall answer such questions as the said examiners shall then and there put to him by written or printed papers touching his fitness and capacity to act as an attorney. 5th.—That upon compliance of the aforesaid regulations, and if the major part of the said examiners, actually present at and conducting the said examination, (one of them being one of the said masters or prothonotaries), shall be satisfied as to the fitness and capacity of the person so applying to act as an attorney, the said examiners so present, or the major part of them, shall certify the same under their hands, in the following form; *viz.* 'In pursuance of the rules made in Hilary and Easter Terms, 1836, of the Courts of King's Bench, Common Pleas, and Exchequer, we, being the major part of the examiners actually present and conducting the examination of A. B., of &c., do hereby certify, that we have examined the said A. B. as required by the said rules; and we do testify that the said A. B. is fit and capable to act

Certificate of.

(*s*) *Exp. Henry*, 1 Per. & D. 71.

(*t*) See 2 Bing. N. S. 801; 1 M. & W. 292; Tidd, New Prac. 49.

(*u*) See the Questions on the next page.

as an attorney of the said courts.'" There are also certain questions inserted in these regulations concerning the due service of the clerk, and which are to be answered by the clerk and attorney; and a certificate is required to be signed by the latter. The questions and certificate are as follows: *viz.*—

Questions as to due Service to be answered by the Clerk.

Questions as to Service to be answered by the Clerk.

1. What was your age on the day of the date of your articles?

2. Have you served the whole term of your articles at the office where the attorney or attornies to whom you were articled or assigned carried on his or their business? and if not, state the reason.

3. Have you at any time, during the term of your articles, been absent without the permission of the attorney or attornies to whom you were articled or assigned? and if so, state the length and occasions of such absence.

4. Have you, during the period of your articles, been engaged or concerned in any profession, business, or employment, other than your professional employment as clerk to the attorney or attornies to whom you were articled or assigned?

5. Have you, since the expiration of your articles, been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment, other than the profession of an attorney or solicitor?

Questions as to due Service to be answered by the Attorney.

Questions as to Service to be answered by the Attorney.

1. Has A. B. served the whole term of his articles at the office where you carry on your business? and if not, state the reason.

2. Has the said A. B. at any time, during the term of his articles, been absent without your permission? and if so, state the length and occasions of such absence.

3. Has the said A. B., during the period of his articles, been engaged or concerned in any profession, business, or employment, other than his professional employment as your articled clerk?

4. Has the said A. B., during the whole term of his clerkship, with the exceptions above-mentioned, been faithfully and diligently employed in your professional business of an attorney or solicitor?

5. Has the said A. B., since the expiration of his articles, been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment, other than the profession of an attorney and solicitor?

And I do hereby certify, that the said A. B. hath duly and faithfully served under his articles of clerkship (or assignment, as the case may be), bearing date &c., for the term therein expressed, and that he is a fit and proper person to be admitted an attorney. [C. D.]

Directions to Candidates.

The candidates for examination are requested to attend to the following directions:—

Each candidate will have a number given to him, and will take his seat at the table according to such number.

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A paper of questions will be delivered to him with his name and number upon it, containing questions to be answered in writing, classed under the several heads of—

1. Preliminary.—2. Common and statute law and practice of the courts.—3. Conveyancing.—4. Equity and practice of the courts.—5. Bankruptcy and practice of the courts.—6. Criminal law.

Each candidate is required to answer all the preliminary questions (No. 1.), but it is not expected that he should answer every question under each of the other heads.

The answers to the questions under the several heads are to be written on separate papers, prefixing to each answer the number of the question, and each paper should be written in a plain and legible manner and signed.

When the candidate has finished his answers, he will deliver them together with his printed copy of the questions at the examiners' table, and he will then receive a ticket which he is to give to the person at the door when he goes away.

No candidate will be allowed to communicate with, receive assistance from, or copy from the paper of another; and in case this rule is discovered to be infringed, such person will be considered not to have passed his examination.

After the examination has begun no candidate is to leave the hall (without permission obtained) until he shall have delivered in his answers, and any candidate who leaves the hall without permission will not be allowed to return.

Leave to send in Answers *nunc pro tunc.*

Where the clerk has been unavoidably prevented from sending in answers to the questions (in pursuance of the above regulations) in due time, by the negligence of others or by unavoidable accident, the court will allow the answers to be sent in *nunc pro tunc*;—thus, where the delay in sending in the answers was caused by the unexpected absence of the attorney, with whom the articles were served, the court allowed the answers to be sent in (*u*). And where, in consequence of the London agent's negligence, the questions had not been forwarded to the clerk in due time, the court allowed the answers to be sent in, and made the agent pay the costs of the application (*v*). And, where the time appointed for leaving with the examiners the articles of clerkship, and sending in the answers to the questions, expired on the 30th of May, but the time of service did not expire until the 1st of June, so that the master could not satisfactorily answer the question, whether the clerk had served the whole of his time until the 2nd of June, and the examination was to take place on the 5th, Coleridge, J., on an application made on the 2nd of June, ordered the examiners to receive the answers (*w*).

Examination as Solicitor sufficient.

If the clerk has passed his examination for the purpose of being admitted a solicitor of the Court of Chancery, he may be admitted in the common law courts without a further examination (*x*).

Fees on Examination.

The *fees* payable on the examination are, by the 7 *W.* 4 & 1 *V. c.* 56, *ss.* 2, 3, directed to be 5*s.* on leaving the articles of clerkship and assignments for inspection and inquiry as to due

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(*u*) *Ex p. Lyons*, 6 Dowl. 517.

(*v*) *Ex p. Holland*, 5 Dowl. 681.

(*w*) *Ex p. Cooper*, 5 Dowl. 703.

(*x*) *Ex p. Farncombe*, 13 Leg. Ob. 269.

service, and 15*s*. on the examination into the fitness and capacity of the clerk, and for the certificate thereof; and no other fee, gratuity, or sum whatever can be demanded or received.

5. *Admission.*

5. Admission; Notice of Intention to apply for.

Notice of Intention to apply for Admission.] There are rules in the Queen's Bench that every person intending to apply for admission as an attorney of that court (not being an attorney of any other court) shall, during *one full term* previous to the term in which he shall apply to be admitted, cause his name and place of abode, and the name and place of abode of the attorney or attornies to whom he was articled, written in legible characters, to be affixed on the *outside* of the Court of Queen's Bench, in such place as public notices are usually affixed, and also in the *Queen's Bench Office;* otherwise he shall not be admitted (*y*); though there may be an excuse for not complying strictly with this rule (*z*). There is also a rule of the same description in the Common Pleas (*a*), ordering a similar notice to be affixed on the outside of the court, in such place as public notices are usually affixed on, for the space of one full term previous to which the party shall apply to be admitted, and to be left for the like space of time at *each of the judges' chambers* of that court, and there fixed up in some conspicuous place; and that such notice shall likewise be fixed up for the like time in the *Common Pleas Office* (*b*). And by a general rule of all the courts, of *H. T.* 6 *W.* 4, it is ordered, that "*three* days (*c*) at the least before the commencement of the term next preceding (*d*) that in which any person *not before admitted* shall propose to be admitted an attorney of either of the courts, he shall cause to be delivered at the *master's* or *prothonotary's* office, as the case may be, *instead of affixing the same on the walls of the courts*, as now required, the usual written notices, which shall state, *in addition* to the particulars now required, his place or places of abode, or service, for the last preceding *twelve* months; and the master or prothonotary, as the case may be, shall reduce all such notices as in this rule first mentioned into an alphabetical table or tables, under convenient heads, and affix the same on the first day of term in some conspicuous place within or near to and on the outside of each court."

Right Names of all Parties to be stated in Notice.

Where the clerk has served part of his time with one attorney, and part with another to whom the articles were assigned, the name of the assignee must be inserted in the notice (*e*); and, in general, the right names of all the persons with whom the clerk has served during the period of clerkship must be inserted (*f*). A mistake or omission of a name is generally fatal (*g*); but where the name of the person with whom the clerk resided, was inserted by mistake instead of

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(*y*) R. T. 31 G. 3, r. 2, 4 T. R. 379; R. T. 33 G. 3, 5 T. R. 368; see 4 T. R. 492; 4 D. & R. 646. See form of the notice, Chit. Forms, 4.

(*z*) *Ex p. Herbert*, 2 Dowl. 172. See *Ex p. Hulme*, 4 Dowl. 88, where a term's notice was dispensed with under particular circumstances, for the purpose of practising in New South Wales.

(*a*) R. T. 31 G. 3, 2 Marsh. 48 (*a*).

(*b*) Tidd's Prac. 9th ed. 69.

(*c*) Of which, Sunday will reckon as one. (*Ex p. Bumps*, 5 Dowl. 713). Where the 15th of April falls on Easter Sunday, notice given three days before the 18th of April, for Easter Term, is sufficient, (*Ex p. Bayley*, 6 Dowl. 516).

(*d*) *Ex p. Southern*, 6 Dowl. 26.

(*e*) *Ex p. Stokes*, 1 Chit. Rep. 556: *Ex p. Jones*, 1 Dowl. 439.

(*f*) *Ex p. Dobson*, 2 Dowl. 539.

(*g*) *Ex p. Dobson*, 2 Dowl. 539: *Ex p. Jones*, 1 Dowl. 439.

the name of the person to whom he was articled, the Court allowed him to amend his notices, and to be admitted on the last day of the following term (*h*). And the same permission was granted to a clerk who had by mistake inserted in his notices his present name instead of his former one (*i*). And where the master and clerk were each described in the notices by two christian names, and in the articles by one only; the court allowed the clerk to be admitted, upon an affidavit stating the identity of the parties, and that they were truly described in the notice (*k*).

Notice, at what time to be given.

On the above rule of *H. T.* 6 *W.* 4, it has been holden, that a party intending to apply for an original admission as an attorney must cause the required notices to be delivered at the master's office *three* clear days (of which Sunday will reckon as one) (*l*) before the commencement of the term next preceding that in which he proposes to be admitted (*m*). But where proper notice had been given, according to the rule for the admission of a person as an attorney, in a term when he subsequently found he could not be present for examination, leave was given him to give a fresh notice, after the commencement of the term, for admission the following term (*n*). And the court, under special circumstances, have allowed the name of a person proposing to be admitted as an attorney to be inserted in the master's list, on the first day of term, though the usual notices had not been regularly given (*o*).

When dispensed with.

The term's notice has been in some cases dispensed with, under particular circumstances, where the attorney was about to practise in one of the colonies, &c. (*p*).

Entry of Name, &c., at Judges' Chambers, in Q. B.;

Entry of Name, &c., at Judges' Chambers.] For the space of one full term before the term of his application for admission the applicant must cause to be *entered*, in a book kept for this purpose at each of the judges' chambers of the Court of Queen's Bench, his name and place of abode, and the name and place of abode of the attorney or attornies to whom he was articled; otherwise he will not be admitted in that court (*q*). Where, however, through the inadvertence of the London agent, the entry was made in the book at the chambers of the chief justice only, and not at the other judges' chambers, until a short time before the second term, the clerk was allowed to be admitted on the last day of term (*r*).

In C. P.

In the Common Pleas he should post a notice to the same effect in each of the chambers of the judges, and also fix up such a notice in the Common Pleas Office (*s*).

Affidavit of Service.

Affidavit of Service.] Before admission, the clerk, or the at-

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(*h*) *In the matter of Clarke*, 4 N. & M. 709; *Anon.* 1 H. & W. 146: and see *Ex p. Collins*, 6 Dowl. 495.

(*i*) *Ex p. Ridley*, 1 H. & W. 66.

(*k*) *Ex p. Croft*, 5 N. & M. 58.

(*l*) *Ex p. Bumps*, 5 Dowl. 713.

(*m*) *Re Prangley*, 4 A. & E. 781; 6 N. & M. 421, *S. C.*: and see *Ex p. Gordon*, 2 Dowl. 470.

(*n*) *Ex p. Senior*, 1 W. W. & D. 45: see *Ex p. Herbert*, 2 Dowl. 172: *Ex p. Stonehurst*, 1 Har. & W. 517.

(*o*) *Ex p. Blunt*, 5 Dowl. 231: and see *Anon.* 1 H. & W. 146: *Ex p. Jones*, E. T. 1819, Id. n.: *Ex p. Lambert*, 3 M. & P. 269: and see further, as to the consequence of the notice being irregular, *Ex p. Woolwright*, 4 Dowl. 274; 1 H & W. 517: *Ex p. Morgan*, 4 Dowl. 296: *Ex p. Croft*, 5 N. & M. 58.

(*p*) *Ex p. Hulme*, 4 Dowl. 88; 1 Har. & W. 366, *S. C.*: and see *Ex p. Lawson*, 2 Har. & W. 85: *Ex p. Handcock*, 2 Har. & W. 99.

(*q*) R. T. 33 G. 3, 5 T. R. 368; R. T. 31 G. 3, 4 T. R. 492.

(*r*) *Ex p. Woolright*, 4 Dowl. 474.

(*s*) R. T. 31 G. 3; 2 Marsh. 48.

torney to whom he was bound, must make an affidavit that the clerk "hath actually and really served and been employed by such attorney, or his agent, during the whole of the five years;" and must file such affidavit with one of the masters (*t*).

Affidavit of Stamp-duty being paid, and of Enrolment, &c.

Affidavit of Stamp Duty being paid, and of Enrolment, &c.] Previous to admission, the clerk must make an affidavit of the stamp-duty having been paid; specifying also in such affidavit the name and place of abode of the attorney to whom he was articled at the time of the execution of the articles, as also the time of enrolling or registering the same; and if the person intending to apply for admission be already an attorney of another court, he must also specify in the affidavit the court in which he was admitted, and the time of his admission. This affidavit must be filed with one of the masters (*u*).

Admission, and Oaths to be taken on.

Mode of Admission, and Oaths to be taken on.] *Call at the master's office, and get the original affidavit of the execution of the articles which has been filed there. Having made the affidavit of service, and the affidavit of the payment of the stamp-duties, &c., above-mentioned, before a judge, and also having obtained the certificate of the examiners, and also your former master's certificate thereon of your service and fitness for admission, and that part of your articles which was signed by your former master, carry these to the judges' chambers; give them to the clerk, who will then introduce you and your master (if he accompany you) to the judge. The judge, upon examining these affidavits, certificates, and the articles, and upon examining you as to your fitness, will, if he deem you duly qualified, grant his fiat for your admission. Pay the clerk for the judge's fiat* 10*s*. 6*d*. No more can be charged or taken. (7 *W*. 4 & 1 *V*. *c*. 56, *s*. 2). *Carry this fiat and the affidavits and certificates to the master's office, and give them to the clerk.* (Let this be done before 5 o'clock in the afternoon of the day preceding that on which you intend taking the oaths in Court.) *Pay him* 25*l*., *the amount of the stamp-duty upon the admission*, (55 *G*. 3, *c*. 184); *he will then engross your admission on stamped parchment, and inform you at what time you are to attend in Court to be sworn.* An application, upon special circumstances, to be admitted an attorney, must be made by petition to the judges at the Treasury Chamber, and not by motion to the court (*y*).

Oaths to be taken in Court on.

Before admission, the clerk must be sworn in court, (2 *G*. 2, *c*. 23, *s*. 2); *and he must attend at Westminster for that purpose, at the time mentioned by the master.* The oaths to be administered to him are the oaths of allegiance and supremacy, and the declaration against popery; (7 & 8 *W*. 3, *c*. 24; 13 *W*. 3, *c*. 6, *s*. 3); but if he be a Catholic, then, instead of these oaths and declarations, he may take the oath in 31 *G*. 3, *c*. 32, or 10 *G*. 4, *c*. 10. He must also, in either case, take the following oath: "*I*, A. B., *do swear that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability.*" (2 *G*. 2, *c*. 32). If the clerk be a Quaker, he may make an affirmation instead of

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(*t*) 22 G. 2, c. 46, s. 10. See form of affidavit, Chit. Forms, 4.

(*u*) 34 G. 3, c. 14, s. 3; 7 W. 4 & 1 V. c. 30. See the form of it, Chit. Forms, 6.

(*y*) *Ex p. Saunders*, 2 Smith, 154; but see *Ex p. Hulme*, 4 Dowl. 88; and see page 30, n. (*p*).

these oaths. (12 *G.* 2, *c.* 13, *s.* 8). The oaths may be taken and the declaration subscribed before a single judge in the Bail Court. (1 *G.* 4, *c.* 55, *s.* 4). *The fee for the oath is* 1*s. and no more.* (7 *W.* 4 & 1 *V. c.* 56).

After you have taken the oaths, and after the affidavit of execution of the articles, and the affidavit of the payment of the stamp-duty, &c., already mentioned, and also the certificates of the examiners and your former master having been read, (22 *G.* 2, *c.* 46, *s.* 4; 34 *G.* 3, *c.* 14, *s.* 3), *the admission (being written in English on parchment and stamped, as is already mentioned) will then be signed by one of the judges, and delivered to you.* (2 *G.* 2, *c.* 23, *s.* 6, *ante* 24). *Pay to the usher of the court, on signing the roll,* 5*s.* (7 *W.* 4 & 1 *V. c.* 56, *ss.* 2, 3).

Enrolment of Admission, &c.

Enrolment of Admission.] *After admission the name of the clerk should be entered on the roll by one of the masters; from which it is afterwards copied into the book kept in the master's office* (*z*). The fee to the master's clerk for a certificate of the enrolment is 5*s.* (7 *W.* 4 & 1 *V.* 56, *ss.* 2, 3.)

Practising without it penal.

By 2 *G.* 2, *c.* 23, *s.* 5, "no person who shall not before the first day of December, 1730, have been sworn, admitted, and enrolled, pursuant to the directions of this act, shall be permitted to act as an attorney, or to sue out any writ or process, or to commence, carry on, or defend any action or actions, or any proceedings, either before or after judgment obtained, in the name or names of any other person or persons, in any of the courts of law aforesaid, unless such person shall have been bound, by contract in writing, to serve as a clerk for and during the space of five years to an attorney duly and legally sworn and admitted, as hereinbefore is directed, in some or one of the courts hereinbefore mentioned; and that such person, for and during the said term of five years, shall have continued in such service; and also, unless such person, after the expiration of the said term of five years, shall be *examined, sworn, admitted, and enrolled* in the same manner as the persons who shall be admitted attornies of the said courts are hereinbefore required to be examined, sworn, *admitted*, and *enrolled*." Also, if any person practise as an attorney before such admission and enrolment, or if, after being admitted and enrolled, he allow any other person not duly admitted to practise in his name, he is liable to a penalty of 50*l.*, recoverable by any person who will sue for the same. (2 *G.* 2, *c.* 23, *s.* 24; 22 *G.* 2, *c.* 42, *s.* 12). The Court will allow the enrolment to be made *nunc pro tunc* (*a*) unless an action has been brought for the penalty (*b*). If not enrolled, the attorney cannot sue for his costs, though otherwise duly qualified (*c*). But the proceedings in an action, conducted by an attorney not thus enrolled, will not be affected on that ac-

Enrolment *nunc pro tunc.*

Proceedings, how affected by Omission to enrol.

(*z*) See R. v. *Crossley*, 2 Esp. 526: *Humfrey* v. *Harvey*, 1 Bing. N. S. 62; 2 Dowl. 827, *S. C.;* and 2 G. 2, c. 23, s. 18; Tidd. 9th ed. 71. In *Humfrey* v. *Harvey*, it was held that the book of the clerk of the warrants, before the abolition of that office, was the proper place of enrolment for the name of an attorney of the Common Pleas, but the master's office seems to be the proper place since. (7 W. 4 & 1 V. c. 56).

(*a*) *Ex p. Fry*, 3 Dowl. 338.

(*b*) *Ex p. Swift*, Id. 636; 1 Bing. N. S. 734, *S. C.*

(*c*) *Humfrey* v. *Harvey*, 4 M. & Scott, 500; 1 Bing. N. S. 62; 2 Dowl. 827, *S. C.*: See *Young* v. *Dowlman*, 3 Y. & J. 24: *Latham* v. *Hide*, 1 Dowl. 594; 1 C. & M. 128, *S. C.*

count (*d*). The court will take judicial notice of an attorney's being on the roll (*e*). The cases as to whether an attorney on changing his name can have the roll altered, conflict (*f*).

Admission of an Attorney of the Queen's Bench or Common Pleas as an Attorney of the Exchequer.

Admission of an Attorney of the Queen's Bench or Common Pleas as an Attorney of the Exchequer.] An attorney of the Court of Queen's Bench or Common Pleas may be admitted an attorney of the Exchequer, upon taking his admission in one of the former courts to the chambers of one of the barons, who, if he thinks fit, will grant a fiat directing the master to swear, admit, and enrol the applicant (*g*). The attorney must then make an affidavit (*h*), on stamped paper, stating that the duty on his articles of clerkship was duly paid; that the articles (stating the names and descriptions of the parties thereto) were executed and enrolled, as appears by the certificate of the proper officer; and if there has been an assignment of the articles, the name and description of the parties, and the time of the enrolment; and further, that the deponent was admitted an attorney of her Majesty's Court of Queen's Bench or Common Pleas, as the case may be, on a certain day specified, and has since continued on the rolls of the said court. This affidavit, with the judge's fiat, should be left at the Exchequer Office in the evening before the attorney proposes to be sworn, and, at the sitting of the court on the following morning he should attend, and, after being sworn, sign the roll (*i*). This privilege has been rendered almost useless by the recent statute of 7 *W.* 4 & 1 *V. c.* 56, *s.* 4, amended by 1 & 2 *V. c.* 42; which enable attornies admitted in one court to practise in the others on signing the roll. This statute, 7 *W.* 4 & 1 *V. c.* 56, has been held not to be retrospective (*j*).

Fraudulent Admission.

Fraudulent Admission.] If any fraud or false swearing have been practised to obtain the admission, the Court, upon being made acquainted with it, will strike the party off the roll. Thus, where an attorney and clerk joined in the affidavit of the execution of the articles, and the clerk swore to the service under them, and was consequently admitted; it appearing afterwards that the articles were merely collusive, the pretended clerk being in fact an apprentice to a hatter, and his affidavit of service under the articles false, the Court ordered the clerk to be struck off the roll, and granted an attachment against the attorney for the collusion (*k*). But without some such fraud or false swearing, the admission will in general be conclusive evidence of its having been obtained properly, especially where the attorney was not admitted until after some opposition (*l*), or where he has been admitted for a considerable length of time, as three years and a half (*m*).

(*d*) See *Glynn* v. *Hutchinson*, 3 Dowl. 529: *Hilleary* v. *Hungate*, Id. 56.

(*e*) *Ex p. King*, 3 Dowl. 41: *Ex p. Hore*, Id. 600; 1 H. & W. 211, *S. C.*

(*f*) *Ex p. Ware*, 6 Dowl. 311, aff.; *Ex p. Ware*, 6 Dowl. 311; *Ex p. Hayward*, 5 Scott, 712, neg.

(*g*) See form, Chit. Forms, 8; and form of admission thereon, Id. 8.

(*h*) See form, Chit. Forms, 7.

(*i*) See Bagley's Pract. 43; Jervis's Rules, 5, n. (*e*).

(*j*) *Newton* v. *Spencer*, 4 Bing. N. C. 174; 6 Dowl. 401, *S. C.* See the provisions of the statute more fully, *post*, 40.

(*k*) *Ex p. Hill*, 2 W. Bl. 391: *Re Taylor*, 5 B. & Ald. 538.

(*l*) *Ex p. Page*, 2 Bing. 160; 7 Moore, 572, *S. C.*

(*m*) *Re Anon.* 2 B. & Ad. 766.

6. *Certificate.*

6. Certificate.

Between the 15th November and the 16th December in every year, (54 *G.* 3, *c.* 144), every attorney shall deliver to the commissioners of stamps, or to the officer appointed by them, at their head office in Middlesex, a note in writing, containing the name and usual place of residence of such attorney; and thereupon, upon payment of the duty, he shall receive a certificate under the hand and name of the proper officer. (37 *G.* 3, *c.* 90, *s.* 26).

Duty on.

This *duty* is regulated thus:—If the attorney reside within London or Westminster, or within the limits of the twopenny post, then, if he have not been admitted three years, he shall pay 6*l.* yearly; but if three years or more, 12*l.* If he reside out of the limits of the twopenny post, and have not been admitted three years, he shall pay 4*l.* yearly; but if three years or more, 8*l.* (55 *G.* 3, *c.* 184).

How long in force.

The certificate in all cases *expires on the* 15*th November*, (54 *G.* 3, *c.* 144), without any reference to the day on which it was taken out. If taken out before the 16th December, it will have relation back to the 15th November, and protect the attorney from penalties incurred before that time for having practised without a certificate; but if taken out on or after the 16th December, it will have relation only to the day on which it issues. (*See* 37 *G.* 3, *c.* 90, *s.* 26; 54 *G.* 3, *c.* 144, *s.* 14).

Entry of.

The certificate, when obtained, must be *entered with the proper officer of the court in which the attorney was admitted*; and such officer shall, on payment of one shilling, enter in the proper book the name and true residence of the attorney, and the date of the certificate. (37 *G.* 3, *c.* 90, *s.* 27). In the Common Pleas there is a rule of *M. T.* 5 *W.* 4, requiring the entry of the certificate to be made on or before the first day of Easter Term in every year (*n*). Where an attorney, through the negligence of his clerk, omitted to make the entry in due time, but it appeared that he had taken out his certificate regularly, and paid the duty for that year, the Court allowed the entry to be made *nunc pro tunc* (*o*).

Practising without it, penal.

If any person shall, in his own name or the name of any other person, sue out any writ or process, or commence, prosecute, or defend any action or suit, or any proceedings in any court holding pleas, where the debt or damage shall amount to 40*s.* or more, for fee or reward, or shall act in court as an attorney, without having first *obtained and entered his certificate*, as above directed, or shall deliver in a false or fictitious place of residence, with intent to evade the payment of the higher duties, he shall forfeit 50*l.*, and be incapable of maintaining any action for fees for prosecuting or defending suits (*p*), &c., without such certificate as aforesaid. (37 *G.* 3, *c.* 90, *s.* 30). This, however, does not, it seems, extend to actions in which the attorney is himself a party (*q*); nor to suits in the sheriff's court, although prosecuted there by virtue of a writ

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(*n*) 1 M. & Scott, 289; 1 Bing. N. C. 411.

(*o*) *Ex p. Fry*, 3 Dowl. 338: and see *Ex p. Jones*, 4 Moore, 347; and *Ex p. Graddon*, 6 Dowl. 5.

(*p*) See *Pilcher* v. *Hulkes*, K. B. Hil. 1827, Chit. Col. Stat. 78.

(*q*) *Prior* v. *Moore*, 2 M. & Sel. 605: *Skirrow* v. *Tagg*, 5 M. & Sel. 281.

of justicies, for more than 40*s.* (*r*). It has been doubted whether an attorney is liable to distinct penalties for each step he takes in a cause during the time he is without his certificate, or for one penalty only for all the proceedings he takes in it (*s*). Where two attornies are in partnership, both must take out and enter their certificates (*s*); and if both neglect to do so, they must be sued separately, and not jointly, for the penalties (*t*). Before the 14 *G.* 3, *c.* 98, *s.* 10, it was held, that a common informer might sue for the penalty (*u*); but since that act he cannot do so, and the action must be in the name of the attorney-general, or solicitor or other officer of the stamps.

Proceedings, how affected by want of it.

It may be necessary to observe, that although an attorney renders himself liable to a penalty for thus practising without a certificate, the proceedings taken by him are not deemed void or irregular on that account; for the interests of the client are not to suffer by the misconduct of his attorney, and a party is not bound to inquire and ascertain whether his attorney is properly qualified before he employs him (*x*). This might be otherwise, however, where it could be clearly shewn that the party, when he retained the attorney, knew he had not taken out a certificate. Nor is it a ground of objection to bail, that the attorney has not taken out a certificate (*y*). And the plaintiff's cause having been conducted by an attorney who has not taken out his certificate, or even by a person who is not an attorney, does not, it seems, deprive the plaintiff of his right to full costs against the defendant where the plaintiff has made advances to his attorney (*z*). Where a declaration was delivered in the name of a person as the attorney, but who in fact was not an attorney, it was held, that the defendant could not in fact treat the declaration as a nullity, and sign judgment, but that he might apply for a stay of the proceedings until a proper attorney was appointed (*a*). Where the defendant on being sued paid the debt, but refused to pay the costs, and plaintiff's attorney proceeded to trial and issued execution for them, the court stayed the proceedings, the attorney being uncertificated, and plaintiff having made him no advances (*b*). It has been decided, that a warrant of attorney executed by a defendant in custody on mesne process, in the presence of and attested by an attorney who had not taken out his certificate within a year, is invalid (*c*).

(*r*) *Cross* v. *Kaye*, 6 T. R. 663: and see *Jones* v. *Stevens*, 11 Price, 235: *Ex p. Hodgson & Ross*, 3 Ad. & E. 224: *Hodgkinson* v. *Mayor*, 6 Law, J., N. S. 113, K. B., H. T. 1837: *Bowler* v. *Brown*, 3 Ad. & E. 116.

(*s*) *Edmonson* v. *Davis*, 4 Esp. 14.

(*t*) *Davis* v. *Edmonson*, 3 B. & P. 382. *Barnard* v. *Gostling*, 1 New Rep. 245; overruling 2 East, 569, *S. C.*

(*u*) *Barnard* v. *Gostling*, 1 New Rep. 245; overruling 2 East, 569, *S. C.*

(*x*) *Welch* v. *Pribble*, 1 D. & R. 215: *Reader* v. *Bloom*, 10 Moore, 261; 3 Bing. 9, *S. C.*: *Smith* v. *Wilson*, 1 Dowl. 545: *Anon.* v. *Sexton*, Id. 180.: *Hilleary* v. *Hungate*, 3 Dowl. 56: *Glynn* v. *Hutchinson*, 3 Dowl. 529. In *Paterson* v. *Powell*, 9 Bing. 620, the Court set aside a notice of trial by an attorney who had not taken out his certificate, as irregular; but the doctrine laid down in the above text seems correct.

(*y*) *Anon.*, 2 Chit. Rep. 98.

(*z*) *Reader* v. *Bloom*, 10 Moore, 261; 3 Bing. 9, *S. C.*: *Anon.* v. *Sexton* 1 Dowl. 180: *sed vide Young* v. *Dowlman*, 3 Y. & J. 24: *Humphrey* v. *Harvey*, 1 Bing. N. C. 59; 2 Dowl. 822, *S. C. semb. cont.*

(*a*) *Bayley* v. *Thompson*, 2 Dowl. 655: see *Hill* v. *Mills*, Id. 696.

(*b*) *Meekin* v. *Whaley*, 1 Bing. Rep. N. C. 59; 2 Dowl. 822, *S. C.*, see also *Humphrey* v. *Harvey*, Id. 827; 4 M. & Scott, 500; 1 Bing. N. C. 62, *S. C.* (where the attorney was not properly enrolled): also *Young* v. *Dowlman*, 3 Y. & J. 24.

(*c*) *Verge* v. *Dodd*, Tidd's Supplement, 57.

INTROD.

Neglect to take it out for a year.

If an attorney *neglect* (*d*) *to take out his certificate for one whole year*, he shall thenceforth be incapable of practising in court, either in his own name, or in that of any other person; and his admission shall be deemed *void* (*e*); but the court may order him to be *re-admitted*, upon payment of all arrears of duty since the expiration of his last certificate, and of such further sum, by way of penalty, as the court shall think proper. (37 *G.* 3, *c.* 90, *s.* 31). If an attorney so neglects to take out his certificate for the space of one whole year, he is liable, under the 37 *G.* 3, *c.* 90, *s.* 30, (*ante*, *p.* 34), to a penalty for practising during that period, although he regularly take it out afterwards (*f*). But it seems, that, unless the neglect be *wilful*, he may recover his fees (*g*). And such wilful neglect must be proved by the defendant to make it an available defence. Where, in an action brought by an attorney in 1825, the defendant proved that the plaintiff had not taken out any certificate during the years, 1814, 1815, 1818, 1819, and 1820, but did not prove that the plaintiff had not been re-admitted after that time, and there was evidence that in 1824 the plaintiff had acted as an attorney, and been retained by defendant in that character, it was held, that this *primâ facie* evidence was unrebutted by the defendant, and that the plaintiff was entitled to recover (*h*). And an attorney may maintain an action for business done at a time when he was uncertificated, provided that a certificate be taken out by him before the end of a year after the expiration of the period to which the prior certificate extended (*i*). Where an attorney, disqualified from practising by reason of his not taking out his certificate, had obtained a rule for his re-admission, the court held, that for business done by him after he obtained the rule, and before his re-admission had actually been entered at the proper office, he could maintain an action (*k*).

Re-admission, where Certificate never taken.

Where an attorney has been admitted, but has never taken out his certificate (*l*), or does not take it out for a year (*m*), he is, it seems, entitled to take it out and practise without re-admission.

Indemnity Acts for Neglect to take it out.

Indemnity acts are occasionally passed, to prevent the neglect of the attorney to take out his certificate vitiating the service of the clerk. (*See* 1 & 2 *V.* 16 & 7 *W.* 4, *c.* 12.) Indemnity acts are also occasionally passed, to relieve the attorney himself who has neglected to take out his certificate. (*See* 1 *W.* 4, *c*, 26, *s.* 6; 7 *W.* 4, *c.* 12).

7. *Entry of Name and Abode at Master's Office.*

7. Entry of Attorney's Name and Abode. In Q. B.

Every attorney practising in the Queen's Bench, and residing in London or Westminster, or within two miles thereof, shall, in a book to be kept for that purpose in the master's office, enter

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(*d*) The word "neglect" here used imports "culpability," *per Abbott*, C. J., 2 D. & R. 239: and see *Bowler* v. *Brown*, 3 Dowl. 80.

(*e*) See *Skirrow* v. *Tagg*, 5 M. & Sel. 281.

(*f*) *Slack* v. *Williams*, 1 C. & M. 23; 3 Tyr. 158, *S. C. nom. Slack* v. *Wilkins*.

(*g*) *Bowler* v. *Browne*, 3 Dowl. 80: and see *Pilcher* v. *Wilkins*, Chit. Col. Stat. 78.

(*h*) *Pearce* v. *Whale*, 5 B. & C. 38; 7 D. & R. 512, *S. C.*

(*i*) *Bowler* v. *Brown*, 4 N. & M. 17.

(*k*) *Coren* v. *Sharpe*, 1 B. & Ad. 386.

(*l*) *Ex p. Jones*, 2 Dowl. 451: *Ex p. Marshal*, 6 Dowl. 526, where twenty-four years had elapsed since admission.

(*m*) *Semble, Hilleary* v. *Hungate*, 3 Dowl. 56: see *Ex p. Jones*, 2 Dowl. 451: *Ex p. Marshall*, 6 Dowl. 526: *sed vide, Ex p. Nicholas*, 6 Taunt. 408, 2 Marsh. 123, *S. C.*: *Wilton* v. *Chambers*, 2 N. & P. 392; 7 Ad. & El. 524, *S. C.*

his name, and his place of abode, or some other place where he may be served with notices, summonses, orders, and rules; and he shall make the like entry as often as he changes his place of abode, or the place where he may be so served with such notices, &c. (*n*). This rule extends to pleadings, as well as notices, &c., though not mentioned in it (*o*).

In Exchequer.

Also, by a rule in the Exchequer, (*M. T.* 1 *W.* 4, *r.* 8), it is ordered, "that the clerk of the pleas, or his deputy, shall forthwith cause to be prepared a proper alphabetical book, for the purposes after mentioned; and that the same shall be publicly kept at the office of the clerk of the pleas, to be there inspected by any such attorney as aforesaid, or his clerk, without fee or reward; and that every attorney admitted in this court, and residing in London, or within ten miles' distance of the same, shall forthwith enter in such book, in alphabetical order, his name and place of abode, or some other place in London, Westminster, or the borough of Southwark, or within one mile of the said office, where he may be served with notices, summonses, orders, and rules, in causes depending in this court; and every attorney hereafter to be admitted, and practising and residing as aforesaid, shall, upon his admission, make the like entry; and as often as any such attorney shall change his place of abode, or the place where he may be served with notices, summonses, orders, and rules, he shall make the like entry thereof in the said book. And that all notices, summonses, orders, and rules which do not require personal service, shall be deemed sufficiently served on such attorney, if a copy thereof be left at the place lastly entered in such book, with any person resident at or belonging to such place; and if any such attorney shall neglect to make such entry, then the fixing up of any notice, or the copy of any summons, order, or rule, for such attorney, in the said office of pleas, shall be deemed as effectual and sufficient as if the same had been served at such place of residence as aforesaid." Under this rule it has been held, that where an attorney resides out of London, but within ten miles, he must enter in the book, in the master's office, some proper place, within one mile of the office, where notices, &c., may be served; and that it is not sufficient to name merely his place of abode; also, that the rule applies to pleadings, as well as notices, &c., though not mentioned in it (*o*).

8. *Re-admission.*

8. Re-admission.

The statute which renders void the admission of any person who has neglected to take out his certificate for the space of a year, saves the power of the courts to re-admit such person, on payment of the duty accrued since the expiration of his last certificate, and such further sum by way of penalty as the court shall think fit (*p*). There is, it seems, no necessity for re-admission in cases where the attorney has never practised, nor taken out a certificate after admission (*q*); but this is doubtful, and certainly is not the case after re-admission (*r*).

(*n*) R. H. 8 G. 3, Q. B.: Loft, 357: see *post*, 52.

(*o*) See *Blackburn* v. *Peat*, 2 C. & M. 244; 2 Dowl. 293; 4 Tyr. 38, *S. C.*

(*p*) 37 G. 3, c. 90, s. 31.

(*q*) *Hilleary* v. *Hungate*, 3 Dowl. 56, 61: *Ex p. Jones*, 2 Dowl. 451: *Ex p. Marshal*, 6 Dowl. 526; *sed vide Ex p. Nicholas*, 6 Taunt. 408; 2 Marsh. 123, S.C.

(*r*) *Wilton* v. *Chambers*, 2 N. & P. 392; 7 Ad. & El. 524, *S. C.*

The notices and affidavits necessary to support the application for re-admission in the Queen's Bench (*t*) are as follows: viz.—

Notice for Re-admission.

A notice must be prepared, stating the name and place of abode of the party, and that he intends to apply on the last day of the next term for re-admission (*u*). A copy of this notice must be stuck up outside the Court of Queen's Bench at Westminster Hall; another copy must be stuck up at the Queen's Bench Office, and another served on the solicitor of the Stamp Office at Somerset House (*x*). The notice should also be entered in the book of each of the judges of the court at chambers (*y*). If these notices be affixed, entered, and served at any time before the first day of term, and remain up during the term, it will be sufficient to entitle the applicant to re-admission on the last day of that term; and perhaps it would be held sufficient to stick up, enter, and serve the notices at any time before the sitting of the full Court on the first day of the term (*z*). Pecuniary difficulties, or illness (*a*), or absence abroad (*b*), or mere inadvertence (*c*), will not in general excuse such notice. Where, however, an attorney, who had actually obtained a rule for his re-admission, broke his leg, and was thereby prevented from practising, and consequently did not take out his certificate, he was re-admitted by Patteson, J. in a subsequent year, *nunc pro tunc*, on payment of arrears of duty, and taking out his certificate for the current year, without the usual notices (*d*). An exception has also been made, so as to dispense with the usual notice before making this application, where the party has continued to practise, having reason to suppose that his agent, or some other person, has taken out a certificate for him (*e*); but, even in this case, the usual notice of the application must be given at the Stamp Office (*f*).

First Affidavit for.

An affidavit should also be prepared (*g*), stating the payment of the duty on the articles, the admission and time of admission under them (*h*), and up to what time the attorney obtained his certificate, and also stating his place or places of abode during the last preceding year (*i*); and stating the reason (as illness, absence abroad, poverty, &c. (*j*)) of his not having continued to take out his certificate, and the manner in which he has since been employed. This affidavit should be filed with the master at the time of giving the usual notice of the intention to apply for re-admission, and a copy of it

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(*t*) The proceedings in the other courts are nearly the same, *mutatis mutandis*.

(*u*) See form, Chit. Forms, 8.

(*x*) *Ex p. Bridgman*, 3 Dowl. 371: *Ex p. Franks*, 3 Dowl. 319.

(*y*) In C. P. and Exch. there is only one book.

(*z*) *Ex p. Davey*, 4 D. & R. 646: *Ex p. Senior*, 1 Dowl. 517: *Ex p. Pilkins*, 2 Id. 203: *Ex p. Gordon*, Id. 470: and see *Ex p. Mosley*, 4 Dowl. 69. But a notice put up on the last day of one term, and remaining up during the vacation, will not be sufficient to obtain re-admission on the *second* day of the next term. (*Ex p. Cross*, 4 Dowl. 18).

(*a*) *Ex p. Bartlett*, 1 Chit. Rep. 207: see, however, *Ex p. French*, 5 Dowl. 374.

(*b*) *Ex p. Watson*, 2 Chit. Rep. 208.

(*c*) *Ex p. Franks*, 3 Dowl. 319.

(*d*) *Ex p. French*, 5 Dowl. 374.

(*e*) *Ex p. Thorpe*, 3 Dowl. 392: *Ex p. Bartlett*, 1 Chit. Rep. 7, 207: *Ex p. Winter*, 1 B. & Al. 189: *Ex p. Jones*, 4 Moore, 347: *Ex p. Vaughan*, Tidd, 9th ed., 79: *Ex p. Jones*, 2 Dowl. 199: *Ex p. Rigby*, 1 N. & M. 593: *Ex p. Minchir*, 5 Dowl. 253: see form of affidavit in such case, Chit. Forms, 11.

(*f*) *Ex p. Franks*, 3 Dowl. 319.

(*g*) See the form, Chit. Forms.

(*h*) It will suffice if the affidavit clearly shews by the statements that he must have been admitted, without positively stating the fact, *Ex p. Wentworth*, 2 Dowl. 607.

(*i*) R. H. 6 W. 4.

(*j*) *Ex p. Richards*, 1 Chit. R. 101, 102: *Ex p. Cunningham*, 1 Bing. 91; 7 Moore, 410, *S. C.*: *Ex p. Saunders*, 2 Smith, 155: *Ex p. Maliphant*, 7 Moore, 495.

should at the same time be left with the clerk of the lord chief justice of the Court of Queen's Bench, in pursuance of the general rule of *H. T.* 6 *W.* 4. That rule, after reciting that it is expedient, upon the re-admission of attornies, that the judges should have further means of inquiring as to the circumstances under which persons applying to be re-admitted discontinue to practise, and as to their conduct and employment during the time of such discontinuance, orders, that "at the time of giving the usual notice of the intention to apply for such re-admission, the party shall cause to be filed the affidavit on which he seeks to be re-admitted with the master or prothonotary, as the case may be; which affidavit shall contain, in *addition* to the particulars now required, a statement of his place or places of abode during the last preceding year; and such person shall also, at the same time, cause to be left a copy of such affidavit with the clerk of the lord chief justice of the Court of King's Bench: and the rule for the re-admission of such person shall be drawn up, on reading such affidavit, and also an affidavit of such copy having been left, in compliance with this rule." By leave of the court it may be filed *nunc pro tunc* (*k*).

Second Affidavit for.

Another affidavit should also be prepared (*l*) in support of the application, stating that the usual notice has been stuck up and entered, and served on the solicitor of the Stamp Office, as above directed, and also that the above affidavit has been at the same time filed with the master, and a copy of it left with the clerk of the lord chief justice.

Motion for, where and when to be made.

All matters connected with the re-admission of attornies must, it seems, be settled in open Court, and, therefore, where the affidavit was imperfect, leave to apply in chambers on an amended affidavit was refused (*m*). The motion must be made on the last day of the term, for which notice is given; where, however, the application was made on the second day of the following term, the Court (it being a hard case) allowed the applicant to give notice then, for the last day of that term (*n*).

When refused.

The court exercises a discretion in complying with application to be re-admitted; thus, where a party had been struck off the roll at his own request, and was subsequently called to the bar, the Court refused to re-admit him as an attorney (*o*); and the same, where the applicant had discontinued practice for thirty years, and had occupied himself in the meantime as an officer of the Customs (*p*). But mere lapse of time is not of itself a bar to re-admission; thus, attornies have been admitted after ceasing to practise for five or six years (*q*); and where an attorney had been struck off the roll at his own request, he was re-admitted after the lapse of *fifteen* years, without payment of arrears of duty or fine (*r*).

Rule for.

The rule for re-admission is absolute in the first instance (*s*). *Take it to the master's office, and get it entered there.* If an attorney has been re-admitted in one court, he may be re-admitted in another, on reading the rule for his re-admis-

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(*k*) *Ex p. Vincent*, 2 Jurist, 47: *Ex p.* ——, Id. 442.

(*l*) See the form, Chit. Forms, 8.

(*m*) *Ex p. Owen*, 1 Dowl. 511.

(*n*) *Ex p. Moseley*, 4 Dowl. 69.

(*o*) *Ex p. Cole*, 1 Doug. 114.

(*p*) *Ex p. Billings*, 5 Dowl. 395.

(*q*) *Ex p. Smith*, 1 Chit. 692: *Ex p. Cunningham*, 7 Moore, 410; 1 Bing. 91, *S. C.*

(*r*) *Ex p. Calland*, 2 B. & Al. 315, n.: see *Ex p. Clarke*, 2 B. & Ald. 314: see a case where he had not taken out his certificate or practised for twenty-four years, (*Ex parte Marshall*, 6 Dowl. 526).

(*s*) *Sed vide* Tidd. New Prac. 55.

sion in the former (*t*). When an attorney, having ceased to take out his certificate, is off the roll, it is not usual to expunge his name; but when a rule for re-admission is presented at the office, a memorandum of such re-admission is prefixed to the party's name on the roll. It is settled, however, that, when the rule for his re-admission is obtained, he may practise, and sue for business done after the obtaining it, although before he has caused his re-admission to be entered at the master's office (*u*).

Proof of.

Evidence of having acted as an attorney is *primâ facie* proof of re-admission in an action for fees (*x*).

Terms of Re-admission.

Terms of Re-admission.] The terms imposed upon an applicant for re-admission differ according to the circumstances of the case.

Where Applicant has not practised in a superior Court since last Certificate, &c.

Where the applicant *has not practised* on his own account in this country (*y*), since the expiration of his last certificate, the Court will allow him to be re-admitted without payment of fine or arrears of duty (*z*); and the same, where the attorney has not practised *since his admission* (*a*), (except that the affidavit in that case is somewhat different (*b*)). An attorney who has practised abroad (*c*), or in a borough court, where persons not attornies might practise (*d*), or who has practised after ceasing to take out his certificate, but has had the penalties remitted by the commissioners of stamps, stands in the same situation as a person who has not practised, and will be re-admitted on the same terms (*e*).

Where he has practised.

But where the attorney *has practised* on his own account, in this country (*f*), since the expiration of his last certificate, the Court will not order him to be re-admitted, except upon the terms of his paying all arrears of duty, and a fine, which is usually 5*l*. or less (*g*); and, in this case, the court also will require to be satisfied by the affidavit, that the party's not having taken out his certificate arose from the mere neglect of himself or his agent (*h*), or clerk (*i*), and not from any wilful omission or improper motive (*k*).

9. *Admission and Practising in Courts in which he is not Admitted.*

9. Admission and Practising in Courts in which he is not admitted.

Attornies and solicitors, who have been admitted in the superior courts of law or equity respectively, may be admitted in any other court of law or equity without paying additional stamp-duty (*l*). This privilege, so far as it relates to attornies of the courts of law, has become nearly useless since the recent statute, 7 *W*. 4 & 1 *V*. *c*. 56, *s*. 4, which enacts, that "any per-

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(*t*) *Ex p. Yates*, 1 Dowl. 724; 2 M. & Scott, 618; 9 Bing. 454, *S. C.*

(*u*) *Coren* v. *Sharp*, 1 B. & Ad. 386: see form of rule there.

(*x*) *Pearce* v. *Whale*, 5 B. & C. 38.

(*y*) *Ex p. Philcox*, 2 Dowl. 450. see *Ex p. Thompson*, 5 Dowl. 275.

(*z*) *Ex p. Clarke*, 2 B. &Ald. 314: *Ex p. Calland*, Id. 315: *Ex p. Matson*, 1 Chit. Rep. 102; 2 D. & R. 238, *S. C.*: *Ex p. Thompson*, 2 Dowl. 160: and see 6 Taunt. 398: *Ex p. Cunningham*, 1 Bing. 91; 7 Moore, 410, *S. C.*

(*a*) *Ex p. Davis*, 1 Chit. Rep. 729.

(*b*) See forms of affidavit and notice, Chit. Forms, 9; and of the rule, Id. 11.

(*c*) *Ex p. Philcox*, 2 Dowl. 450.

(*d*) *Ex p. Thompson*, 5 Dowl. 275.

(*e*) *Ex p. Tuffkin*, 1 H. & W. 516.

(*f*) *Ex p. Philcox*, 2 Dowl. 450: *Ex p. Thompson*, 5 Dowl. 275.

(*g*) *Ex p. Philpot*, 3 Dowl. 339: see *Ex p. Murray*, 2 Turn. & Russ. 56: *Ex p. Leacroft*, 4 B. & Ald. 90.

(*h*) See *Ex p. Leacroft*, 4 B. & Al. 90: *Re Winter*, 8 Taunt. 129: *Ex p. Jones*, 2 Dowl. 199.

(*i*) *Ex p. Rigby*, 1 N. & M. 593.

(*k*) See forms of affidavit and notice, Chit. Forms 9; and of the rule, Id. 11.

(*l*) 2 G. 2, c. 23, s. 20; 22 G. 2, c. 45, s. 15.

By Attornies of Courts at Westminster.

son who shall have been duly admitted an attorney in any one of her Majesty's courts of law at Westminster, shall be at liberty to practise in any other of her Majesty's courts of law at Westminster, although he may not have been admitted an attorney thereof, and that no person having been duly admitted an attorney or solicitor in any of her Majesty's courts of law or equity at Westminster, shall be prevented from recovering or receiving the amount of any costs which would otherwise have been due to him, by reason of his not being admitted an attorney or solicitor of the court in which such costs shall have been incurred. Provided always, that any attorney or solicitor, practising in any court of law or equity, shall be subject to the jurisdiction of such court as fully and completely to all intents and purposes whatever, as if he had been duly admitted an attorney or solicitor of such court" (*m*). This act has been amended by 1 & 2 *V. c.* 45, *s.* 3, which, after reciting the act of 7 *W.* 4 & 1 *V.*, and that it is expedient, in order to secure the jurisdiction of the courts over the attornies practising therein, to have a record in each court of the admission of attornies; enacts, "that any person entitled to be admitted an attorney of any of the courts at Westminster, shall, after being sworn in and admitted as an attorney of any one of the courts, be entitled to practise in any other of the courts, *upon signing the roll of such court, and not otherwise*, in like manner as if he had been sworn in and admitted an attorney of such court; provided, that no additional fee, besides those payable under 7 *W.* 4 & 1 *V. c.* 56, shall be demanded or paid; and that the fees payable for such admission shall be apportioned in such manner as the judges of the said courts or any eight of them shall direct or appoint." And by a general rule of M. T. 1838, after reciting 1 & 2 *V. c.* 45, *s.* 3, it is directed and appointed that "the fees payable by virtue of the said last-mentioned act for the judges' fiat, be received in the first instance by the clerk of the judge granting the fiat, and paid over by him to the clerk of the chief justice or chief baron of the Court, as the case may be; and the day after each term all the fees so received shall be divided into fifteen portions, one of which shall be paid to the clerk or clerks of each judge; and further, that the fees payable by virtue of the said act to the ushers shall be received in the first instance by one of the ushers of the court in which the admission shall take place, and shall on the day after each term be divided into three equal portions, one of which shall be paid to the ushers of each court."

By Attornies of Courts of Wales, Chester, Lancaster, Durham, &c.

Any person who has served under articles of clerkship in order to his admission in the courts of Great Sessions of Wales (*n*), or of the counties palatine of Chester (*n*), Lancaster, or Durham, or in any other court of record in England, (not being one of her Majesty's courts of record at Westminster), holding pleas where the debt or damage amounts to 40*s.*, may, upon payment of 120*l.*, have his articles of clerkship stamped, and be admitted an attorney or solicitor in any of the courts at Westminster, provided the articles have been

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(*m*) This act does not apply to costs which became due before the passing of the act, *Newton* v. *Spencer*, 4 Bing. N. C. 401; 6 Dowl. 174, *S. C.* It does not take away the privilege of being sued in attorney's own court, (*Prior* v. *Smith*, 6 Dowl. 299).

(*n*) Now abolished, 11 G. 4 & 1 W. 4, c. 70, *ante*, 3: see *Ex p. Williams*, 5 Ad. & E. 140.

properly stamped before the time of the application. And by the 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 16, persons who were *practising* attornies of the thereby abolished courts of Chester or Wales at the time of the passing of that act, are entitled upon payment of 1*s.* to have their names entered upon a roll, to be kept for that purpose in each of the superior courts at Westminster, and thereupon to practise in such courts, in all actions *against persons residing, at the commencement of the suit, within the county of Chester or principality of Wales* (*o*). And by *s.* 17 of the same act, all attornies and solicitors, then actually admitted and practising (*p*) in the thereby abolished courts, may be admitted attornies of the courts at Westminster, in the usual way, upon payment of such sum for duty, in addition to the sum already paid by them, as shall, together with such latter sum, amount to the duty for admission in the courts at Westminster. Similar provisions are made by the same sections for the admission of clerks articled to attornies of the abolished courts, before the passing of the act (*q*). The application for admission of an attorney under the 17th section should be made on production of his admission in the abolished court, and an affidavit that he was a practising attorney at the time of the passing of the act, (*viz.* 23rd July, 1830), at the master's office (*r*).

Of Attorney of Treasury, &c.

The solicitor or attorney of the treasury, customs, excise, stamps, or any other branch of the revenue, may act and practise as such, under the directions of the commissioners in any court in the kingdom (*s*).

Practising in inferior Courts.

Practising in Inferior Courts.] An attorney who has been admitted in any of the courts at Westminster may practise in any inferior court, provided he be in other respects qualified according to the custom of the place (*t*). Persons who have not been admitted as attornies of one of the courts at Westminster are liable to a penalty of 50*l.* and treble the costs of suit for practising at general or quarter sessions (*u*), and of 20*l.* for practising in any county court (*x*). No *certificate* is necessary for practising in the county court (*y*).

Practising in the Name of Another.

Practising in the Name of Another.] Before the passing of the statute 7 *W.* 4 & 1 *V. c.* 56, *s.* 4 (*z*), an attorney was not entitled to practise *in his own name* in a court in which he was not admitted, and if he did, the proceedings would have been stayed, and the attorney would have been ordered to pay the costs, even after issue joined and notice of trial given (*a*); and in such case he could not maintain

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(*o*) See *per Tindal*, C. J., in *Davies* dem. *Dawkins* ten. *Evans* vouchee, 7 Bing. 149; 1 Dowl. 206; 4 M. & P. 789, *S. C.*

(*p*) *Ex p. Read*, 1 B. & Ad. 957: *Ex p. Garratt*, 2 Dowl. 371; 2 C. & M. 410; 4 Tyr. 282, *S. C.*: see, however, *Ex p. Williams*, 5 Ad. & El. 140.

(*q*) See successful application for admission, independently of this statute, *Ex p. Williams*, 5 Ad. & E. 140, where a person, who, before the passing of the above act, had been admitted in the Court of Great Sessions at Wales, having paid the higher duty on his articles, under 55 G. 3, c. 184, was admitted without examination, though he had never taken out his certificate nor practised.

(*r*) As to the practice on admission, enrolment of admission, &c., see *ante*, p. 29 to 32.

(*s*) 9 G. 4, c. 25, s. 1: see *West* v. *Taunton*, 6 Bing. 40; 4 M. & P. 79, *S. C.*

(*t*) 6 G. 2, c. 27, s. 2.

(*u*) 22 G. 2, c. 46, s. 12.

(*x*) 12 G. 2, c. 13, s. 7.

(*y*) *Hodgkinson* v. *Mayer*, 6 Ad. & El. 194.

(*z*) See the provisions of this act, *ante*, p. 40.

(*a*) *Constable* v. *Johnson*, 1 Dowl. 598: see *Miller* v. *Towers*, Peake, 102: *Thwaites* v. *Makinson*, 1 M. & M. 109; Id. 529; 2 M. & M. 33: *Humphrey* v. *Harvey*, 1 Bing. N. C. 62; 2 Dowl. 827; 4 M. & Sc. 494, *S. C.*

an action or gain a lien for his fees, or even for money out of pocket (*b*). It was, therefore, then usual, and is still allowable, for an attorney of one court at Westminster to practise in any other, in the name of an attorney of such other court, provided he have a consent in writing signed by such other attorney so to do (*c*); and provided both have regularly taken out and entered their certificates (*d*). But attornies of the courts of Lancaster or Durham, or other courts in England, are not allowed to practise in the courts at Westminster, either in their own name or that of any other person (*e*). The consent need not, it seems, be a formal one; but it is sufficient if evidence of a consent can be collected from the correspondence between the parties (*f*). But where there is no consent whatever, the Court will set aside the proceedings and attach the attorney (*g*). And, where process was sued out in the name of A. by B., neither of whom were attornies of the court, and B. had no authority from any other attorney to act in his name, the court set aside the proceedings, and ordered A. & B. to pay the costs (*h*).

Proceedings to be in the Name of admitted Attorney.

The proceedings ought, it seems, to be carried on in the name of the attorney who is admitted, only; and, where bail was put in in this form, "Ely by Cole," the former not being an attorney of the court, though the latter was; Alderson, B., held the proceedings to be informal, but gave time to amend (*i*). A solicitor of the Court of Chancery, not admitted in the Equity Exchequer, may practise in the Equity Exchequer in the name of a sworn clerk in the Remembrancer Office, and is entitled to his fees (*k*).

A demand of costs by an attorney who uses the name of an attorney of the Court by his consent, is sufficient to ground an attachment (*l*).

Statutes on this subject inapplicable to Agents, and almost useless since 7 *W.* 4 & 1 *V. c.* 56.

The statutes on this subject do not affect the employment of agents by country attornies (*m*); and they are rendered of little practical importance by the recent statute of 7 *W.* 4 & 1 *V. c.* 56, amended by 1 & 2 *V. c.* 42, which, as has been stated (*n*), enables an attorney of any one of the courts to practise in any other of them in his own name on signing the roll; and enacts, that no person having been duly admitted an attorney or solicitor in any superior court of law or equity, shall be prevented from recovering costs by reason of not being admitted in the court in which the costs were incurred (*n*).

Allowing an unqualified person to practise in his name.

Unqualified Person practising in Attorney's Name by consent.] If any attorney or solicitor shall act as agent for, or permit his name to be used by or for the profit of, or send any process to an unqualified person, to enable him to act as an attorney or

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(*b*) *Latham* v. *Hide*, 1 Dowl. 494; 1 C. & M. 128, *S. C.*: *Vincent* v. *Holt*, 4 Taunt. 452.

(*c*) 2 G. 2, c. 23, s. 10: in *Davison* v. *Davison*, Sayer, 95: and *Gardner* v. *Cover*, 1 Gale, 45; 3 Dowl. 424, *S. C. nom. Goodner* v. *Cover*. There does not seem, from the reports, to have been any written consent.

(*d*) 25 G. 3, c. 80. s. 8.

(*e*) 34 G. 3, c. 14, s. 4.

(*f*) See *per Parke*, B., in *Jones* v. *Jones*, 2 M. & W. 323.

(*g*) *Oppenheim* v. *Harrison*, 1 Bur. 20: *Hopwood* v. *Adams*, 5 Bur. 2660.

(*h*) *Hawkins* v. *Edwards*, 4 Moore, 603.

(*i*) *Marden's Bail*, 3 Dowl. 654; 2 C. M. & R. 29, *S. C. nom. Chadwick* v. *Hugh*.

(*k*) *Att.-Gen.* v. *Matin*, 2 C. & J. 500, and see *Meddowcross* v. *Holbrook*, 1 H. Bl. 50.

(*l*) *Davison* v. *Davison*, Sayer, 95.

(*m*) *Jones* v. *Jones*, 2 M. & W. 323: see *Goodman* v. *Cover*, 3 Dowl. 424.

(*n*) See the provisions of this statute more fully stated, and the preliminary steps rendered necessary by subsequent statutes, and R. M. T. 1838, *ante*, p. 40.

solicitor, knowing him not to be such, the attorney upon complaint and proof upon oath will be struck off the rolls, and for ever disabled from practising, and the court may commit the unqualified person to the prison of the court, for any time not exceeding one year (*o*). An attorney who forms a *partnership* with an unqualified person is within the provisions of the act 22, *G.* 2, *c.* 46 (*p*); therefore, where an attorney engaged a certificated conveyancer to conduct his business, and allowed him a moiety of the profits instead of a salary, and the business was carried on in their joint names, the Court ordered the attorney to be struck off the rolls, and the conveyancer to be imprisoned for a month (*q*); but an agreement, by the eldest son of an attorney who had died and bequeathed his property to his widow, entered into with his mother, for the mixed consideration of the goodwill of the business, the advancement of money for carrying it on, and family affection, to continue the business and to account to her for the profits during the minority of his brothers and sisters, is not contrary to the act (*r*). An attorney, who resided occasionally at A., occupied part of a house in B., where his articled clerk lived, the names of both being on the door: the clerk was in the habit of attending a court of requests, and before magistrates as such clerk, but deriving a profit to himself therefrom; he also conducted an appeal in the name of his master, who allowed part of the bill to be paid by a suit of clothes made for the clerk: it also appeared that several writs, issued out of the King's Bench, had been placed in the hands of an officer to be executed, having the master's name upon them, for part of which he paid, but referred the officer to the clerk for the remainder, saying, it was the clerk's business and not his; and that, in an action carried on in the King's Bench in the name of the master, with his knowledge and concurrence, the clerk appeared and acted as the attorney, and, after a verdict obtained, claimed to have the costs paid to himself, and objected to have them paid to the master: it was held, that this was a case within the above enactment, and the Court ordered the attorney to be struck off the roll (*s*). And where a bailiff had written to an attorney for writs, which the latter sent, without knowing anything of the parties or circumstances; but the bailiff had never represented himself, or been considered, as an attorney, nor looked for any profit upon the law proceedings; the court held, that, although this was not a case within the statute, yet, that it was a most improper practice, which the Court, in virtue of its general jurisdiction over attornies, would punish severely (*t*). But the Court of Common Pleas refused to strike an attorney off the roll, on an affidavit which stated, that a person who had lately been his clerk, and who lived at a town eight miles distant from the residence of the attorney, and carried on business at an office, over the door of which was written the attorney's name, but that he only attended on market-days, and then transacted all his business at an inn; on the ground, that

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(*o*) 22 G. 2, c. 46, s. 11: see 2 G. 2, c. 23, s. 17: 22 G. 2, c. 42, s. 12: *Re Jackson and Wood*, 1 B. & C. 270: *Re Clark and Others*, 3 D. & R. 260: *Re Jaques*, 2 Id. 64.

(*p*) *Tench* v. *Roberts*, Mad. & Geld. 145, n.: see *per Richardson*, J., *Hopkinson* v. *Smith*, 7 Moore, 243; 1 Bing. 13, *S. C.*

(*q*) *Re Jackson and Wood*, 1 B. & C. 270; 3 D. & R. 263, n. *S. C.*

(*r*) *Candler* v. *Candler*, Mad. & Geld. 141.

(*s*) *Re Palmer*, 1 Harr. & W. 55.

(*t*) *Ex p. Whatton*, 5 B. & Ald. 824.

it should have been shewn that such person either participated in the profits, or carried on business on his own account (*u*); and the Queen's Bench made a similar decision in a more recent case (*x*).

Who not an "unqualified person."

An attorney who has been regularly admitted, but who is off the rolls by reason of having neglected to take out his certificate for a year, is not an "*unqualified person*" within the meaning of the 22 *G.* 2, *c.* 46, *s.* 11; but it might be otherwise if he were struck off the roll for misconduct (*y*).

Both must be proceeded against.

In order to enable the Court to punish, under this statute, an unqualified person who has acted in the name of an attorney, it is necessary to shew that such practice was with the knowledge of the latter, and the Court will not entertain an application against the unqualified person alone, but the attorney must also be proceeded against (*z*).

Costs not recoverable.

Where an attorney has allowed an unqualified person to act in his name, no action is maintainable for the costs (*a*).

Unqualified Persons acting as Attornies without Consent.

Unqualified Persons acting as Attornies without Consent.] Any person who practises as an attorney, before being duly admitted and enrolled, is liable to a penalty of 50*l.* (*b*); but the Court will not punish him summarily, there being a specific remedy pointed out by the act (*c*). A proceeding, taken by an unqualified person in his own name (*d*), or in that of an attorney, without consent, cannot, it seems, be treated as a nullity (*e*); but, in the former case, the proceedings will, on application to the Court, be stayed until a proper attorney is appointed, or they will be set aside, unless a proper attorney be appointed within a limited time (*f*); and, in the latter case, the proceedings will be set aside (*g*).

10. *Agents in Town.*

10. Agents in town.

May in general be treated as Attornies in the cause.

Attornies in the country usually employ others in town as their agents. Both must be attornies, and must have duly taken out their certificates. Generally speaking, the agent may be considered and treated by the opposite party as the attorney in the cause. All notices, &c., relative to business done in town (*h*), such as a demand of declaration (*i*), notice of trial or of executing a writ of inquiry (*k*), or of continuance of inquiry, must be served on the agent in town; so, the issue must be delivered to him (*l*). But notice of trial on an old issue may be given to the agent in town or to the attorney in the country; so may a countermand of notice of trial (*m*), or inquiry, unless otherwise ordered by the court or a judge (*k*).

Attorney bound by Agent's Acts.

The attorney is bound by the acts of his agent; thus, where the plaintiff's agent had given the defendant time to plead, and the attorney having in the meantime come to town, demanded

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(*u*) *Ex p. Garbutt*, 9 Moore, 157; 2 Bing. 74, *S. C.*

(*x*) *Re King*, 1 A. & E. 560.

(*y*) *Re Ross and Hodgson*, 4 N. & M. 763; 1 Harr. & W. 265.

(*z*) *Re Hodgson*, 3 Dowl. 330; 1 Harr. & W. 110, *S. C.*

(*a*) *Hopkinson* v. *Smith*, 7 Moore, 243: see *per Richardson*, J., 1 Bing. 13, *S. C.*

(*b*) 2 G. 2, c. 23, ss. 5, 12, 24.

(*c*) *Mathews* v. *Royle*, 6 Moore, 70.

(*d*) *Bayley* v. *Thompson*, 2 Dowl. 655.

(*e*) *Hill* v. *Mills*, 2 Dowl. 696.

(*f*) *Bayley* v. *Thompson*, 2 Dowl. 655.

(*g*) *Norton* v. *Curtis*, 2 Dowl. 345.

(*h*) *Griffiths* v. *Williams*, 1 T. R. 711.

(*i*) *Elwood* v. *Elwood*, Barnes, 311.

(*k*) R. H. 2 W. 4, r. 57: *Hayes* v. *Perkins*, 3 East, 568.

(*l*) *Haslefoot* v. *Duke*, Barnes, 251.

(*m*) *Tashburn* v. *Havelock*, Id. 306.

a plea, and signed judgment, the Court upon application set aside the judgment for irregularity (*n*). So, where an agent in town took money out of Court, which had been paid in irregularly, the court held, that the plaintiff was bound by the act of the agent, and the irregularity thereby waived (*o*).

And answerable for his Misconduct.

The attorney is answerable for the mistakes or negligence of the agent; thus, where a plaintiff obtained a verdict, in consequence of the defendant's agent not having informed the defendant of his having been served with notice of trial, the defendant's attorney was held to be liable for the neglect of the agent (*p*). And if an agent be guilty of negligence, and the attorney's client thereby sustain an injury, the client cannot sue the agent, nor will the Court entertain any application of the client against him, for there *is no privity between them;* the client's remedy in such a case is against his own attorney (*q*). And on account of this want of privity between the client and agent, payment of a debt to the agent is not in law a payment to the attorney's client, as a payment to the attorney himself would have been, unless indeed the attorney have given the agent a special authority to receive the money (*r*).

Agent's Lien.

Nor will an agent be allowed a lien upon money recovered by him in a suit for the client (*s*), beyond the amount of his charges for agency in that particular suit (*t*); but on the money received in the cause, and upon the papers in the cause, he has a lien against all the world for the amount due for his agency bill in that particular cause; and if he had no payment made to him specifically, on account of that cause, he is entitled to the lien until his agency bill in that cause is satisfied (*u*); and he has a lien for his general balance upon the papers and money of his immediate client, the country attorney (*x*). If the agent voluntarily parts with the papers, even by mistake, his lien is at an end; but if taken from him wrongfully, he may sue for their recovery (*y*).

Recovery of Costs by.

An attorney employing an agent to do business for his client is *primâ facie* liable to the agent for his bill, although the latter knew that the business was done for the client; but to whom the credit was given, is a question for the jury (*z*). An agent need not deliver a signed bill of costs under the statute, before suing for his agency bill (*a*), though a delivery of bill for business done for another attorney in the superior courts (*b*) is in other cases necessary (*c*). It seems that the common law courts have no power to tax an agency bill (*d*).

Continuance of his Power.

Service of rule for judgment as in case of a nonsuit, after a lapse of seven years without any proceedings having been taken, on an agent who knew nothing of plaintiff or his at-

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(*n*) *Wallace* v. *Willington*, Id. 256.

(*o*) *Griffiths* v. *Williams*, 1 T. R. 710.

(*p*) *Collins* v. *Griffin*, Barnes, 37.

(*q*) *Ex p. Jones*, 2 Dowl. 161: *per Taunton*, J., *Gray* v. *Kirby*, 2 Dowl. 601.

(*r*) *Yates* v. *Frecklington*, 2 Doug. 622.

(*s*) *Moody* v. *Spencer*, 2 D. & R. 6.

(*t*) *White* v. *Royal Exchange*, 1 Bing. 21; 7 Moore, 249, *S. C.*: and see *Bray* v. *Hine*, 6 Price, 203: *Taunton* v. *Goforth*, 9 D. & R. 384: see *Dicas* v. *Stockley*, 7 C. & P. 587.

(*u*) *Curtis* v. *Tabram*, 1 Harr. & W. 523.

(*x*) *Dicas* v. *Stockley*, 7 C. & P. 587: see *Hullock*, 2 Ed. 529. If the client has, before the receipt of the money or papers by the agent, paid his attorney money on account, the agent would have no lien to the amount of that payment. (See *Hullock*, 2 Ed. 530: and *per Bayley*, J., in *Moody* v. *Spencer*, 2 D. & Ry. 8).

(*y*) *Taunton* v. *Goforth*, 6 D. & R. 384.

(*z*) *Scrace* v. *Whittington*, 2 B. & C. 11; 3 D. & R. 195, *S. C.*

(*a*) *Sandys* v. *Hornby*, Mo. & R. 33.

(*b*) *Reynal* v. *Smith*, 2 B. & Ad. 469.

(*c*) *Heming* v. *Wilton*, 1 M. & M. 529.

(*d*) *Weymouth* v. *Knipe*, 3 Bing. N. C. 387, but the Vice-Chancellor expressed disapprobation of this case in E. T. 1837.

torney, was held to be bad; but the rule was enlarged, in order to give an opportunity of serving it on some one else (*e*).

For unqualified person.

An attorney, acting as an agent for an unqualified person, renders himself liable to be struck off the roll. (*Ante*, 43).

11. *Privileges and Disabilities of Attornies.*

11. Privileges of Attornies. Exemption from serving Offices.

Attornies are exempted from serving all offices where personal service is required, even although imposed by act of Parliament, and in the most comprehensive terms (*f*); as the offices of constable (*g*), overseer of the poor (*h*), or a tything man, offices under the commissioners of sewers, collectors of subsidies, watch and ward, &c. (*i*), and corporation officers, such as sheriffs, &c., even although the attorney be resident in the corporation town (*k*); but they are not privileged from being ballotted for the militia, for they can pay for substitutes (*l*).

Privilege as Plaintiffs.

An attorney, *plaintiff*, (no matter where resident), has the privilege in all personal actions (*m*), except in actions against attornies of his own court, of suing in his own court, and laying and retaining the venue in Middlesex; but in order to enforce this privilege he must sue in person, and not by another attorney (*n*); and the privilege (which has been designated as an odious one) does not extend to laying the venue in London (*o*), and it is waived by laying the venue in any other county than Middlesex (*p*). An attorney is not in general obliged to sue in courts of requests, unless the Court of Request Act expressly names him therein (*q*).

As Defendants.

As *defendants*, attornies have no privilege as to venue (*r*), but they cannot in general be arrested on mesne process. (*Post*). And formerly an attorney must have been proceeded against by bill, in the court of which he was an attorney; but now, by the 2 *W.* 4, *c.* 39, he may be proceeded against as a common person, though it must still be in the court of which he is an attorney (*s*), unless his privilege be taken away by being sued with unprivileged (*t*) persons, or in some other instances presently noticed, where he loses his privilege. An attorney has no privilege against a foreign attachment (*u*). And, where an attorney sues an attorney of another court, the privilege of that court which is first possessed of the cause will be preferred, and the defendant cannot, in such case, plead his privilege (*x*). An attorney's privilege, of being sued in

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(*e*) *Curtis* v. *Tabram*, 1 Har. & W. 523.

(*f*) *Gerard's case*, 2 W. Bl. 1126.

(*g*) R. v. *Routledge*, 2 Doug. 538: *Gerard's case*, 2 W. Bl. 1126.

(*h*) *Gerard's case*, 2 W. Bl. 1126: *Ex p. Jefferies*, 6 Bing. 195.

(*i*) *Gerard's case*, 2 W. Bl. 1126.

(*k*) *Mayor of Norwich* v. *Berry*, 1 W. Bl. 636; 4 Bur. 2109, *S. C.*

(*l*) *Gerard's case*, 2 W. Bl. 1126: see *Evindon's case*, 2 Str. 1143, *contra.*

(*m*) *Pitcher* v. *Sheriff of Monmouth*, 2 Marshall, 152, even where the witnesses on both sides reside in the county to which the venue is sought to be changed.

(*n*) This privilege is not taken away by the 2 W. 4, c. 39, ss. 1, 2: (*Meggison* v. *Cole*, M. S., K B., 11th June, 1833, Tidd. Supp. 65: *Partington* v. *Woodcock*, 2 Dowl. 550: *Burn* v. *Passmore*, 1 Dowl. 17): but he must sue in person, and not by another attorney. (*Harrington* v. *Page*, 2 Dowl. 164: *Lowless* v. *Timms*, 3 Dowl. 707). He need not be described an attorney in the proceedings. (*Willoughby* v. *Fenton*, 2 Jurist, 1041).

(*o*) *Bradshaw* v. *Barton*, Bail Court, M. T. 1838, 2 Jurist, 990.

(*p*) *Lewis* v. *Shelley*, 7 Taunt. 146.

(*q*) See *post*, Vol. II. Book III. Part II. Ch. 3. *Willoughby* v. *Fenton*, Bail Court, Q. B. M. 1838, 2 Jurist, 1041.

(*r*) *Yeardley* v. *Roe*, 3 T. R. 573.

(*s*) *Lewis* v. *Kerr*, 2 M. & W. 226; 5 Dowl. 447, *S. C.*: and see *Prior* v. *Smith*, 6 Dowl. 299; *Dyer* v. *Levy*, 4 Dowl. 630: *Davidson* v. *Chilman*, 1 Bing. N. C. 297: see Tidd, Supp. 65.

(*t*) See *Ramsbottom v. Harcourt*, 4 M. & Sel. 585.

(*u*) *Ridge* v. *Hardcastle*, 8 T. R. 417.

(*x*) *Danser* v. *Berryman*, 2 W. Bl. 1325.

his own court, is not taken away by Court of Request Acts, &c., unless there be express words for the purpose (*y*).

As to Costs.

Where an attorney is a party to an action, and obtains a judgment in his favour, he is entitled to the same costs as if he had conducted the action as attorney for some other person, and not merely to the costs which another person suing or defending in person would be entitled to (*z*).

Only practising Attornies privileged.

An attorney who has left off practice (*a*), or is in prison for debt (*b*), is not entitled to the privileges he would otherwise enjoy; for the privileges of an attorney continue only whilst he is a *practising* attorney (*c*), and it has been ruled that an attorney who had not practised for several years might be arrested, though *after suing out the writ*, and before the arrest, he re-commenced his practice and took out his certificate (*d*). But the omitting to take out his *certificate* does not deprive an attorney of his privileges (*e*), unless, indeed, he omit to do so for one whole year, in which case he ceases altogether to be an attorney. (*Ante*, 36). Where an attorney's certificate having been, by his agent's mistake, filed in the Court of King's Bench, in which court he had not been admitted, instead of the Court of Common Pleas; and he, being sued for debt in an inferior court, sued out a writ of privilege from the Common Pleas, that court ordered it to be quashed, and a *procedendo* to be issued (*f*).

Privileged Communications.

An attorney is not bound, nor indeed will he be permitted, to disclose in evidence any matter communicated to him as an attorney by his client (*g*); and this, although no suit was commenced at the time of the communication (*h*).

Disabilities of Attornies generally.

Disabilities of Attornies generally.] A *practising* attorney cannot be sheriff, under-sheriff, deputy to an under-sheriff, clerk of the peace, or his deputy (*i*), sheriff's clerk, receiver, or sheriff's bailiff (*k*), nor justice of the peace (*l*), nor a master, or (in general) clerk or messenger to a master of the superior courts (*m*); nor can he be a commissioner of the land-tax, unless he possesses 100*l*. *per annum* (*n*); nor can he be lessee in ejectment, or bail (*o*), except in criminal cases (*p*). And by rule of all the courts of *H. T.* 2 *W.* 4, *r.* 13, " if any per-

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(*y*) *Gardner* v. *Jessop*, 2 Wils. 42: *Wiltshire* v. *Lloyd*, 1 Doug. 380. See post, Vol. II. Book IV. Part I. Ch. 30.

(*z*) *Jervis* v. *Dewes*, 4 Dowl. 764: see *Parsloe* v. *Foy*, 2 Dowl. 181: *Leaver* v. *Whalley*, 2 Dowl. 80.

(*a*) *Goldsmith* v. *Baynard*, 2 Wils. 232.

(*b*) *Byles* v. *Wilton*, 4 B. & Al. 88.

(*c*) *Brooke* v. *Bryant*, 7 T. R. 25.

(*d*) Ib.: see also *Dyson* v. *Birch*, 1 B. & B. 4.

(*e*) *Skirrow* v. *Tagg*, 5 M. & Sel. 281: *Prior* v. *Moore*, 2 M. & Sel. 605.

(*f*) *Nixon* v. *Hewitt*, 10 Moore, 270.

(*g*) Phil. Ev. 173: Roscoe, Evid. 122: and see *Baugh* v. *Cradocke*, 1 M. & Rob. 182: *Cleve* v. *Powell*, Id. 228: *Griffiths* v. *Davies*, 5 B. & Ad. 502: *Greenhaugh* v. *Gaskell*, 1 Myl. & K. 48: *Wheatley* v. *Williams*, 1 M. & W. 533: *Doe* v. *Watkins*, 3 Bing. N. C. 421: *Taylor* v. *Blacklow*, Id. 235: *Turquand* v. *Knight*, 2 M. & W. 93.

(*h*) *Clark* v. *Clark*, 2 M. & Mal. 3: see *Moore* v. *Terrell*, 4 B. & Ad. 870: *Taylor* v. *Blacklow*, 3 Bing. N. C. 235: *Doe* v. *Harriss*, 5 C. & P. 592. And it seems that an attorney who has prepared and attested a deed purporting to pass property, is estopped from saying that nothing passed by it. (*Lord* v. *Wardle*, 3 Bing. N. C. 680; 4 Scott, 402, *S. C.*)

(*i*) 22 G. 2, c. 45, s. 14.

(*k*) 1 H. 5, c. 4; R. M. 1654, S. 1; but *quære* since repeal of 1 H. 5, c. 4, by 1 & 2 V. c. 55. See Atkinson on Sheriffs, 32.

(*l*) 5 G. 2, c. 18, s. 2. See *Duffy* v. *Oakes*, 3 Taunt. 166.

(*m*) 7 W. 4 & 1 V. c. 30, s. 15. This section contains a proviso in favour of attornies practising at the time of the passing of the act, and employed in any office abolished by the act, and who might be appointed to act as *clerk* or *messenger* under the act. Such persons are exceptions to the above rule.

(*n*) 30 G. 2, c. 3, s. 87, &c.

(*o*) R. M. 1654, S. 1; 2 Doug. 466, n. See *Bologne* v. *Vautrin*, 2 Cowp. 828.

(*p*) 2 Doug. 467, n.

son put in as bail to the action, except for the purpose of rendering only, be a practising attorney, or clerk to a practising attorney, the plaintiff may treat the bail as a nullity, and sue upon the bail-bond as soon as the time for putting in bail has expired, unless good bail be put in in the meantime."

Disabilities of attorney, prisoner.

Disabilities of Attorney, Prisoner.] If an attorney be a prisoner within any gaol or prison, or the rules thereof, he shall not commence or prosecute any action, (even in a county court) (*q*), in his own name or in the name of another, under pain of being struck off the roll; and any attorney allowing him to sue in his name shall incur the like penalty. (12 *G.* 2, *c.* 13, *s.* 9.) But this does not extend to suits commenced previously to his imprisonment; (*Id. s.* 14); and where an attorney commenced an action before his imprisonment, the Court held, that he might, during his imprisonment, commence an action upon the bail-bond (*r*). So, an attorney, although a prisoner, may defend an action; for the statute extends only to commencing and prosecuting (*s*): or he may commence an action at his own suit; for the statute is confined to actions commenced and prosecuted by him for his clients (*t*). An attorney in custody, also, thereby loses his privilege of not being holden to bail, and may be sued as in ordinary cases against prisoners (*u*).

12. *Incidents to Suing and Defending by Attorney.*

13. Incidents to suing and defending by.

Right to Sue or Defend by.] At common law, the parties in the action were obliged to appear in Court in person, unless allowed by a special warrant from the crown, called a *dedimus potestatem de attornato faciendo*, to appoint an attorney; or unless after appearance they had appointed a deputy, called a *Responsalis*, to act for them, and which the Court allowed them to do in some instances. But now a general liberty is given to the parties in an action to appear by attorney (*v*); excepting in the cases of infants, idiots, and married women. Infants sue by *prochein amy*, or guardian, and defend by guardian (*x*). Idiots must sue and defend in person; and yet lunatics of full age appear by attorney (*y*). Married women also must appear in person (*z*); but when a husband and wife are sued jointly, they may appear by attorney, for the husband is capable of appointing an attorney for both (*a*). Corporations, it should be observed, cannot sue or defend otherwise than by attorney; which attorney must be appointed under their common seal (*b*). The statutes, however, giving the above-mentioned general liberty to parties to appear by attorney, do not prevent parties to an action from suing and defending in person, if they think proper to do so (*c*).

Right to sue or defend by.

(*q*) *Re Flint*, 2 D. & R. 406; 1 B. & C. 254, *S. C.*

(*r*) *Whetham* v. *Needham*, Barnes, 46.

(*s*) *Longman* v. *Rogers*, Willes, 288; Barnes, 263, *S. C.*: see *Noel* v. *Hart*, 8 C. & P. 230.

(*t*) *Kaye* v. *Denew*, 7 T. R. 671: and see *Prior* v. *Moore*, 2 M. & Sel. 605.

(*u*) *Byles* v. *Wilton*, 4 B. & Al. 88.

(*v*) Stat. Westm. 2, (13 Ed. 1), c. 10; 7 R. 2, c. 14; 15 H. 6, c. 7; 29 El. c. 5; 2 Inst. 376; Fitz. N. B. 25; Gilb. C. B. Chap. 8: see *Thompson* v. *Blackhurst*, 1 N. & M. 271.

(*x*) See *post*, Vol. II. Bock III. Part II. Ch. 7.

(*y*) *Beverley's case*, 4 Co. 124, b: 2 Saund. 333, n. 4: see Tidd, 9th ed. 93, n. 6.

(*z*) Co. Lit. 135: *Oulds* v. *Sansom*, 3 Taunt. 261: see *post*, Vol. II. Book III. Chap. 8.

(*a*) *Foxwist* v. *Tremaine*, 2 Saund. 213.

(*b*) Co. Lit. 66. b. *post*, Vol. II. Book III. Chap. 2.

(*c*) *La Grue* v. *Penny*, 2 H. Bl. 600; Say. 217: see *Ward* v. *Nethercoate*, 7 Taunt. 145.

Attorney, how appointed.

Attorney, how appointed.] An attorney, regularly, should be appointed by a warrant in writing, authorizing him to prosecute or defend the suit in question, for or on behalf of the person appointing him; and it is recommended that he should, in all cases, have such written authority (*d*). Yet a verbal authority is considered sufficient to support a judgment (*e*); in fact, in practice, any other than a verbal authority is scarcely ever given by the client to the attorney, or indeed required by the latter: except, perhaps, in cases where the attorney may be fearful of his client's afterwards disclaiming the authority, and may on that account require a warrant or other authority in writing, to serve as evidence of his retainer. And this is in such cases necessary for the attorney's protection; for, if the attorney be not able to prove the authority, if disputed, the court would perhaps set aside the proceedings, and make the attorney pay the costs (*f*).

Appointment by third party.

An authority from the assignee of a debt, to sue in the name of the assignor, is sufficient (*g*). And so in many other cases would an authority from a *cestui que* trust. An undertaking by a third person to pay an attorney the expenses of business to be done for another must, by the Statute of Frauds, in general be in writing, unless the business was done upon the sole credit of the third party, and the party to the suit incurred no responsibility whatever to the attorney (*h*).

Appointment by Court in case of refusal.

In a case where a plaintiff, not being able to find an attorney willing to undertake his cause, applied to the court to appoint one for him, the court is said to have appointed an attorney nominated by him, to prosecute his suit (*i*). Yet, in another case, where a motion was made to compel an attorney to appear for a party, the court held that he was not compellable to appear for any one, unless he take his fee or back his warrant (*k*).

Warrant need not be entered.

By rule of all the courts of *H. T.* 4 *W.* 4, *r.* 4, "no entry shall be made on record of any warrants of attorney to sue or defend;" so that the prior statutes and rules on the subject are virtually repealed (*l*).

Memorandum of warrant unnecessary.

Before the 5 *G.* 4, *c.* 41, the warrant should have been stamped (*m*), and no attorney could commence or carry on

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(*d*) See *Owen* v. *Ord*, 3 C. & P. 349, *per Lord Tenterden*. See the forms of retainer, Chit. Forms, 11, 12.

(*e*) 1 Lil. Pr. Reg. 134, 137.

(*f*) *Anon.* 1 Chit. Rep. 193, (a), see *post.*

(*g*) *Pickford* v. *Ewington*, 4 Dowl. 453.

(*h*) *Barber* v. *Fox*, 1 Stark. N. P. C. 270: *Hellings* v. *Gregory*, 1 C. & P. 627: see *Tomlinson* v. *Gell*, 1 N. & P. 588.

(*i*) *Anon.* 12 Mod. 583.

(*k*) *Anon.* 1 Salk. 87.

(*l*) Even before this rule, in practice, the warrant was seldom, if ever, filed, or indeed given by the client to his attorney; all that was done, was, on making up the roll, to enter the warrants for the plaintiff and defendant at the top of it, in pursuance of the rules of E. T. 4 J. 2, and H. T. 2 W. 4, reg. 1, s. 1. It was decided, that if a warrant were filed at any time pending the suit, (*Duke* v. *Sweeting*, 1 Wils. 183: *Noke* v. *Caldecot*, 1 Str. 526: *Henriquez* v. *Dutch E. I. Comp.*, 2 Str. 807; 2 L. Raym. 1532, *S. C.*), that is, at any time before final judgment, (*Brooke* v. *Manning*, Fitz. 191), it was sufficient; previously to that, the court would always intend it. And it was even decided, that, although an attorney might have been punishable for not filing his warrant within the time specified in the statutes abovementioned, yet his not having done so was not assignable as error, (*Coke* v. *Allen*, 8 Mod. 77): and if assigned, the court would set aside the assignment, (*Chartres* v. *Cusaick*, 1 Str. 141), or allow the attorney to file and enter his warrant after error brought. (*Calverley* v. *Bieseley*, 2 Dy. 18 a: *Killegrew* v. *Trewymard*, Id. 225 a.; and see Marsh. 121, pl 201: see also *Bradburn* v. *Taylor*, 1 Wils. 85). The want of a warrant was aided after verdict, by 18 El. c. 14, (and see 32 H. 8, c. 30), although not perhaps after judgment by default, (see 4 & 5 A. c. 16, and *Bradburn* v. *Taylor*, 1 Wils. 85). Also the warrant might be amended under stat. 8 H. 6, c. 12, for any misprision of the clerk. (See *Richards* v. *Brown*. Doug. 114 a).

(*m*) 25 G. 2, c. 80, s. 1; 44 G. 3, c. 98, any proceedings, or defend, for fee or reward, unless he had delivered a memorandum to the proper officer, containing the names of the parties in the action, with the name of the attorney and agent, to be filed of record, (25 *G.* 3, *c.* 80, *s.* 13), under pain of 5*l.* (*Id.* *s.* 16). So, if a defendant, before appearance, confessed the action, or gave a warrant of attorney, the attorney, before he entered up judgment, was bound to give to the proper officer a memorandum of the cognovit or warrant of attorney, under pain of 5*l.* (25 *G.* 3, *c.* 80, *s.* 19). Now, however, inasmuch as the stamp duties on warrants of attorney are repealed by the 5 *G.* 4, *c.* 41, the filing of this memorandum or minute of the attorney's warrant is unnecessary, and, at all events, is discontinued in practice.

Indorsement of name of attorney on mesne process, and stating place of abode, &c. of client.

Indorsement of Name of Attorney on Mesne Process, and stating Place of Abode, &c., of Client.] Writs of summons (*n*), "shall be indorsed with the name and place of abode of the attorney actually suing out the same; and in case such attorney shall not be an attorney of the court in which the same is sued out, then also with the name and place of abode of the attorney of such court in whose name such writ shall be taken out; (see now, however, the statute of 7 *W.* 4 & 1 *V.*, allowing attornies to practise in their own names in courts in which they are not admitted on signing roll, &c., *ante*, 40); but in case no attorney shall be employed for that purpose, then with a memorandum expressing that the same has been sued out by the plaintiff in person, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's residence, if any such there be." (2 *W.* 4, *c.* 39, *s.* 12). And "when the attorney actually suing out any writ shall sue out the same as agent for an attorney in the country, the name and place of abode of such attorney in the country shall also be indorsed upon the said writ." (*R. M.* 3 *W.* 4, *r.* 9). And "every attorney whose name shall be indorsed on any writ issued by authority of this act shall, on demand in writing made by or on behalf of any defendant, declare forthwith whether such writ has been issued by him, or with his authority or privity; and *if he shall answer in the affirmative*, then he shall also, in case the court, or any judge of the same or of any other court, shall so order and direct, declare in writing, within a time to be allowed by such court or judge, the profession, occupation, or quality, and place of abode of the plaintiff, on pain of being guilty of a contempt of the court, from which such writ shall have (*o*) appeared to have been issued; and if such attorney shall *declare that the writ was not issued by him, or with his authority or privity*, the said court, or any judge of either of the said courts, shall and may, if it shall appear reasonable so to do, make an order for the immediate discharge of any defendant or defendants who may have been arrested on any such writ, on entering a common appearance." (2 *W.* 4, *c.* 39, *s.* 17). This enactment extends to nonbailable as well as bailable process (*p*). "If any at-

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Sch. A. &c.; 55 G. 3, c. 184, Sch. pts. 2 & 3.

(*n*) Writs of capias and detainer under 2 W. 4, c. 39, are now abolished by 1 & 2 V. c. 110, ss. 1 & 2, except in proceeding against an insolvent under s. 85. See *Turnor* v. *Darnell*, 7 Dowl. 346.

(*o*) So in the printed Act.

(*p*) *Gilson* v. *Carr*, 4 Dowl. 418.

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torney shall, as required by the said act, declare that any writ of summons or writ of *capias*, upon which his name is indorsed, was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed until further notice." (*R. M.* 3 *W.* 4, *r.* 14). As to one attorney's improperly practising in the name of another, *see ante*, 40. Where a plaintiff, being called upon for his place of residence, gave "Peel's Coffee-house, Fleet-street," it was held not sufficient, and proceedings were stayed till he gave a better place of residence (*q*).

Under 1 & 2 *V. c.* 110.

These provisions contemplate process issued under 2 *W.* 4, *c.* 39, but the form of the new *capias* given by 1 & 2 *V. c.* 110, has an indorsement to the same effect.

Disclosure of abode &c., of parties.

Independently of these provisions and rules, an attorney may, in general, be compelled by the court or a judge to disclose the place of his client's residence, if the application be made in an early stage of the cause (*r*); and where an attorney under such circumstances refused to comply with a judge's order upon the subject, the court allowed the defendant to *non pros* the action, ordered the attorney to pay the costs, and awarded an attachment against him for the nonpayment of them (*s*). So, in a case before the 3 & 4 *W.* 4. *c.* 42. *s.* 8, where a defendant pleaded non-joinder of defendants in abatement, the court upon application ordered the defendant's attorney to furnish the plaintiff with the places of abode and additions of the parties not joined, or that in default thereof the plea should be set aside (*t*). An attorney, however, cannot be compelled to disclose the place of his client's residence after verdict (*u*).

Service of notices, &c., upon attornies.

Service of Notices, &c. upon Attornies.] Where a party has a known attorney, that is to say, where the plaintiff sues by an attorney, and where the defendant has appeared or put in bail by attorney, all notices, &c., must be delivered to the attorney, (or his agent if it be a country cause), and not to the party himself (*x*).

Where.

If the attorney practise in the Court of Queen's Bench, and reside in London or Middlesex, or within ten miles thereof, all notices, summonses, orders, and rules, which do not require *personal* service, shall be deemed sufficiently served, if a copy thereof shall be left at the place stated in the book at the master's office (*see ante*, *p.* 36), with any person resident at or belonging to such place; and if the attorney have not entered his name and place of abode, &c., in the said book, then the fixing up of any notice, or of the copy of any summons, order, or rule, for such attorney in the Queen's Bench Office, shall be deemed a sufficient service, unless the matter be such as shall require a personal service (*y*). And see the rule of *Michaelmas Term*, 1 *W.* 4, *r.* 8, in the Exchequer, *ante*, 34.

(*q*) *Hodson* v. *Gamble*, 3 Dowl. 174.

(*r*) *Johnson* v. *Birley*, 5 B. & Al. 540; 1 D. & R. 174, S. C. Previous to the statute of Westminster the plaintiff appeared in person, unless he had a special writ of authority authorizing him to appear by attorney. Then the pleadings were *ore tenus*, and a defendant had the privilege of seeing and knowing who the plaintiff was.

(*s*) *Gymm* v. *Kirby*, 1 Str. 402.

(*t*) *Taylor* v. *Harris*, 4 B. & Al. 93.

(*u*) *Hooper* v. *Harcourt*, 1 H. Bl. 534: *Braceby* v. *Dalton*, 2 Stra. 705: *Shindler* v. *Roberts*, Barnes, 126.

(*x*) *Tashburn* v. *Harelock*, Barnes, 306: and see *Howard* v. *Ramsbottom*, 3 Taunt. 530: *Ward* v. *Nethercote*, 7 Taunt. 145.

(*y*) R. H. 8 G. 3: see *Ward* v. *Nethercote*, 7 Taunt. 145: *Re Sandys*, 1 Dowl. 362. By rule M. T. 1 W. 4, r. 7, Exch., pleadings, &c., are to be served on the

When.

"Service of rules, orders, and notices, if made before nine at night, shall be deemed good, but not if made after that hour." (*R. H. 2 W. 4, r. 50*).

Pleadings are within these rules, and must be delivered accordingly (*z*). See further, as to the service of rules, &c., *post, Vol. II. Book IV. Part I. Ch. 33.*

Clients, when bound by acts, &c., of attorney.

Clients, when bound by Acts, &c., of Attorney.] The acts of an attorney, or even of a town agent, within the scope of his authority, are binding upon the client (*a*). Thus, where an attorney agreed to refer a cause, without the consent or approbation of his client, the court held, that the client was bound by the attorney's act, and refused to set aside the rule of reference (*b*). So, where the plaintiff's attorney waived a judgment by default, the court held, that the plaintiff was bound by the waiver, although he wished to insist upon his judgment (*c*). So, a payment to the attorney is considered a payment to the client (*d*). So, a tender to the attorney is considered a tender to the client (*e*). And, upon the same principle, the attorney may, *before* judgment signed (*f*), acknowledge satisfaction on the record, and his client will be bound by the acknowledgment (*g*); but not, it seems, after judgment signed (*f*). If, however, an attorney exceed the scope of his authority, (as by entering into an agreement to settle a cause in an unusual manner (*h*)), the client will not be bound.

When bound to act, &c.

When bound to act, &c.] If he have undertaken to appear, he must enter an appearance accordingly, otherwise the court will grant an attachment against him, or strike him off the roll (*i*); the undertaking must, according to some authorities, be in writing, and signed by the attorney (*k*); but, in a later case, the court appear to have considered a *verbal* undertaking sufficient (*l*). So, if he accept a warrant or declaration, or subscribe process, the court will compel him to appear (*m*). Nor can he in general retract, after he has once taken upon himself to be attorney for the party (*n*). And it has been determined in the Common Pleas, that an attorney, having improperly quitted his client before trial, could not bring an action for his bill (*o*). In one old case, it was even held that the attorney was bound to proceed for his client, notwithstanding he refused to supply him with money (*p*). But this, as a general position, is certainly incorrect; and in a recent case, on an appli-

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attornies of the parties, and not on the sworn or side clerks, &c., and henceforth no entry of any notice shall be required to be made in any book to be kept in the office of pleas, as heretofore.

(*z*) See *Blackburn* v. *Peat*, 2 C. & M. 244; 2 Dowl. 293; 4 Tyr. 38, *S. C.*

(*a*) *Griffiths* v. *Williams*, 1 T. R. 710.

(*b*) *Filmer* v. *Delber*, 3 Taunt. 486.

(*c*) *Anon.* 1 Salk. 86.

(*d*) *Yates* v. *Frecklington*, 2 Doug. 622: *Powell* v. *Little*, 1 W. Bl. 8: *Mason* v. *Whitehouse*, 4 Bing. N. C. 692. As to payment to the attorney's agent, see *ante*, 46.

(*e*) See *Crozier* v. *Pilling*, 4 B. & C. 28; 6 D. & R. 132, *S. C.*: *Wilmot* v. *Smith*, 3 C. & P. 453.

(*f*) See *Davis* v. *Jones*, 5 Dowl. 503: *per Tindal*, C. J.

(*g*) *Anon.* 12 Mod. 440; 1 Ro. Abr. 366: but *quære* if he can do so after judgment? See *Davis* v. *Jones*, 5 Dowl. 503.

(*h*) See *per Curiam*, *Iveson* v. *Corington*, 1 B. & C. 160; 2 D. & R. 207, *S. C.*, where the attornies *personally* undertook.

(*i*) R. M. 1654, s. 10: *Anon.* 6 Mod. 42: *Lorimer* v. *Hollister*, 2 Str. 693: *Kilbey* v. *Weyberg*, 12 Mod. 251: *Mould* v. *Roberts*, 4 D. & R. 719: *post*, 58.

(*k*) *Lorimer* v. *Hollister*, 2 Str. 693; Lofft. 192: and see *Stratton* v. *Burgess*, 1 Str. 114: and see further, as to his undertakings, *post*, 58.

(*l*) *Anon.* 2 Chit. 36.

(*m*) R. M. 1654, s. 10: 1 Lil. Pr. Reg. 102.

(*n*) *Anon.* 1 Sid. 31.

(*o*) 14 Ves. 272; and see Id. 196, 271; 1 Swanst. 1, 3; Id. 93.

(*p*) *Mordecai* v. *Solomon*, Sayer, 192.

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When bound to act, &c.

cation to the Court of Exchequer for a rule on the part of a plaintiff to compel his attorney to proceed in a cause, or else deliver over the papers to him (*q*), *Bayley*, B., on this subject, said, that he was clearly of opinion that an attorney was not entitled to abandon a cause, provided he had received the amount of his bill up to a certain period, and it was the wish of his client to proceed to trial. But in the ordinary course of retaining an attorney, he (*Bayley*, B.) would be very sorry if any rule were to be found, which would require or compel an attorney to carry a cause to trial at his own entire cost. It was his opinion that an attorney was entitled to insist that he should be supplied with the money necessary to carry the cause to trial, not only to the amount of costs out of pocket, but the other expenses. There were many causes in which the amount necessary to be advanced for the carrying them on amounted to an enormous sum, which, were it necessary for the attorney to advance himself, would be a case of great injustice, if not of impossibility. But he knew it was the constant practice for advances to be made to attornies on the commencement of proceedings. He was of opinion that an attorney had a right to insist on the advance by his client of the necessary funds, if he thought it convenient to do so. And, in another case, in an action by an attorney for his bill of costs for conducting a Chancery suit, where it appeared that the attorney had conducted the cause up to the time of his obtaining the master's report, and had made repeated but ineffectual attempts to procure money from his client to carry on the proceedings, Lord *Tenterden* said, "it was not to be expected that a solicitor should continue to conduct a cause for an indefinite length of time, after repeated applications for money without effect;" and the jury accordingly found for the plaintiff (*r*). The attorney, however, should not abandon the cause on the ground of want of money, without giving his client reasonable notice, for if he do, he will be liable to an action for negligence (*s*).

Attorney, refusing to proceed, must produce papers, &c.

And it seems that an attorney, who declines to proceed with an action, cannot retain his client's papers under a claim of lien (*t*). In a late case in Chancery, it was laid down by Lord *Cottenham*, C., that Lord Eldon's opinion, that a solicitor discharging himself cannot claim a lien, must be understood as meaning, not that the solicitor loses his lien altogether, but that he cannot set it up so as to prevent his client proceeding in the cause; the rule is, that the solicitor shall have every security not inconsistent with the progress of the cause, but he will not be permitted to impose upon the plaintiff the necessity of carrying on the cause in an expensive, inconvenient, and disadvantageous manner.—He will, therefore, be ordered (on petition of client) to hand over to the new solicitor all proceedings and documents, &c., necessary for the hearing, without prejudice to lien, and to be returned undefaced within a fixed time after the hearing (*u*).

Change of attorney.

Change of Attorney.] Pending a suit, the client cannot

(*q*) *Wadsworth* v. *Marshal*, 2 C. & J. 665.

(*r*) *Rowson* v. *Earle*, 1 M. & M. 538: Merrifield's Law of Attornies, 181: *Vansandau* v. *Brown*, 2 M. & Scott, 543; 9 Bing. 402; 1 Dowl. 715. *S. C.*: *Lawrence* v. *Potts*, 6 Car. & P. 428: and see Mann. Exch. Prac. 585.

(*s*) *Hoby* v. *Built*, 3 B. & Ad. 350: *Lawrence* v. *Potts*, 6 Car. & P. 428.

(*t*) *Vausandau* v. *Brown*, *ubi supra*.

(*u*) *Per Lord Chancellor*, in *Heslop* v. *Metcalfe*, 3 Myl. & Cr. 183.

Change of attorney.

change his attorney without leave of the court or a judge's order, even though he be not attorney on the record (*x*); and the attorney newly appointed shall take notice at his peril of the rules to which the former attorney would have been liable had he continued (*y*). *To obtain the order to change the attorney, apply to the court by motion, founded on an affidavit, or, which is more usual, take out a judge's summons* (*z*). *When the rule or order is obtained, serve a copy of it on the opposite attorney* (*a*). The rule or order in such a case is drawn up on payment of the attorney's bill, to be taxed by the master (*b*). Until the order for changing has been obtained and served, the opposite party and his attorney are justified in considering the former attorney as being still employed; and are not bound to take notice of any proceeding in the name of another attorney, unless such proceeding be sanctioned by a judge or the court (*c*). Therefore, payment to plaintiff's attorney, who had been changed without leave, was held to be a good payment to the plaintiff (*d*); and notice of justification of bail (*e*), or a plea put in (*f*), by an attorney substituted by a defendant without an order, were holden to be irregular (*g*). But where the defendant's attorney refused to proceed to the justification, the court allowed the bail to appear, and justify by their own attorney (*h*). So, where the defendant's attorney gave notice of bail, and the bail to the sheriff by their attorney gave notice of adding and justifying other bail, the court held it to be sufficient (*i*). Although the steps taken by an attorney changed without an order are in general irregular, and may be objected to by the opposite party, yet the irregularity may be waived; as, by accepting a notice, or by taking a plea out of the office, and keeping it, (*k*), or otherwise treating the new attorney as the attorney in the cause (*l*); and a step taken by a new attorney, without an order to change, cannot be treated as a nullity (*m*), and it has been held, in favour of liberty, that, when a defendant is a prisoner, notice of justification may be given by a new attorney, without an order for changing the attorney previously employed (*n*). And a party called on to shew cause may oppose the rule by a new attorney without notice to the other party of a rule to change his attorney (*o*). It appears that a plaintiff may sue out an execution, or enter satisfaction on the roll (*p*), by a different attorney from the attorney in the cause, without an order for changing (*q*); and no order is required for changing the attorney, when the action is brought upon a *sci. fa.* or writ of

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(*x*) *May* v. *Pike*, 6 Dowl. 667.

(*y*) R. M. 1654, s. 10, 13: Lil. Prac. reg. 134, 143: and see *Macpherson* v. *Rorison*, 1 Doug. 217: *Anon.* 7 Mod. 50: *Kaye* v. *De Mattos*, 2 W. Bl. 1323: *Powell* v. *Little*, 1 Id. 8: *Ginders* v. *Moore*, 1 B. & C. 654.

(*z*) See a form of the summons and order, Chit. Forms, 12.

(*a*) *R.* v. *Shff. of Middlesex*, 2 Dowl. 147.

(*b*) *Macpherson* v. *Rorison*, Doug. 217: 1 Lil. Pr. reg. 141: and see *Lovegrove* v. *Dymond*, 4 Taunt. 669.

(*c*) See *Ginders* v. *Moore*, 1 B. & C. 654.

(*d*) *Powel* v. *Little*, 1 Blac. Rep. 8.

(*e*) *Kaye* v. *De Mattos*, 2 Blac. Rep. 1323: *Macpherson* v. *Rorison*, Doug. 217: *Hill* v. *Roe*, 6 Taunt. 532; 2 Marsh. 257, *S. C.*: *Haggett* v. *Argent*, 7 Taunt. 48. *Buckler* v. *Rawlings*, 3 B. & P. 111.

(*f*) *Perry* v. *Fisher*, 6 East, 549. But see 13 Ves. 161, 195.

(*g*) *Lovegrove* v. *Dymond*, 4 Taunt. 669.

(*h*) *Haggett* v. *Argent*, 7 Taunt. 47; 2 Marsh. 365, *S. C.*

(*i*) *R.* v. *Shffs. of London*, in *Plomer* v. *Houghton*, 2 B. & Al. 604; 1 Chit. Rep. 329, *S. C.*

(*k*) *Margerem* v. *Mackilwaine*, 2 New Rep. 509.

(*l*) *Farley* v. *Hebbes*, 3 Dowl. 538.

(*m*) *Doe* d. *Bloomer* v. *Bransom*, 6 Dowl. 490.

(*n*) *Keys* v. *Tavernier*, 1 Chit. Rep. 291.

(*o*) *Lovegrove* v. *Dymond*, 4 Taunt. 649.

(*p*) *Marr* v. *Smith*, 4 B. & Ald. 466.

(*q*) *Tipping* v. *Johnson*, 2 Bos. & Pul. 357.

error; those being looked upon as new proceedings (*r*). It has been determined, that where a term's notice is necessary, as in moving for a new trial, or giving notice to plead, after the lapse of four terms, an order for changing the attorney is not such a step in the cause as will supersede the necessity for a term's notice (*s*). The record ought to mention the change, and that it was done by leave of the court or a judge (*t*).

Changed attorney may, in general, act for other party.

After the attorney is changed, the court will not, in general, restrain him from acting for the opposite party, unless the change was procured by his own act, and some confidential communication had been made to him by the first party who employed him, the disclosure of which would be prejudicial to that party (*u*).

Death of attorney.

Upon the *death* of the attorney in the cause, notice should be given to the opposite party of the appointment of the new attorney, before the latter can proceed in the cause (*x*). If the party who employed the deceased attorney neglect to appoint a new one after notice, the opposite party may proceed in the action (*y*).

Continuance of his authority.

Continuance of his Authority.] The warrant for his acting continues in force until the end of the suit (*z*); and, according to Lord Coke (*a*), the attorney may sue out execution under it at any time within a year after the judgment, and may prosecute such execution afterwards (*b*); so he may acknowledge satisfaction on the roll, and receive the amount of the debt and costs, &c. (*c*). It should seem, however, that the attorney's authority is at an end on final judgment being signed (*d*); and it has been holden that a party may sue out execution even within the year, or bring a writ of error (*e*), or enter satisfaction on the roll (*f*), by a different attorney, without an order to change his attorney. The original warrant, however, does not extend to a *scire facias* against the bail (*g*), or a *scire facias* to revive the judgment (*h*).

But the warrant may be sooner determined, by the client's obtaining an order to change his attorney, (*vide ante*, 55), or by the attorney's death (*i*).

Acting without authority.

Acting without Authority.] If the attorney is a *responsible person*, and appear without any warrant or authority, it is said that the court will look no further, but proceed as if the attorney had been fully authorized, and leave the party to his action against him for acting without his authority (*k*); and

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(*r*) *Anon.* 12 Mod. 440: *Batchelor* v. *Ellis*, 7 T. R. 337.

(*s*) *Deacon* v. *Fuller*, 1 Dowl. 675; 1 C. & M. 349, *S. C.*

(*t*) *Anon.* 12 Mod. 440: *sed qu.* since R. H. 4 W. 4?

(*u*) See *Johnson* v. *Marriott*, 2 C. & M. 183; 2 Dowl. 343, *S. C.*: *Grissell* v. *Peto*, 2 M. & Scott. 568; 9 Bing. 1, *S. C.*: *Cholmondeley* v. *Clinton*, 19 Ves. 261: *Bricheno* v. *Thorp*, 1 Jac. 300: *Beer* v. *Ward*, Id. 77.

(*x*) *Ryland* v. *Noakes*, 1 Taunt. 342: see as to effect of death of principal attorney, upon authority of agent, *Taunton* v. *Goforth*, 6 D. & R. 384: and see Lil. Pr. Reg. 141.

(*y*) Pr. Reg. 13: see *Bradley* v. *Breach*, 2 Keb. 275.

(*z*) 1 Ro. Abr. 295, pl. 25.

(*a*) 2 Inst. 378.

(*b*) See also *Isted* v. *Clark*, Comb. 40: *Lawrence* v. *Harrison*, Sty. 426.

(*c*) *Anon.* 12 Mod. 440: *sed quære*, if he can do so after judgment? *Davis* v. *Jones*, 5 Dowl. 503. *Semble*, not.

(*d*) *Macbeath* v. *Cooke*, 1 M. & P. 513; 4 Bing. 578, *S. C.*

(*e*) *Batchelor* v. *Ellis*, 7 T. R. 337: and see *Parsons* v. *Gill*, 2 L. Raym. 895.

(*f*) *Marr* v. *Smith*, 4 B. & Al. 466.

(*g*) *Burr* v. *Attwood*, 1 Salk. 89.

(*h*) *Hussey* v. *Welby*, Say. 218.

(*i*) Lil. Pr. Reg. 141, *supra*.

(*k*) *Anon.* 1 Salk. 86; 6 Mod. 16, *S. C.*

Acting without authority.

the court refused to set aside a judgment for the plaintiff, where an attorney had appeared for the defendant without authority, saying, that they would never set aside proceedings on that account, where the attorney was a responsible person (*l*). But if the attorney, as it is said, "be a beggar or in a suspicious condition," the court will set aside the judgment, otherwise the defendant will have no remedy (*m*). And in any case, perhaps, the court would interfere where the application is made as soon as the party discovers the attorney acting without his authority (*n*); and, in a recent case, even after execution levied on defendant's goods, the court ordered the plaintiff to restore the proceeds to him, the attorney, who was insolvent, having defended the cause without his knowledge or consent (*o*). Where, on a motion for judgment as in case of a nonsuit, it appeared that the action was commenced and carried on in the plaintiff's name without his authority or knowledge, and that the attorney could not be found after diligent inquiry, it was held, that this was no answer to the motion, and that the plaintiff's only remedy was against the attorney; but the court, under the circumstances, enlarged the rule, to give the plaintiff time to find the attorney, and granted a rule to shew cause why the attorney should not pay the defendant's costs (*p*). When an attorney, under a forged authority, commenced an action for a debt, received the amount of it from the defendant, and paid it over to the person from whom he had the authority, the court held that this was no bar to an action brought by the real plaintiff for the same debt; that the defendant might recover from the attorney the sum he had before paid, and the attorney might recover it from the person who had given him the false authority (*q*). In a late case at Nisi Prius it was held, that if an attorney sue out a writ against A. at the suit of B., without any authority, express or implied, from B. for so doing, and A. pay the costs of such writ to the attorney, A. may recover back the amount of those costs, by bringing an action for money had and received against the attorney; but if the attorney had any authority, either express or implied, from B. to sue out the writ, such action for money had and received will not lie against the attorney, even though B. had no cause of action against A. (*r*). If an attorney bring an action without the plaintiff's consent, and the defendant obtain a verdict, and the plaintiff is insolvent and unable to pay the defendant's costs, the court would make the attorney liable for such costs (*s*); but not so, if a juror was withdrawn by consent (*t*). And perhaps an action would lie by the opposite party against

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(*l*) *Latuch* v. *Pasherante*, 1 Salk. 86: *Anon.* 1 Salk. 88; 6 Mod. 16, *S. C.*: and see *Chambers* v. *Donaldson*, 9 East, 471.

(*m*) *Anon.* 6 Mod. 16; 1 Salk. 86: and see *per Bayley*, B., in *Williams* v. *Smith*, 1 Dowl. 633.

(*n*) See *Williams* v. *Smith*, 1 Dowl. 633.

(*o*) *Stanhope* v. *Firmin and Another*, 6 Law, J., N. S. 175; 3 Bing. N. C. 301; 5 Dowl. 357, *S. C.*: see *Lessee Earl of Limerick* v. *Odell*, 1 Jones, Rep. Ir. Exch. 80.

(*p*) *Mudry* v. *Newman*, 1 C. M. & R. 402; 2 Dowl. 695, *S. C.*: and see *Senton* v. *Watts*, Id. 263: *Doe* d. *Davis* v. *Eyton*, 3 B. & Ad. 785. In the latter case the attorney was ordered to pay the costs in the first instance, and an issue was directed to try the question of authority between him and his client, the costs to abide the result.

(*q*) *Robson* v. *Eaton*, 1 T. R. 62: and see *Worley* v. ———, 12 Mod. 318: *Buckle* v. *Roach*, 1 Chit. Rep. 193.

(*r*) *Dupen* v. *Keeling*, 4 C. & P. 102.

(*s*) See *per Alderson*, B., in *Hammond* v. *Thorpe*, 1 C. M. & R. 65; 2 Dowl. 721, *S. C.*

(*t*) *Souter* v. *Watts*, 2 Dowl. 264.

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an attorney for bringing an action against him without authority, if he were damaged thereby (*u*).

13. *Duties and Undertakings of Attornies. Remedies and Punishments for their Breach of Duty, Misconduct, &c.*

13. Duties and Undertakings.

Duties to the Court.

Duties and Undertakings of, &c.] First,—as to their duties to the *court*. They must attend the court upon motions, notice being previously given them for that purpose. (*R. E.* 1656; *M.* 1654, *s.* 10). They must attend the judges upon summons. (*R. M.* 11 *G.* 1). They must attend the master upon appointments; (*R. H.* 15 *C.* 2); and they must attend the first appointment without waiting for a second, or in default thereof the master shall proceed *ex parte* on the first appointment. (*R. H.* 32 *G.* 3; and see *R. T.* 1 *W.* 4, *r.* 9).

Duties to their clients.

Secondly,—as to their duties to their *clients*. An attorney is bound to use skill and care in the management of his client's suits, &c.; and if he commit mistakes inconsistent with ordinary skill, or if, from his negligence, his client sustain any injury, he is liable to make reparation for the damage thereby occasioned (*v*). He is also bound to manage the business intrusted to him with fidelity; and this seems the more necessary, when it is considered that the client is bound by the acts of the attorney (*x*). It is the duty of an attorney to communicate personally with his clients, and give his attention to their concerns, so that they may reap the benefit of his advice and judgment (*y*). And it is inconsistent with a proper attention to the interests of his client, that an attorney should be also engaged for the opposite party in an action; therefore, in a case where it appeared that the same attorney was employed on both sides, the court set aside all proceedings, and ordered the attorney to pay the costs (*z*). But as the interests of lender and borrower do not necessarily clash, it seems that the same attorney may fairly be employed by both parties; in this case, however, he will not be permitted to give evidence against either (*a*). We have already seen that an attorney cannot in general retract after he has once taken upon himself to be attorney for the party, unless under circumstances where his client will not supply him with money, &c. (*Ante*, 53, 54). As to enforcing the delivery of deeds, money, &c., see *post*, 64.

Undertakings of, in what cases enforced.

Lastly,—as to their *undertakings*. In general, where an attorney in a cause gives an undertaking, the court will enforce such undertaking, or punish the breach of it in a summary way. We have seen (*ante*, 53) that if an attorney undertake in writing to appear for a defendant, (see *R. H.* 2 *W.* 4, *r.* 31), or accept a warrant or declaration, or subscribe a process, the court will compel him to appear, under pain of an attachment, or of being struck off the roll. So, if he undertake to the plaintiff to put in bail for the defendant, the court will compel him, under pain of attachment, to put in bail, or render his principal (*b*); though, if such undertaking have been given to the sheriff or his officer, the court will not enforce it, be-

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(*u*) *Souter* v. *Watts*, 2 Dowl. 264.

(*v*) See the authorities, *post*, 60, 62.

(*x*) *Filmer* v. *Delber*, 3 Taunt. 486.

(*y*) *Hopkinson* v. *Smith*, 7 Moore, 237; 1 Bing. 13, *S. C.*

(*z*) *Berry* v. *Jenkins*, 11 Moore, 438.

(*a*) See *per Tindal*, C. J., *Doe d. Peter* v. *Watkins*, 3 Bing. N. C. 421.

(*b*) *Rogers* v. *Neville*, 1 T. R. 422: *Sedgworth* v. *Spicer*, 4 East, 569.

Undertakings of.

cause it is void by stat. 23 *H.* 6, *c.* 9 (*c*). And an attorney who stays proceedings upon an undertaking to pay costs, is bound to fulfil his engagement, although his client die before bail is put in (*d*). And though the undertaking be void by the Statute of Frauds, (for instance, an undertaking not in writing to pay debt and costs for his client), the court may, when given by an attorney as such, enforce him to perform it (*e*). And the undertaking will be enforced, whether it be within the scope of the attorney's authority or not; therefore, where attornies for the plaintiff and defendant, in a cause which was ready for trial, entered into an agreement whereby they personally undertook that the record should be withdrawn, that certain things should be done by the plaintiff and defendant, and that costs should be taxed for the defendant in a certain manner, it was held, that the attorney for the plaintiff was personally bound to pay the costs when taxed in the mode specified (*f*). And where an attorney, in order to get possession of papers belonging to A. B. in the hands of A. B.'s former attorney, who had a lien upon them for the amount of his bill then in dispute, undertook that A. B. should enter into an unqualified reference not revocable, &c.; it was held, that A. B., having become subsequently bankrupt for the second time, and without paying 15*s.* in the pound, the proof of the debt under the commission was not an election by the former attorney under 49 *G.* 3, *c.* 121, *s.* 14, so as to dispense with the reference, and that the attorney was liable, pursuant to his undertaking, to procure A. B.'s signature to an agreement of reference to find security for the performance of the award to the satisfaction of the master (*g*). And where an attorney received a promissory note from the father of a clerk articled to him as his fee for taking him, on an undertaking that the note should not be negotiated until the expiration of a certain period, and he did negotiate it contrary to his undertaking, the court compelled him to take it up (*h*).

In what cases not enforced

But although the court will hold an attorney strictly to the performance of such undertakings, and punish him for the breach of them, yet it seems that he will not be summarily compelled to indemnify the person to whom such an undertaking has been given, against damages arising from its breach: thus, where a plaintiff was delayed in his action by the breach of an undertaking of the defendant's attorney to enter an appearance, and in the meantime the defendant became insolvent, *Williams*, J., refused to compel the attorney to give security to pay the debt and costs, in case of plaintiffs obtaining a verdict (*i*). Nor will the court interfere, where the undertaking has been given by an attorney (who is also a solicitor) in a suit in Chancery (*k*); and it seems that, in such a case, the application should be made to the court in which the suit is pending (*k*), provided the attorney be admitted in that

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(*c*) *Sedgworth* v. *Spicer*, 4 East, 569: *Lewis* v. *Knight*, 1 Dowl. 261; 1 M. & Scott, 353; 8 Bing. 271, *S. C.*: and see *post*, Book II. Part I. Ch. 1, Sect. 6.

(*d*) *Hellings* v. *Jones*, 10 Moore, 360; 3 Bing. 70, *S. C.*

(*e*) *Re Paterson*, 1 Dowl. 469: *Re Greaves*, 1 C. & J. 374, n.: *Evans* v. *Duncombe*, 1 C. & J. 372.

(*f*) *Iveson* v. *Conington*, 1 B. & C. 1602; D. & R. 307, *S. C.*

(*g*) *Ex p. Hughes*, 5 B. & Ald. 482.

(*h*) *Ex p. Gardner*, 2 Dowl. 520.

(*i*) *Morris* v. *James*, 6 Dowl. 514.

(*k*) *In re Garland*, 6 Dowl. 512.

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Undertakings of.

court (*m*). It seems that, in general, if the undertaking be not given by him as attorney in a cause or suit, the court will not interfere summarily, but will leave the party to his action (*n*); thus, where an attorney, as a party in a cause, gave his undertaking to indemnify the sheriff, the court refused to enforce it summarily (*o*). And, in a late case, *Littledale*, J., refused to compel an attorney summarily to pay money, pursuant to his undertaking to indemnify against costs, in an action where, at the attorney's instance, a party allowed his name to be used as plaintiff (*p*). Of course the court will not interfere where the undertaking has been waived; thus, where the defendants' attorney, on their being sued by the plaintiff, undertook, by letter, to procure their signature to a cognovit for payment of debt and costs, which he failed to do, but the plaintiff afterwards said he would proceed with the action, it was held that, as the attorney's undertaking had been virtually waived, he could not be called on by the court to perform it (*q*).

Remedies and punishment for breach of duty, misconduct, &c.

Remedies and Punishment for Breach of Duty, Misconduct, &c.] Besides the ordinary proceedings by action and indictment, there is a mode of proceeding against attornies by an application to the summary jurisdiction of the court; this jurisdiction is exercised according to law and conscience, and not by any technical rules (*r*). The court will, in general, compel the attorney specifically to perform his duty, if practicable, and will punish him for its breach. The mode of punishment (where the court interferes summarily) is either by fine, attachment, or (in very gross cases, where enough is shewn to prove that the attorney is unfit to be a member of the profession) by striking him off the roll, and if struck off by one court, he will not afterwards be admitted in any other (*s*.) In some cases the court think it sufficient to make the attorney pay the costs incurred by the parties, by reason of his misconduct; thus, where an attorney put in bail which he knew to be insufficient, and gave notice of their justification, the court ordered him to pay the costs of opposing them (*t*). The cases in which this summary jurisdiction is most frequently exercised, may conveniently be reduced to three classes, viz.,—1st, misconduct and crimes; 2nd, negligence and ignorance: 3rd, refusal to deliver up deeds, papers, monies, &c., in his hands; and these will now be considered *seriatim*.

In cases of misconduct and crime of.

1st, As to Misconduct and Crimes:—Where an attorney obtained a rule *nisi* on his own affidavit, swearing that no bail to the action had been put in, when, in fact, bail had been put in and justified, but merely a mistake was made, in the filacer's entry, in the christian name of one of the plaintiffs, the court discharged the rule, with costs to be

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(*m*) *Sharp* v. *Hawker*, 3 Bing. N. C. 66: but see now 7 W. 4 & 1 V. c. 56.

(*n*) *Walker* v. *Arlatt*, 1 Dowl. 61: *Ex p. Watts*, Id. 512: *Re Greaves*, 1 C. & J. 374, n.: *Re Bateman*, 2 Dowl. 161.

(*o*) *Northfield* v. *Orton*, 1 Dowl. 415.

(*p*) *Ex p. Clifton*, 5 Dowl. 218.

(*q*) *Miller* v. *James*, 8 Moore, 208.

(*r*) *Ex p. Bayley*, 9 B. & C. 691.

(*s*) R. M. 1654, s. 1, *post*, 68: *Re Smith*, 1 B. & B. 522; 4 Moore, 319, *S. C.*: see *Ex p. Hague*, 7 Moore, 64: 3 B. & B. 257, *S. C.*: *Ex p. Yates*, 9 Bing. 455; 1 Dowl. 724, *S. C.* Unless there is a cause in court, it seems the application cannot be made at chambers. (*Ex p. Higgs*, 1 Dowl. 495).

(*t*) *Blundell* v. *Blundell*, 1 D. & R. 142; 5 B. & Ald. 533, *S. C.*

paid by the attorney who had so sworn (*u*). So, where an attorney obtained a rule *nisi* on suggestions which were groundless, the court discharged the rule, and ordered the attorney to pay the costs (*x*). Where an attorney, without any corrupt or unworthy motives, prepared a special case, in order to take the opinion of the court upon the will of a testator, and suggested several facts which had no foundation, he was holden to be guilty of a contempt, and fined 30*l*. for his offence (*y*). Where an old lady had obtained a judgment against the casual ejector, and the attorney for the landlord afterwards called upon her, and, in the absence of her attorney obtained her signature to a paper, whereby she agreed to abandon her judgment and to allow the title to be tried between her and the landlord, the court ordered the attorney to give up the instrument to the old lady, and obliged him to pay the costs (*z*). Where a promissory note of 200*l*. was given to an attorney by the father of an articled clerk as a premium, the attorney undertaking not to negotiate it for five years, at the end of eighteen months, however, the attorney and the articled clerk separated, it being found, that, from the articles not being stamped at the beginning of the clerkship, the time thus served would not be reckoned in the five years; the attorney then negotiated the note, and the father was arrested upon it; upon application the attorney was ordered to take up the note, and to pay the costs of the application (*a*). Where an attorney executed a bond for himself to a client upon a wrong stamp, the court upon motion compelled him to have a proper stamp put upon it (*b*). In one case, where it appeared that an attorney kept out of the way in order to avoid a personal service of a rule for an attachment, the court are reported to have intimated a doubt of the propriety of his being allowed to remain any longer upon the roll (*c*); but an application to that effect has since been refused (*d*); and mere disobedience of a rule or order is no ground for striking an attorney off the roll (*e*). The court will interfere in this summary way, not only in cases where the misconduct of the attorney has arisen in the course of a suit, or other regular and ordinary business of an attorney, but where it has arisen in any other matter so connected with his professional character as to afford a fair presumption that he was employed in it in consequence of that character (*f*). Where an attorney sent letters to a person, threatening him with a prosecution, in order to extort money from him, the court ordered him to be struck off the roll, the misconduct having been in his business of an attorney (*g*). But where an attorney brings several *qui tam* actions, and after their commencement makes an offer to the defendants to compromise them, it is no ground for striking him off the roll (*h*). Nor is it a ground for striking him off the

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(*u*) *Clarke* v. *Gorman*, 3 Taunt. 492.

(*x*) *Rolfe* v. *Rogers*, 4 Taunt. 191: and see *Gruggen* v. *White*, Id. 881.

(*y*) *Re Elsam*, 5 D. & R. 389; 3 B. & C. 597, *S. C.*: but see now 3 & 4 W. 4, c. 42, s. 45.

(*z*) *Re Oliver*, 4 Nev. & M. 471; 1 Harr. & W. 79, *S. C.*

(*a*) *Ex p. Gardner*, 2 Dowl. 520.

(*b*) *Gwilliam* v. *Barnet*, 2 Smith, 155.

(*c*) *Anon.* 1 D. & R. 529.

(*d*) *R.* v. *Carpenter*, MS., H. 1825.

(*e*) See *Ex p. Townley*, 3 Dowl. 39: *Ex p. Grant*, 3 Dowl. 320.

(*f*) Tidd, 9th ed., 86: *Re Aitkin*, 4 B. & Ald. 47: and see *De Wolfe* v. ——, 2 Chit. Rep. 68: *Re Knight*, 1 Bing. 91: *Ex p.* ——, 2 Dowl. 110.

(*g*) *R.* v. *Southerton*, 6 East, 143.

(*h*) *Smith* v. *Gillett*, 3 Dowl. 364: and see *Re Warren*, 1 Har. & W. 113.

roll that he has brought vexatious actions, though it might be otherwise if he made a threat to bring them for the purpose of extortion or the like (*i*).

Sham pleas, fictitious signatures, &c.

The court of Q. B. in one case refused to require the defendant's attorney to disclose by what authority he pleaded a sham plea (*j*); but, if an attorney sign a fictitious name to a special plea, as that of a barrister (*k*), or sign the name of a barrister without his knowledge or assent, the court will strike him off the roll. So, if an attorney knowingly suffers his name to be used by an unqualified person, or knowingly acts as agent for such person (*l*), or otherwise grossly misbehaves himself (*m*), or was fraudulently admitted (*n*), the court will strike him off the roll.

In all cases the application must be made in a reasonable time after the misconduct took place (*o*).

If offence indictable, Court will not, in general, interfere before conviction.

It may be laid down as a general rule, that the court will not interfere in this summary way, where the misconduct complained of amounts to an indictable offence, as barratry, champetry, conspiracy, maintenance, perjury, or the like (*p*), for an attorney cannot, any more than any other person, be called on to answer criminating matter, as his answer would afterwards be evidence against him in case of an indictment (*q*), and *nemo tenetur prodere seipsum* (*r*); but the court might, perhaps, interfere in a case where enough appeared, *on his own admission*, to make the intervention of a jury unnecessary (*s*). And after conviction the court will act (*t*). Where an attorney had been convicted of larceny, the court ordered him to be struck off the roll, although the conviction had taken place five years before, and no subsequent misconduct was attributed to him; for the court held that the conviction rendered him an unfit person to practise as an attorney (*u*). But a conviction for a conspiracy is not of itself sufficient ground for striking an attorney off the roll, unless the conspiracy was of an aggravated nature (*x*). Nor will the court thus interfere against an attorney upon the ground of a verdict having been obtained against him in an action for a libel, however gross the libel may have been (*y*).

Forgers, perjurers, &c., practising may be transported.

If any person convicted of forgery, perjury, subornation of perjury, or common barratry, shall practise as attorney, solicitor, or agent in any court of law or equity in England, the judge may transport the offender for seven years, by such ways and under such penalties as felons (*z*).

Remedy in case of negligence and ignorance.

By way of action or defence.

2ndly, In case of Negligence and Ignorance:—In general, an attorney is liable for the consequences of ignorance or non-observance of the rules of practice of the court; for want of care in the preparation of the cause for trial, or of attendance thereon with

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(*i*) *Smith* v. *Gillett*, 3 Dowl. 364; and see *Re Warren*, 1 Har. & W. 113.

(*j*) *Merrington* v. *A'Beckett*, 2 B. & C. 81.

(*k*) *Smith* v. *Matham*, 4 D. & R. 738.

(*l*) *Ante*, 45; Tidd, 9th ed. 89.

(*m*) *Potter's case*, Tidd, 9th ed. 89: *Priddle's case*, Id.

(*n*) *Ex p. Hill*, 2 W. Bla. 991.

(*o*) *Post*, 68.

(*p*) *Anon.* 5 B. & Ad. 1088: *Re Knight & Hall*, 1 Bing. 142: *Short & Pratt*, 7 Moore, 424; 1 Bing. 102, *S. C.*: *Ex p. Anon.* 2 Dowl. 110.

(*q*) Ib.: and see *Ex p. Charneronzou*, K. B. 25th April, 1834, *cor. Taunton*, J.

(*r*) *Hinde's case*, 3 Bulst. 50.

(*s*) See *In re* ——, 3 N. & P. 389.

(*t*) *Ex p. Brownsac*, Cowper, 829.

(*u*) *Ex p. Bramall*, Cowp 829: see also *Rex* v. *Vaughan*, 1 Wils. 22.

(*x*) *Anon.* 1 Dowl. 174; R. M. 1654, s. 1.

(*y*) *Anon.* 2 Dowl. 110.

(*z*) 12 G. 1, c. 29.

his witnesses, and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession (*a*), or for disclosing privileged communications (*b*). Thus, if a prisoner be superseded for the attorney's neglecting to charge him in execution, the client may maintain an action against the attorney for the damages arising from such negligence (*c*). But if he make a mistake in a point of law or practice, where there is a reasonable doubt of the law upon the subject, he is not liable (*d*). And where the law cannot presume an attorney to have sufficient knowledge in a point, and he takes the advice of counsel on the subject, who advises him wrongly, and he acts upon such advice, whereby a loss arises, he will not be liable (*e*). Nor is an attorney in a cause liable for the absence, neglect, or want of attention in the counsel engaged in it (*f*). Where the client has not in fact been damnified, he cannot in general proceed thus against his attorney; as, for instance, if he had no right or merits in the suit which the attorney was conducting for him (*g*). And where judgment had been signed for want of a plea, through the negligence of the attorney, but it appeared also that the client actually owed the debt for which he was sued, and consequently was not damnified, the court refused to interfere (*h*). But where A., a plaintiff in Chancery, employed B. as his solicitor, during whose employment an irregular order to dismiss the bill on a certain day, unless publication passed, was obtained; before that day arrived, C. was appointed the solicitor of A., and the bill having been dismissed because no step was taken by C., an action was commenced against him for negligence, which was held to be maintainable, because he should have conformed with the order, or should within the time have moved to vacate it (*i*). In a late case it was held, that if attornies, employed by a vendor to settle on his part the assignment of a term, allow him to execute an unusual covenant, without explaining the liability thereby incurred, they are responsible to him for the consequent loss, notwithstanding he is himself at the time of the assignment aware of the fact in respect of which he afterwards incurs liability on his covenant (*k*). The client will not be allowed to set up any mistake of his attorney as a defence to an action brought against him by such attorney for his costs (*l*); at least not unless the mistake have had the effect of rendering the proceedings wholly ineffective (*m*). But, where an attorney being instructed by

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(*a*) See *per curiam*, 6 Bing. 468: and see *Reece* v. *Rigby*, 4 B. & Ald. 202: *Pitt* v. *Yalden*, 4 Bur. 2060.

(*b*) See *Taylor* v. *Blacklow*, 3 Bing. N. C. 235.

(*c*) *Russell* v. *Palmer*, 2 Wils. 325: *Russell* v. *Stewart*, 3 Bur. 1787: and see *Lee* v. *Ayrton*, Peake, 119; 2 Lev. 85.

(*d*) *Pitt* v. *Yalden*, 4 Bur. 2060: *Baikie* v. *Chandless*, 3 Camp. 17; Id. 19, *S. C.*: *Laidler* v. *Elliott*, 3 B. & C. 738; 5 D. & R. 635, *S. C.*: *Jacks* v. *Bell*, 3 C. & P. 316: *Kemp* v. *Burt*, 1 N. & M. 262.

(*e*) *Godefroy* v. *Dalton*, 6 Bing. 460: and see *Kemp* v. *Burt*, 1 N. & M. 262.

(*f*) *Lowry* v. *Guilford*, 5 C. & P. 234.

(*g*) *Aitcheson* v. *Madock*, Peake, 162: *Frankland v. Cole*, 2 C. & J. 590.

(*h*) *Re Barnes*, Barnes, 38: and see *Johnson* v. *Alston*, 1 Camp. 175.

(*i*) *Frankland* v. *Cole*, 2 C. & J. 590.

(*k*) *Stannard* v. *Ullithorne*, 10 Bing. 491.

(*l*) *Templer* v. *M'Lachlan*, 2 New Rep. 136: *Johnston* v. *Alston*, 1 Camp. 176: *sed vide Swannell* v. *Ellis*, 8 Moore, 340; 1 Bing. 347, *S. C.*

(*m*) Ib.: see *Montriou* v. *Jefferys*, 2 C. & P. 113; Ry. & M. C. N. P. 317, *S. C.*: *Hopkinson* v. *Smith*, 7 Moore, 237; 1 Bing. 13. *S. C.*: *Shaw* v. *Arden*, 2 M. & Scott, 341; 9 Bing. 287, *S. C.*: *Hill* v. *Featherstonehaugh*, 7 Bing. 569.

an administratrix to bring an action against a tenant for rent, brought assumpsit for use and occupation, without previously inquiring whether the holding was or was not by deed, and, upon its afterwards appearing to have been by deed, he was obliged to discontinue the action of assumpsit and commence another action, and, in taxing his bill as between him and his client, the master allowed him the costs in both actions; the court ordered the master to review his taxation, leaving the attorney to bring his action for the other costs if he would (*n*).

By application to the Court where negligence or ignorance very gross.

The court will not interfere in a summary way against an attorney for negligence or ignorant conduct, unless the negligence or ignorance complained of be very gross (*o*), and very clearly established by the affidavits (*p*), but will leave the client to his remedy by action. Where an attorney discharged a person in custody at his client's suit, upon receiving from him a security which he knew at the time to be worth nothing, the court, upon application, ordered him to pay his client the amount of the debt and costs (*q*). Where an attorney had neglected to fee counsel, whereby his client was nonsuited, the court awarded an attachment against him, but ordered it to lie in the office a few days, in order to give him an opportunity to make satisfaction to his client (*r*). So, where judgment of *nonpros* was signed for the attorney's neglect in not making up the issue, the court ordered the attorney to pay the costs of the *nonpros* (*s*). So, where a cause was called on and tried as an undefended cause, in consequence of the defendant's attorney neglecting to deliver his briefs, the court granted a new trial, and ordered the defendant's attorney to pay the costs as between attorney and client (*t*). And where a fine was left imperfect, through the negligence of an attorney, the court ordered a new one to be levied at his expense (*u*).

Attorney not obliged to supply evidence of his own negligence.

Where a client applied for a rule calling on his attorney to deliver up letters which he had written to him, in order to enable him to support an action against the attorney for negligence, the court refused the rule, saying, that there was no precedent for such an application (*x*).

The application must, as in the case of an application against him for misconduct, be made promptly (*y*).

Compelling delivery of papers, money, &c.

3dly, In case of refusal to deliver up papers, money, &c.:—If writings, monies, &c., come into the possession of an attorney *in the way of his business*, the court, or a judge at chambers, upon application, at the instance of the party who deposited them (*z*), will order him to deliver them up, (together with all drafts, copies, &c., of deeds, as well as the deeds themselves), upon satisfaction of his lien (*a*), even although they come into his hands as

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(*n*) *Cliffe* v. *Prosser*, 2 Dowl. 21: and see *Montriou* v. *Jefferys*, 1 Ry. & M. 317.

(*o*) *Pitt* v. *Yalden*, 4 Bur. 2061: *Barker* v. *Butler*, 2 W. Bl. 780; Lofft, 188.

(*p*) *Meggs* v. *Binns*, 2 Bing. N. C. 625.

(*q*) *Rex* v. *Bennett*, Say. 169.

(*r*) *Rex* v. *Tew*, Say. 50.

(*s*) *Mordecai* v. *Solomon*, Say, 172: see also *Adlington* v. *Appleton*, 2 Camp. 410: *Rex* v. *Fielding*, 2 Bur. 654: *De Roufigny* v. *Peale*, 3 Taunt. 484.

(*t*) *De Roufigny* v. *Peale*, 3 Taunt. 484.

(*u*) *Stone* v. *Stone*, 4 Taunt. 601.

(*x*) *Lewis* v. *Briggs*, 2 Hodg. 4.

(*y*) See *Garry* v. *Wilks*, 2 Dowl. 658.

(*z*) *Re Thornton*, 2 Dowl. 156.

(*a*) *Goring* v. *Bishop*, 1 Salk. 87; Say. 125: *Strong* v. *Howe*, 1 Str. 621; 8 Mod, steward of a court and receiver of rents (*b*). If it appear that a third person is interested in them, the court will take a security from the person to whom they are to be delivered, to produce them, on demand, for the inspection of such third person (*c*). But they will not interfere where he holds the papers merely as trustee (*d*), or in any other manner than as attorney (*e*). Where the motion was, not only that the attorney should deliver up papers which he held as receiver of an estate, but, also, that he should give an account on oath of his receipts and payments in respect of a certain mortgaged estate, the court refused to grant an order, saying, that this was matter for a bill in equity, and not for a summary application to a court of law (*f*). It seems that it is only on the application of the client, or of some one claiming under him, that the court will interfere (*g*); and they will not interfere unless the duty springs from his employment as attorney (*h*). Thus, where an attorney advanced money on a deposit of bills to a much greater amount than the advance, and he afterwards received the amount of the bills, *Patteson*, J., refused a rule to make him pay over the balance (*i*). Where a party gave a deed to an attorney for the purpose of getting it executed by his client, the court refused to order him to deliver it up (*k*). Where a man in his will made his housekeeper sole legatee, and afterwards gave the will to his attorney for the purpose of destroying it, but died before the attorney had actually done so, and his son took out letters of administration, the court refused to order the will to be delivered to the legatee (*l*). So, where a party, after successfully resisting an action by an attorney for costs, on the ground of not having retained him, afterwards applied to have certain documents delivered up by the attorney which had come to his hands in the course of the transactions in which the costs were incurred; *Coleridge*, J., held that, as the party had already treated the attorney as not being employed by him, he could not then be permitted to allege that he was, in order to compel him to deliver up these documents, and accordingly he refused the rule (*m*). And, where an attorney, with whom his own marriage settlement had been deposited for safe custody, was allowed to retain it until after the only child of the marriage, and who was entitled to the property settled, had come of age, the court refused to order him to deliver the settlement up to the trustee (*n*). And where an attorney received monies during his clerkship, and before he became an attorney, the court refused to interfere

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339, *S. C.*: *Anon.* 12 Mod. 516: *Ex p. Lowe*, 8 East, 237: *Duncan* v. *Richmond*, 7 Taunt. 391; 1 Moore, 99, *S.C.*: *De Woolf* v. ———, 2 Chit. 68 He has, it seems, no lien on them for any other debt than costs. (*Hughes* v. *Hughes*, 3 T. R. 275: *Marshall's case*, 2 W. Bla. 912: *Ex p. Grubb*, 5 Taunt. 206: see also *Re Rice*, 2 Keene, 181: *Re Barker*, 6 Sim. 476: *Rex.* v. *Park*, 9 Price, 349).

(*b*) *Hughes* v. *Mayre*, 3 T. R. 275: *Marshall's case*, 2 W. Bl. 912: *Ex p. Grubb*, 5 Taunt. 206.

(*c*) *Hughes* v. *Mayre*, 3 T. R. 275.

(*d*) *Pearson* v. *Sutton*, 5 Taunt. 364: and see *Duncan* v. *Richmond*, 7 Taunt. 391; 1 Moore, 99, *S. C.*: *De Woolf* v. ———, 2 Chit. Rep. 68.

(*e*) *Ex p. Moxon*, 1 Dowl. 6: *Goring* v. *Bishop*, 1 Salk. 87: *Re Chitty*, 2 Dowl. 421: *Ex p. Crisp*, Id 455.

(*f*) *Cocks* v. *Harman*, 6 East. 404; 2 Smith, 409, *S. C.*

(*g*) *Re Fenton*, 5 N. & M. 239; 1 H. & W. 310, *S. C.*

(*h*) *Ibid.*: *Re Chitty*, 2 Dowl. 421: *Ex p Deane*, Id. 533: *Ex p. Cowie*, 3 Dowl. 600: *Cocks* v. *Harman*, 6 East, 404: *Ex p. Schwalbanker*, 1 Dowl. 182.

(*i*) *Ex p. Schwalbanker*, 1 Dowl. 182.

(*k*) *Ex p. Smart*, 1 Harr. & W. 526.

(*l*) *Ex p. Crisp*, 2 Dowl. 455.

(*m*) *Ex p. Maxwell*, 4 Dowl. 87.

(*n*) *Ex p. Moxon*, 1 Dowl. 6.

Compelling delivery of papers, money, &c.

to compel him to pay them over (*o*). Directing an attorney to employ a proctor to obtain probate of a will, is not such an employment of him in the character of an attorney as will give the court summary jurisdiction over him as to money received by him to pay the proctor (*p*). And, upon the whole, the rule upon this subject seems to be, that, where an attorney is employed in a matter wholly unconnected with his professional character, the court will not interfere in a summary way to compel him to deliver up papers, &c., or to execute a trust reposed in him: but where the employment is so connected with his professional character as to afford a presumption that *his character formed the ground of his employment* by the client, the court will exercise this summary jurisdiction. Therefore, where an administrator employed an attorney, or his attorney and agent, to get in the debts due to the intestate's estate; the court, upon application, granted a rule calling upon the attorney to furnish a bill of costs for the business thus done, and also an account of the money received and paid by him on account of the administrator; to pay over the balance, and to deliver up all deeds, papers, &c.; although the attorney had not been employed by the administrator in prosecuting or defending any action, suit, or other law proceeding (*q*). And where an attorney was employed to prepare mortgage-deeds, and the mortgage-money was paid to him, out of which he paid several debts at the instance of the mortgagor, leaving a balance in his hands; *Coleridge*, J. ordered him to pay over the balance to his client, and to deliver up all deeds and papers, &c. (*r*).

Where the attorney becomes bankrupt, Court will not, in general, compel payment.

The court will not compel an attorney to pay over a sum of money he has received in his character of attorney, he having, after the receipt of the money, become bankrupt and obtained his certificate (*s*), unless, perhaps, where there is fraud on his part (*t*), or where he was previously in contempt (*u*). But it seems that the court, notwithstanding his bankruptcy and certificate, will interfere against him by attachment for not duly investing his client's money. In cases where the court would exercise this summary jurisdiction with respect to an attorney, yet if the attorney become bankrupt, and the deeds of his client come into the hands of his assignees, the court will not summarily compel the assignees to deliver them up (*x*).

Same law where right *bonâ fide* disputed.

Also the court will not interfere in this way against him where there is a *bonâ fide* dispute as to the right, which is a question for a jury (*y*). The fact of the money having come to the attorney's hands upwards of six years ago, will not of itself bar the application, though, perhaps, some reason should be shewn for not making the application earlier (*z*).

Same where delivery would be a contempt.

The court will not in general interfere, where, by delivery

(*o*) *Ex p. Deane*, 2 Dowl. 532.

(*p*) *Ex p. Cowie*, 3 Dowl. 600; 1 H. & W. 211. *S. C., nom. Ex p. Cohen.*

(*q*) *Re Aitken*, 4 B. & Ald. 47.

(*r*) *Ex p. Cripwell*, 5 Dowl. 689.

(*s*) *Culliford* v. *Warren*, 8 B. & C. 220; *Re Bonner*, 4 B. & Ad. 811; 1 N. & M. 555, *S. C.* As to compelling a surviving partner of an attorney to refund monies paid on articles of clerkship, see *ante*, 23, 24.

(*t*) *Re Bonner*, 4 B. & Ad. 811. The rule nisi in such a case should shew that the application is of a penal nature. (Ib.)

(*u*) *In re Newbery*, 4 Ad. & El. 100; 5 N. & M. 419, *S. C.*

(*x*) *Ex p. Roy*, 1 Harr. & W. 669; 4 Dowl. 573.

(*y*) *Hodson* v. *Terrall*, 2 Dowl. 264: see *Beal* v. *Langstaff*, 2 Wils. 371.

(*z*) *Ex p. Sharp*, K.B. June 1, 1836: and see *Ex p. Yeatman*, 4 Dowl. 304; 1 H. & W. 510: *Ex p. Sharp*, 5 Dowl. 517.

up of the deeds, &c., the attorney would be brought into contempt of another court (*a*).

If there be a cause in court, it has been decided that the papers may be obtained upon a judge's summons; otherwise there must be a motion in court for a rule to shew cause (*b*).

Drafts and copies must be delivered.

If the attorney be ordered to deliver up the papers, he must deliver up the drafts and copies of deeds, &c., for which he has charged and been paid, as well as the deeds, &c., themselves (*c*). As to compelling an attorney to refund monies overpaid him, &c., see *post*, 78.

Interest paid

The attorney will not be ordered to pay interest on the money (*d*).

Proceedings on the motion to punish Attorney for misconduct.

Proceedings on the Motion to punish Attorney for Misconduct.] Where an attorney is charged by affidavit (*e*) with any fraud or malpractice in his profession, contrary to the obvious rules of justice and common honesty, the court, upon motion made by counsel (*f*), will order him to answer the matters of the affidavit. Such motion cannot be made during the last four days of the term (*g*). If he positively and unequivocally deny the matters alleged against him, the court will dismiss the complaint; otherwise they will award an attachment (*h*). Where an attorney, in his answer to interrogatories, fully denied the matter of complaint, but in doing so gave such an account of the transaction in question as was highly incredible, the court, notwithstanding the denial, granted the attachment (*i*). But it is only in cases where the attorney's answer to the complainant's affidavit cannot have the effect of *criminating* him, that you can move that he answer the matters of an affidavit; in all other cases you must move, in the first instance, either for an attachment, or that he be struck off the roll (*j*). Where the misconduct consists in disobedience to a rule, &c., the motion should be for an attachment (*k*). The motion must not be in the alternative, that he do a certain act, or that an attachment shall issue against him, but you must first obtain a rule absolute, (in the usual way), that he do the act; and, if he afterwards disobey, then move for an attachment (*l*). But where a rule was made absolute, that an attorney should do a certain act, and that if he did not do so an attachment should issue against him, it was holden that, upon the usual affidavit of his having disobeyed the rule, the attachment might issue in the first instance (*m*).

In what Court.

Before the passing of 7 *W*. 4 & 1 *V*. *c*. 56, which enables attornies to practise in courts in which they are not admitted on signing the roll, &c., the application should have been made to the court of which the party was an attorney (*n*); but that statute provides that " any attorney or solicitor

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(*a*) *Re Walmsley*, 1 H. & W. 88.

(*b*) MS., E. T. 1814; *Ex p. Higgs*, 1 Dowl. 495: *Ex p. James*, 5 Leg. Obs. 158: see Bagley's Pract. 45, 46: *Ex p. Townly*, 3 Dowl. 39: *Wilson* v. *Northop*, 2 C. M. & R. 326.

(*c*) *Ex p. Horsfall*, 7 B. & C. 528; 1 Man. & R. 306, *S. C.*

(*d*) *Fenn* v. *Wild*, 1 Doug. 498.

(*e*) As to the distinctness necessary in the affidavit, see *Re King*, 3 Nev. & M. 716.

(*f*) *Ex p. Pitt*, 2 Dowl. 439.

(*g*) *Ex p. Anon.* 2 Dowl. 227: *Re Turner*, 3 Id. 557: see *Bailey* v. *Jones*, 1 Chit. 744.

(*h*) Tidd, 9th ed. 88: *Wadworth* v. *Allen*, 1 Chit. Rep. 186.

(*i*) *Re Crossley*, 6 T. R. 701.

(*j*) MS., E. T. 1820. *Ante*, 60.

(*k*) *Ex p. Townley*, 3 Dowl. 39: *Ex p. Grant*, 3 Dowl. 320.

(*l*) *Roscoe* v. *Hardman*, 5 Dowl. 157; 2 Har. & W. 118, *S. C.*

(*m*) *Ex p. Grant*, 3 Dowl. 320.

(*n*) *Sharp* v. *Hawker*, 3 Bing. N. C. 66.

Proceedings against for misconduct.

practising in any court of law or equity shall be subject to the jurisdiction of such court, as fully and completely, to all intents and purposes whatsoever, as if he had been duly admitted an attorney or solicitor of such court" (*o*).

Motion must be made in reasonable time.

The motion must be made within a reasonable time after the commission of the misconduct complained of: therefore, where the application was not made until three years and a half after the attorney was admitted, and the misconduct complained of occurred before his admission, the court refused the rule (*p*); and even where only three terms had elapsed, the application was holden to be too late (*q*). The court, in the former case, said that the application should have been made very shortly, as a month or two, or a term or two, after the admission. The court have refused to strike an attorney off the roll for misconduct previous to his admission (*r*).

Against agent must be by attorney.

If the agent of an attorney does wrong, it seems *the client* cannot make a summary application against the agent (*s*). But the agent is, like other attornies, liable to be summarily punished on the application of his immediate client, the country attorney.

Where no cause shewn.

Where a rule had been obtained, calling upon an attorney to answer the matters of an affidavit, and no one appeared to shew cause against the rule, *Coleridge*, J. ordered the attorney to be called in court, and, on his not appearing, the rule was made absolute (*t*).

Costs of application.

As to the *costs* in these cases, if the rule be made absolute, the attorney will ultimately have to pay them; if discharged, and there appear to have been no grounds, or very slight ones, for the application, it will be discharged with costs. But if there appear to have been reasonable and probable cause for imputing misconduct to the attorney, although it turn out that there was no actual foundation for the charge, the court will not in general give him his costs (*u*).

Reference to master.

If the application be referred to the master, he may receive any additional affidavits which the parties choose to make on either side (*x*).

Striking off roll of other Court.

If an attorney be struck off the roll of one court, he may, upon the same grounds, be struck off the roll of another; and to support the application, it would, it seems, suffice merely to produce the rule of the other court ordering him to be struck off the roll (*y*).

Striking off roll not always perpetual.

This punishment of an attorney, by striking him off the roll, is not in all cases to be considered a perpetual disability; but the judges may intend it as a temporary suspension only; and if his offence have been attended with circumstances of extenuation, and his subsequent conduct prove him deserving of their lenity, they may order him to be re-admitted, upon a proper application, by petition and motion being made to them, at the treasury chamber, for that purpose (*z*). If he has been

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(*o*) See *Downton* v. *Styles*, 4 Bing. N. C. 122; 5 Scott, 414; 6 Dowl. 189, *S. C.*

(*p*) *Re* ———, 2 B. & Ad. 766.

(*q*) *Garry* v. *Wilks*, 2 Dowl. 649.

(*r*) *Ex p. Page*, 1 Bing. 163.

(*s*) *Ex p. Jones*, 2 Dowl. 161: *Gray* v. *Kirby*, 2 Dowl. 601.

(*t*) *Re Whicker*, 5 Dowl. 715.

(*u*) *Doe* d. *Thwaites* v. *Roe*, 3 D. & R. 226.

(*x*) *Dicas* v. *Warne*, 2 Dowl. 812.

(*y*) *Re Smith*, 1 B. & B. 522; 4 Moore, 319, *S. C.*: *Ex p. Hague*, 3 B. & B. 257; 7 Moore, 74, *S. C.*: *Ex p. Yates*, Bing. 455; 1 Dowl. 724, *S. C.*

(*z*) See *Rex* v. *Greenwood*, 1 W. Bl. 222: *Ex p. Frost*, 1 Chit. Rep. 558, n.

re-admitted in one court, he will, it seems, be re-admitted in another, upon the mere production of the rule for his re-admission in the former court (*a*).

14. *Striking off the Roll at his own Request, &c.*

14. Striking off the roll at his own request, &c.

An attorney may be struck off the roll at his own request; as, for the purpose of being called to the bar, or the like (*b*). The affidavit must state that there is no complaint pending against him, and that he does not apprehend any (*c*). It need not state for what purpose he wishes to be struck off the roll (*d*). He may afterwards be re-admitted, upon application to the court, and undertaking not to take advantage of his privilege in any action then pending (*e*). If he has been called to the bar, however, it is doubtful if the court would re-admit him; at least not until he have been disbarred, upon application for that purpose to the inn of court where he was called (*f*). In general, he must satisfy the court by affidavit that he ought to be restored (*g*). The application must, in both cases, be to the court, and not to a judge at chambers.

15. *Delivery and Taxation of Bill, and Remedy and Lien for Costs.*

15. Delivery of bill. Under 3 J. 1, c. 7, s. 1.

Delivery of Bill, previous to suing for it.] By the 3 *J.* 1, *c.* 7, *s.* 1, all attornies and solicitors shall give a true bill unto their masters and clients, or their assigns, of all charges concerning the suits which they have for them in the *superior courts* at Westminster, subscribed with their hands and names, before such times as they or any of them shall charge their clients with any such fees or charges. Under this statute, therefore, a signed bill for business done *in the superior courts* must always be delivered to the client before bringing an action for it (*h*), but not so for business done in other courts (*i*). The statute extends to business done by one attorney for another, in a cause in which the latter was a party or personally concerned (*j*); but not to agency business (*k*).

Under 2 G. 2, c. 23, s. 23.

Besides this act, it is enacted by 2 *G.* 2, *c.* 23, *s.* 23, that "no attorney or solicitor of any of the courts aforesaid, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements at law or in equity, until the expiration of one [lunar] month (*l*) or more after such attorney or solicitor respectively shall have delivered unto the party or parties to be charged therewith, or left for him, her, or them, at his, her, or their dwelling-house or last place of abode, a bill of such *fees, charges*, and *disbursements*, written in a common legible hand, and in the English tongue (*m*), (except

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(*a*) *Ex p. Yates*, 2 M. & Scott, 618; 9 Bing. 454; 1 Dowl. 724, *S. C.*

(*b*) See the form of the affidavit for that purpose, Chit. Forms, 12, and of the rule, Ib.

(*c*) *Anon.* 1 Chit. Rep. 557, n.; and see Id. 692.

(*d*) *Ex p. Charnock*, B. C. H. T. 1839: *cor. Patteson*, J., 3 Jurist, 23.

(*e*) Doug. 114, n.: see also *Moody's case*, Barnes, 42: *Hill's case*, 2 W. Bl. 991.

(*f*) *Ex p. Cole*, 1 Doug. 114.

(*g*) *Ex p. Sambridge*, Tidd, 9th ed. 90: *Ex p. Smith*, 1 Chit. Rep. 692.

(*h*) *Brooks* v. *Hayne*, 3 Salk. 19; 1 L. Raym. 245, *S. C*: *Millner* v. *Crowdall*, 1 Show. 338: *Clark* v. *Godfrey*, 1 Str. 633.

(*i*) *Reynal* v. *Smith*, 2 B. & Ad. 469; 1 Dowl. 334; 2 M. & Malk. 85, *S. C.*: *Berkenhead* v. *Fanshaw*, 1 Salk. 86; 1 Show. 96; Carth. 147, *S. C.*

(*j*) *Hemming* v. *Wilton*, 4 C. & P. 318.

(*k*) *Sandys* v. *Hornby*, 2 M. & Malk. 33.

(*l*) This month (twenty eight days) must be *exclusive* of the day of delivering the bill, and of the day of commencing the action. (*Blunt* v. *Heslop*, 3 N. & P. 553).

(*m*) 12 G. 2, c. 13, s. 5: and see *post*, 73.

law terms and names of writs), and in words at length, (except times and sums), which bill shall be subscribed with the proper hand of such attorney or solicitor, respectively" (*n*).

The words in this enactment, "fees, charges, and disbursements," are to be understood to mean for some business done in a *court of justice*.

In what courts necessary.

The *court* in which the business must be done, in order to render a delivery of the bill necessary under this act, must be one in which *there is a taxing officer* (*o*). Therefore, a bill for business done in the Middlesex Court of Requests is not within the act, for in that court there is no taxing officer (*p*): nor is a bill for business done in the House of Lords on the prosecution of an appeal (*q*), or in the House of Commons for obtaining a private act (*r*); nor (before the 1 & 2 *W*. 4, *c*. 56) a bill for business done in bankruptcy, not being an act relating thereto, in the Court of Chancery (*s*). But bills for business done in the Insolvent Court (*t*), the Bankrupt Court (*u*), the Central Criminal Court (*x*), the Court of Quarter Sessions (*y*), or the County Court (*z*), are within the act. And it seems, a bill for business done under a commission of lunacy is (*a*). It seems doubtful, whether a signed bill is necessary for business done in a court in which any person, whether an attorney or not, may practise (*b*).

For what description of business necessary.

With respect to the description of the *business*, and how far it must be done in court, the decisions upon the subject do not appear to be governed by any general principle. It has been held, that a mere charge for attending and advising a party in a suit, though no actual business be done by the attorney, is within the act, and will require a bill to be delivered a month before action brought (*c*). So is the drawing an affidavit of debt, and getting it sworn (*d*); or the preparing a warrant of attorney, even though no warrant was ever executed (*e*); or

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(*n*) For the rest of the words of this section, see *post*, 76, 77.

(*o*) See *Beck* v. *Wells*, 1 C. & M. 81. The words in the act are (see *post*, 76) that the bills shall "be taxed and settled by the proper officer."

(*p*) *Beck* v. *Wells*, 1 C. & M. 75.

(*q*) *Williams* v. *Odell*, 4 Price, 279; recognised in *Beck* v. *Wells*, 1 C. & M. 81, and in *Wardle* v. *Nicholson*, 4 B. & Ad. 469; 1 N. & M. 355, S. C.

(*r*) *Ex p. Wheeler*, 3 V. & B. 21. There is a remedy by 7 & 8 G. 4, c. 64.

(*s*) *Crowder* v. *Davis*, 3 Y. & J. 433: *Hamilton* v. *Pitt*, 7 Bing. 232; 4 M. & P. 878; 1 Dowl. 210, *S. C.*: *Burton* v. *Chatterton*, 3 B. & Ald. 486: and see *Taylor* v. *M'Gaugan*, 4 C. & P. 96: *Arrowsmith* v. *Barford*, 1 Stark. 278. n.

(*t*) *Smith* v. *Wattleworth*, 4 B. & C. 364; 6 D. & R. 510, *S. C.*

(*u*) 1 & 2 W. 4, c. 56, s. 10. *Semble.*

(*x*) *Curling* v. *Sedger*, 4 Bing. N. C. 743.

(*y*) *Sylvester* v. *Webster*, 9 Bing. 388: 1 Dowl. 708, *S. C.*: *Ex p. Williams*, 4 T. R. 496: *Clarke* v. *Donovan*, 5 T. R. 694; 1 Esp. 137, *S. C.* The clerk of the peace is in practice the taxing officer of the Court of Quarter Sessions.

(*z*) *Walker* v. *Nicholson*, 1 N. & M. 355; 4 B. & Ad. 469, *S. C.*: in which it was held, that the entering a plaint and preparing a replevin bond was business done in the country court.

(*a*) *Jones* v. *Bywater*, 2 C. & J. 371; 1 Dowl. 557, *S. C.*

(*b*) See *Wardle* v. *Nicholson*, 1 N. & M. 355; 4 B. & Ad. 469, *S. C.*

(*c*) *Smith* v. *Taylor*, 5 M. & P. 66; 7 Bing. 259; 1 Dowl. 212, *S. C.*: *Alderson*, J., diss.

(*d*) *Winter* v. *Payne*, 6 T. R. 645. The decision, it seems, was upon the ground that the swearing of the affidavit was an act done under the sanction of the court. See, now, 1 & 2 V. c. 110, since which it would clearly be a taxable item. Before the abolition of fines and recoveries, even the suing out of a writ of *dedimus potestatem* to take the acknowledgment of a fine, was within the act, and a signed bill must have been delivered. (*Ex p. Prickett*, 1 New Rep. 266). See *In re Branson*, 3 Bing. N. C. 783, where it was held, since that act, that an attorney's bill for taking the acknowledgments of married women and attending before the commissioners was not taxable.

(*e*) *Weld* v. *Crawfurd*, 2 Stark. 538: *Sandom* v. *Bourne*, 4 Camp. 68: *Wilson* v. *Gutteridge*, 3 B. & C. 157: and see *James* v. *Child*, 2 Tyr. 735. The correctness of the decision of *Sandom* v. *Bourne* appears to have been doubted in *Burton* v. *Chatterton*, 3 B. & Ald. 486.

preparing a replevin bond (*f*); or, it seems, preparing and settling a bill in equity, though the bill be never filed (*g*); or obtaining a bankrupt's certificate (*h*); or suing out a *dedimus potestatem* (*i*): or attending a mortgagee summoned to attend before a commissioner of bankruptcy (*k*). Where an item in a bill was for attending the office of the clerk of the peace after the session had ended, to obtain the discharge of the defendant's recognizances, and paying a fee for that discharge, it was holden, that a signed bill should have been delivered, for, as in contemplation of law, the court of quarter-sessions alone had the power to discharge such recognizances, the business must be deemed to have been done in court (*l*). So, a charge for attending defendant at a lock-up-house, and obtaining his release, and filling up a bail-bond (*m*). But a charge in a bill for taking acknowledgment of a married woman (*n*), for serving a subpœna (*o*), or for searching for a judgment (*p*), or for searching to ascertain whether satisfaction of a judgment was entered, or whether an issue was entered and docketted, or it seems for searching in any of the public law offices, is not within the act (*q*). Nor is a charge for advice or attendance after the suit is over (*r*); nor for attending upon and concerting measures with the attorney of the opposing creditor, to resist the discharge of an insolvent (*s*); though, indeed, the contrary has been held as to business done by an attorney of the superior courts in the Insolvent Court, in procuring an insolvent's discharge (*t*). A bill for business done under an extent is, it seems, within the act (*u*).

For what disbursements necessary.

A distinct claim for money lent is clearly not a "*disbursement*" within the act (*v*); nor is a claim for money paid by an attorney in consequence of his undertaking to pay the debt and costs (*x*); nor a sum paid out of pocket for the costs of a discontinuing an action which the attorney conducted gratuitously (*y*). But a claim for 3*l*., lent to defendant to pay the costs of an action against defendant, and in which plaintiff was employed as his attorney, it seems, is (*z*); and so is any claim for money out of pocket expended by the attorney in the course of legal proceedings (*a*).

Where part only of the business is taxable.

If there be no taxable item comprised in the attorney's demand, as if the whole bill be for conveyancing, or the like, a delivery of a bill is unnecessary (*b*). But it has been decided, in many cases, during the time the courts thought they had a common-law jurisdiction to compel the taxation of an attorney's

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(*f*) *Wardle* v. *Nicholson*, 1 N. & M. 355.

(*g*) *Re Barker*, 6 Sim. 476.

(*h*) *Collins* v. *Nicholson*, 2 Taunt. 321.

(*i*) *Ex p. Prickett*, 1 N. R. 266.

(*k*) *Ex p. Benson*, 2 Mont. & A. 706.

(*l*) *Sylvester* v. *Webster*, 1 Dowl. 708.

(*m*) *Fearne* v. *Wilson*, 6 B. & C. 86; 9 D. & R. 157, *S. C.*

(*n*) *Re Branson*, 3 Bing. N. C. 783.

(*o*) *Tresidden* v. *Smith*, 2 Jurist, 205.

(*p*) *Re Rice*, 1 Jurist, 310: *Ex p. Bowles' Trustees*, 1 Bing. N. C. 632: *Fenton* v. *Correia*, R. & M. 262; 2 C. & P. 45, *S. C.*, overruling *Wilson* v. *Gutteridge*, 3 B. & C. 157; 4 D. & R. 736, *S. C.*: and see *James* v. *Child*, 2 C. & J. 678.

(*q*) *Fenton* v. *Correia*, 2 C. & P. 45; R. & M. 262, *S. C.*: *Ex p. Bowles*, 1 Bing. N. C. 632; 1 Hodg. 143, *S. C.*

(*r*) *Pepper* v. *Yeatman*, 5 Dowl. 155; 2 H. & W. 116, *S. C.*

(*s*) *Crowder* v. *Davies*, 3 Y. & J. 433.

(*t*) *Smith* v. *Wattleworth*, 1 C. & P. 615; 4 B. & C. 364; 6 D. & R. 510, *S. C.* The decision, however, appears to have been mainly as to whether the business in the Insolvent Court was within the statute at all, and not whether the acts charged for were acts done in court.

(*u*) *Rex.* v. *Collingridge*, 3 Price, 280.

(*v*) *Hemmings* v. *Wilton*, 4 C. & P. 318.

(*x*) *Prothero* v. *Thomas*, 6 Taunt. 196; 2 Marsh. 539, *S. C.*

(*y*) *Sparrow* v. *Johns*, 6 Dowl. 554; and it is questionable whether this would be in any case a taxable item: see *per Alderson*, B., Ibid.

(*z*) *Smith* v. *Taylor*, 7 Bing. 259; 1 Dowl. 212, *S. C.*, *Alderson*, J., diss.

(*a*) *Per Bayley*, B., *Latham* v. *Hide*, 1 C. & M. 128.

(*b*) See *Hooper* v. *Till*, 1 Doug. 199; Tidd, 9th ed. 328.

Delivery of bill.

bill, that, if an attorney do any business, &c., for a client, of a nature to make his bill taxable, and other business, &c., as such attorney, not so taxable, he is bound to put the whole into one bill, which bill is taxable; and he cannot bring an action in the first instance, and recover, for the non-taxable business, &c., but must, under the statute, deliver his whole bill a month before an action is brought (*c*). But, it is submitted, that as the courts have not a common-law jurisdiction to tax an attorney's bill, (*post*, 77), these decisions are, either no longer law, or much narrowed in their effect, and it is recommended, where the taxable items are of small amount, and worth abandoning, and it is of consequence to the attorney to avoid taxation, or not to be delayed a month before suing his client, that he should deliver a bill omitting all the taxable items, and seek to enforce it accordingly. It has been held, that, where an attorney has not delivered any bill to his client before action brought, he is entitled to recover for business done or money paid, &c., by him for his client's use, where such business or money paid, &c., *has no reference whatever to his business of an attorney*, although he has other claims for business, &c., which are taxable (*d*). Where, however, an attorney failed to recover for business done, not having delivered a bill in time, it was holden that he could not have a verdict for money lent by him to his client to enable him to pay the debt and costs in an action in which he himself acted as attorney (*e*).

Representatives or assignees need not deliver bill.

Where an action is brought by the attorney's executor or administrator, a previous delivery of the bill is not required, either by the stat. 3 *J.* 1, or by the stat. 2 *G.* 2, (*f*). And in a recent case it was laid down by the Court of Exchequer as a broad rule, that the statutes imposed only a personal obligation on the attorney himself, and that therefore the assignee of a bankrupt or insolvent attorney might bring an action for the recovery of a bill of fees due to the bankrupt or insolvent, without delivering any bill (*g*).

Bill may be proved under fiat; or set off; or security for sued on, without delivery.

An attorney may prove his bill under a fiat of bankruptcy (*h*), or be a petitioning creditor (*i*), without delivering a signed bill. It should seem, also, that if the defendant accept a bill of exchange, or give a guarantee or any other security for the payment of the bill of fees, the plaintiff may sue on the security without delivering such bill of fees before action; but this has not been decided. Also, if the attorney wish to *set off* his demand in an action brought against him by his client, this case is not within the meaning of the statute 2 *G.* 2; but it may be within the stat. 3 *J.* 1, and therefore,

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(c) *Thwaites* v. *Mackerson*, 3 C. & P. 341; 1 M. & M. 199, *S. C.*: *James* v. *Child*, 2 C. & J. 678: 2 Tyr. 732, *S. C.*: *Wardle* v. *Nicholson*, 4 B. & Ad. 469; 1 N. & M. 355, *per* Lord *Tenterden*, C. J.: *Smith* v. *Taylor*, 7 Bing. 259; 5 M. & P. 66, *S. C.*: *Doe* d. *Palmer* v. *Roe*, 4 Dowl. 95: see the prior cases of *Hill* v. *Humphreys*, 2 B. & P. 343: *Winter* v. *Payne*, 6 T. R. 645: Peake, 102. But in the more recent case of *Becke* v. *Penn*, 7 C. & P. 399, *cor.* *Tindal*, C. J., at Nisi Prius, it appears that he held, that if a signed bill have been delivered of the taxable part of the plaintiff's demand, he may recover for an untaxable part of his demand of which he had delivered a separate and unsigned bill.

(d) *Mowbray* v. *Fleming*, 11 East, 285: *Wardle* v. *Nicholson*, 4 B. & Ad. 469; 1 N. & M. 356, *S. C.*

(e) *Smith* v. *Taylor*, 7 Bing. 259.

(f) *Ante*. 76: *Wallis* v. *Nicholson*, Andr. 276; 1 Barnard, 433: *Barrett* v. *Moss*, 1 C. & P. 3. But it seems that if the bill be delivered, though unnecessarily, it will be referred for taxation. (*Penson* v. *Johnson*, 4 Taunt. 724).

(g) *Lester* v. *Lazarus*, 2 C. M. & R. 667: acc. *Alsop* v. *Lord Oxford*, 1 Myl. & Cr. 26.

(h) *Eicke* v. *Nokes*, 1 M. & M. 303, *per* Lord *Tenterden*, C. J.

(i) *Ex p. Prideaux*, 1 Glyn & J. 28.

in such case, it would be safest, if not absolutely requisite, to deliver a signed bill before pleading the set-off (*k*). And it seems, that at all events, in such action, if the attorney's bill be taxable, the court will require that he should deliver his bill to the plaintiff a reasonable time previous to the trial, in order that the plaintiff may have an opportunity of having it taxed (*l*).

Bill for business done for another attorney need not be delivered a month before action.

By stat. 12 *G.* 2, *c.* 13, *s.* 6, the above act, (2 *G.* 2, *c.* 23, *s.* 23), "or any clause, matter, or thing therein contained, shall not extend to any bill of fees, charges, and disbursements, that are now, or shall hereafter become, due from any attorney or solicitor to any other attorney or solicitor, or clerk in court; but that every such attorney, solicitor, or clerk in court, may use such remedies for the recovery of his fees, charges, and disbursements, against such other attorney or solicitor, as he might have done before the making of the said act." Where one attorney, therefore, does business for another, either as agent or otherwise, it is not necessary, under this act, that he should deliver a bill one month previously to his commencing an action for his costs (*m*). And this has relation, not to the time when the business was done, but to the time when the action is brought: therefore, where an attorney did business for a client, and afterwards, and before action, the client was admitted an attorney, the court held that it was not necessary to deliver a bill a month previously to the commencing the action, because both parties were attornies when the action was brought (*n*). And it may be here observed, that the court possesses no jurisdiction to compel the taxation of an agency bill or a bill for business done by one attorney for another, either at common law or under the stat. 2 *G.* 2 and 12 *G.* 2, *c.* 13, even where a suit is pending against the defendant for the recovery of the amount (*o*). We have already seen (*ante*, 69) that for business done in the superior courts, under the 3 *J.* 1, *c.* 7, *s.* 1, an attorney must deliver his bill to another attorney before action brought, though such delivery need not have taken place a month before bringing the action.

Must under 3 J. 1.

Form of bill delivered.

We have seen (*ante*, 69) that the bill must be written in a common legible hand, and in words at length, except times and sums, and that it must be subscribed with the proper hand of the attorney or solicitor. Where the business has been done by attornies in partnership, a bill signed in the name of the firm, without adding their christian names, is sufficient (*p*). Any abbreviations used in making out the bill must be such as are usual and intelligible (*q*). In making out the bill on this stat. of 2 *G.* 2, *c.* 23, *s.* 23, it is not sufficient to charge the costs of an action brought by the attorney for his client at one sum in the aggregate, although the costs in

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(*k*) See *per Parke*, B., in *Lester* v. *Lazarus*, 2 C. M. & R. 667; and see 1 Jurist, p. 328.

(*l*) *Williams* v. *Frith*, 1 Doug. 199: *Bulman* v. *Birkett*, 1 Esp. 499; Tidd, 9th ed. 333, 334: *Murphy* v. *Cunningham*, 1 Anst. 198.

(*m*) *Bridges* v. *Francis*, Peake, 1, 2, n.: *Nelson* v. *Garforth*, 1 Esp. 221: *Hooper* v. *Till*, 1 Doug. 199, n.: *Ex p. Bearcroft*, Id. 200, n.

(*n*) *Ford* v. *Maxwell*, 2 H. Bl. 589; 1 Esp. 420, *S. C.*

(*o*) *Weymouth* v. *Knipe*, 3 Bing. N. C. 387: and see *Anon.* 1 Wils. 266. The passage in 1 Tidd, 9th ed. 95, to the contrary, is not, it seems, correct. The Vice-Chancellor, however, has expressed disapprobation of the case of *Weymouth* v. *Knipe*, and intimated that, at all events, the decision does not apply to Courts of Equity, MSS. E. T. 1837.

(*p*) *Smith* v. *Brown*, 1 Tyr. 486; 1 C. & J. 542; 4 C. & P. 94, *S. C.*

What abbreviations good.

(*q*) *Reynolds* v. *Caswell*, 4 Taunt. 193. The abbreviations "declon., affit., confe., atty.," have been held good. *Froud* v. *Stillard*, 4 C. & P. 51.

Delivery of bill.

that action had been taxed at that sum as between party and party (*r*); and it seems, in such a case, the plaintiff cannot recover the residue of his bill as to which the provisions in the statute have been complied with (*s*). Where the plaintiff in his bill charged the defendant with specific attendances on particular days, and, besides that, charged a further sum for several attendances, the judge at the trial directed the jury to deduct this latter sum from the amount of the bill (*t*). A mistake in the date of any of the items, not calculated to mislead, does not vitiate the bill; if the bill be such that it is capable of being taxed, it is sufficient (*u*). It will be safer to state the court in which the business was done, but the Court of Exchequer has intimated that it is unnecessary to do so (*x*). It seems that it ought to appear on the face of the bill of costs that the attorney seeks to charge the person whom he intends to sue, with the amount, and in a late case in the Court of Exchequer in Ireland, where the bill was not addressed to any person, and did not state the names of the persons whom the plaintiff charged to be his debtors, and whom he afterwards sued; the court on motion to enter a nonsuit, held that the bill was insufficient (*y*).

How and to whom delivered.

Leaving the bill at the client's counting-house, is not a sufficient delivery of it within the meaning of the 2 *G.* 2, *c.* 23 (*z*); but it is sufficient to leave it at the *last known* place of abode of the client; and it will be no objection to this, that the client had changed his residence previously to the delivery of the bill, if that circumstance were not known at the time to the attorney (*a*). The bill must also be *left;* therefore, where the attorney merely shewed the bill to his client, the court held that it was not sufficient to enable him to maintain an action on it, although the client, at the time it was shewn to him, expressed himself satisfied with the charges (*b*). If the clients be two or more persons in partnership, a delivery of the bill to one of them, or leaving it at his dwelling-house, will be sufficient; or even where two persons are not partners, but are liable for business done on their joint retainer, it is sufficient if the attorney deliver his bill to the party who has been intrusted with the management of the business (*c*). Where a party in an action having changed his attorney, the second attorney obtained a judge's order that the former attorney should deliver his bill; and the bill was accordingly delivered to the second attorney; the court (*Grose*, *Le Blanc*, and *Bayley*, J. J., *dissentiente Lord Ellenborough*, C. J.) held that this was a sufficient delivery of the bill to "the party to be charged therewith," within the meaning of the statute (*d*). The delivery of a bill to the attorney of the party to be

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(*r*) *Drew* v. *Clifford*, 2 C. & P. 69; 1 R. & M. C. N. P. 280, *S. C.*

(*s*) *Reynolds* v. *Taplin*, 6 Dec. 1826, at Guildhall, *cor. Abbott*, C. J.; *sed quære;* and see 1 R. & M. C. N. P. 280.

(*t*) *Rownson* v. *Earle*, 4 C. & P. 44, *per* Lord *Tenterden*, C. J.

(*u*) *Williams* v. *Barber*, 4 Taunt. 806.

(*x*) *Lester* v. *Lazarus*, 2 C. M. & R. 665: see *Lane* v. *Glenny*, 2 Nev. & P. 258.

(*y*) *Manning* v. *Glynn*, 1 Jones, Ir. Ex. 513.

(*z*) *Hill* v. *Humphreys*, 3 Esp. 254; 2 B. & P. 343, *S. C.*

(*a*) *Wadeson* v. *Smith*, 1 Stark. 324; and see Gow, C. N. P. 73, n.

(*b*) *Crowder* v. *Shee*, 1 Camp. 437: *Brooks* v. *Mason*, 1 H. Bl. 290.

(*c*) *Finchett* v. *How*, 2 Camp. 277: and see *Oxenham* v. *Lemon*, 2 D. & R. 461: *Crowder* v. *Shee*, 1 Camp. 437.

(*d*) *Vinsent* v. *Slaymaker*, 12 East, 372: *quære*, whether this case would have been so decided, if it had been proved that the second attorney had no special directions from his client to apply for the judges' order? (See *per Bayley*, *J.*)

charged is deemed sufficient, if the party himself attend the taxation, or the bill be shewn to have come to his hands (*e*). It is not sufficient evidence of the delivery of a signed bill at the defendant's abode, that a signed bill was delivered at a particular place, not shewn to be his abode, and that he afterwards gave this to his attorney, who attended the taxation of costs (*f*). And the defendant's having signed an admission of the debt, to enable the attorney to prove it under a commission of bankrupt then subsisting against him, is no admission of the delivery of a signed bill; and does not dispense with the necessity of such proof, in an action subsequently brought against him for the same claim (*g*). Nor will the attorney's agreement to accept costs out of pocket vary the case (*h*). Where a bill has been delivered to a client in his lifetime, it is not necessary to deliver a fresh bill to his executor (*i*).

When delivered.

The month limited by the statute for the delivery of the bill is a lunar month (twenty-eight days) (*k*); and these twenty-eight days must be reckoned exclusive both of the day of delivering the bill and the day of commencing the action; therefore, in a late case, where the bill was delivered on the 12th of January, and the action was commenced on the 9th of February, the Court of Queen's Bench held, that the action was commenced too soon by one day, and a rule to enter a nonsuit was accordingly made absolute (*l*).

Non-delivery no ground for staying proceedings.

Where an attorney commenced his action before the expiration of the month, the court refused to stay the proceedings; because that fact might be pleaded as a defence (*m*). And where the defendant was arrested for an attorney's fees, after a bill of costs was delivered to him without being signed, the court refused to discharge him out of custody on entering a common appearance (*n*).

Compelling delivery of bill.

Compelling Delivery of Bill.] Although the courts have no common-law jurisdiction to tax an attorney's bill, (*post*, 77), yet the Court of Exchequer, in a late case, held, that the courts have power independent of the 2 *G.* 2, *c.* 23, *s.* 23, to order an attorney to *deliver* his bill of costs, even where no taxable business has been done, in order to let his client know what claims he has against him (*o*). If the client become bankrupt, his right in that respect vests in his assignees (*o*). In order to compel it—*Take out a judge's summons* (*p*) *for that purpose, (intitled in the court and cause in which the business was done, or, if no cause, then in a court of which he is an attorney), requiring him to attend before a judge at the expiration of two days* (*q*), *or more, after taking it out, and serve him with it. If*

(*e*) *Warren* v. *Cunningham*, Gow, C. N. P. 71.

(*f*) *Eicke* v. *Noakes*, 1 M. & Malk. 303, *per* Lord *Tenterden*, C. J.

(*g*) Ib.: *Crowder* v. *Shee*, 1 Camp. 437; and see 3 Mad. 49.

(*h*) *Miller* v. *Towers*, Peake, Rep. 102.

(*i*) *Reynolds* v. *Caswell*, 4 Taunt. 193.

(*k*) *Hurd* v. *Leach*, 5 Esp. 168: *Crook* v. *M‘Tavish*, 1 Bing. 167; 8 Moore, 265, *S. C.*: *Lacon* v. *Hooper*, 6 T. R. 226.

(*l*) *Blunt* v. *Heslop*, 3 N. & P. 553.

(*m*) *Harper* v. *Leech*, Barnes, 123. The defence must be pleaded specially. (*Lane* v. *Glenny*, 2. N. & P. 258; *Robinson* v. *Rowland*, 6 Dowl. 271).

(*n*) *Tomlinson* v. *Clark*, 4 Moore, 4.

(*o*) *Clarkson* v. *Parker*, 7 Dowl. 87.

(*p*) See a form, Chit. Forms, 13.

(*q*) R. H. 2 W. 4, r. 91. By this rule, "An order to deliver or tax an attorney's bill may be made at the return of *one* summons, the same having been served *two* days before it is returnable." Before this rule in the Common Pleas, three summonses were necessary, in case of non-

Compelling delivery of bill.

he do not attend, after waiting half an hour at the judge's chambers, an order (*r*) *on him to deliver it in a reasonable time will be made of course. Serve him with a copy of the order; and if he still refuse or neglect to deliver his bill, move to make the order a rule of court; serve him personally* (*s*) *with a copy of the rule; make an affidavit of service, and of the non-delivery of the bill, and thereupon move for an attachment* (*t*). You cannot, it seems, under one summons, obtain an order for delivery of the bill as well as for taxing it (*u*).

Taxation of bill between attorney and client.

Taxation of Bill.] "Upon application of the party or parties chargeable by such bill, or of any other person in that behalf authorized (*x*), unto the said Lord High Chancellor, or the Master of the Rolls, or unto any of the courts aforesaid, or unto a judge or baron of any of the said courts respectively, in which the business contained in such bill, or the greatest part thereof in amount or value, shall have been transacted; and upon the submission of the said party or parties, or such other persons authorized as aforesaid, to pay the whole sum that upon taxation of the said bill shall appear to be due to the said attorney or solicitor respectively, it shall and may be lawful for the said Lord High Chancellor, the said Master of the Rolls, or for any of the courts aforesaid, or for any judge or baron of any of the said courts respectively, and they are hereby required, to refer the said bill, and the said attorney's or solicitor's demand thereupon, although no action or suit shall be then depending in such court touching the same, to be taxed and settled by the proper officer of such court, without any money being brought into the said court for that purpose; and if the said attorney or solicitor, or the party or parties chargeable by such bill respectively, having due notice, shall refuse or neglect to attend such taxation, the said officer may proceed to tax the said bill *ex parte* (pending which reference and taxation no action shall be commenced or prosecuted touching the said demand (*y*)); and, upon the taxation and settlement of such bill and demand, the said party or parties shall forthwith pay to the said attorney or solicitor respectively, or to any person by him authorized to receive the same, that shall be present at the said taxation, or otherwise unto such other person or persons or in such manner as the respective court aforesaid shall direct, the whole sum that shall be found to be or remain due thereon, which payment shall be a full discharge of the said bill and demand; and in default thereof the said party or parties shall be liable to an attachment or process of contempt, or to such other proceedings, at the election of the said attorney or solicitor, as such party or parties was or were before liable unto; and if, upon the said taxation and settlement, it shall be found that such attorney or solicitor shall happen to have been

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attendance, before an order could be obtained for delivery or taxation of an attorney's bill. Tidd, 9th ed. 335.

(*r*) See a form, Chit. Forms, 13.

(*s*) *Anon.* 2 Chit. Rep. 66.

(*t*) As to the proceeding by attachment, see *post*, Vol. II. Book IV. Part III.

(*u*) Tidd, 9th ed. 335: but see *per Gurney*, B., *Clarkson* v. *Parker*, 7 Dowl. 87.

(*x*) In *Langford* v. *Nott*, 1 Jac. & W. 291, the Master of the Rolls thought that a third party could not have the bills taxed: and see *Doe* d. *Palmer* v. *Roe*, 4 Dowl. 95: *Sadler* v. *Palfreyman*, 1 A. & E. 717; 3 Nev. & M. 599.

(*y*) See *Howard* v. *Groom*, 4 Dowl. 21: *Doe* d. *Palmer* v. *Roe*, Id. 95: *Hewitt* v. *Bellott*, 2 B. & Al. 745: *Williams* v. *Roberts*, 3 Dowl. 512; 1 Gale, 56, *S. C.*; *post*, 81. The undertaking to pay the amount of the taxation must be given, in order to get a stay of proceedings.

overpaid, then in such case the said attorney or solicitor respectively shall forthwith refund and pay unto the party or parties entitled thereunto, or to any person by him, her, or them authorized to receive the same, if present at the settling thereof, or otherwise unto such other person or persons or in such manner as the respective court aforesaid shall direct, all such money as the said officer shall certify to have been so overpaid; and, in default thereof, the said attorney or solicitor respectively shall, in like manner, be liable to an attachment or process of contempt, or to such other proceedings, at the election of the said party or parties, as he would have been subject to if this act had not been made; and the said respective courts are hereby authorized to award the costs of such taxations to be paid by the parties, according to the event of the taxation of the bill; that is to say, if the bill taxed be less by a sixth part than the bill delivered, then the attorney or solicitor is to pay the costs of the taxation; but if it shall not be less, the court in their discretion shall charge the attorney or client in regard to the reasonableness or unreasonableness of such bill." (2 *G.* 2, *c.* 23, *s.* 23).

No common law right to tax.

The only authority possessed by the courts of ordering the taxation of an attorney's bill, is conferred by this statute: they possess no common-law right to make such an order (*z*). And the court has no power to order the bill to be taxed, unless it appear that some part of the business was done in the court to which application for the order is made (*a*). And by reason of the stat. 12 *G.* 2, *c.* 13, *s.* 6, (*ante*, 73), the court has no power to refer to taxation an agency bill or bill for business done by one attorney for another, even where a suit is pending against the defendant for the recovery of the amount (*b*); and the result is, that it is only in cases where an attorney would be obliged to deliver a bill, previous to his suing upon it, that the courts can compel it to be referred to the master for taxation, and which cases we have noticed (*ante*, 69—73). But a bill delivered by the executor or administrator of an attorney has in some cases been referred (*c*); although we have seen (*ante*, 72) that such executor or administrator is not obliged to deliver a bill previously to his commencing an action.

Taxation, at what time applied for.

As regards the *time* of the application for taxation.—The bill may be taxed at any time before it is paid (*d*); unless an action have been brought on it, and a verdict obtained or writ of inquiry executed, by plaintiff (*e*). Even after verdict, in an action upon an attorney's bill, the court have referred it to the master for taxation (*f*); but this is very unusual, for the

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(*z*) *Weymouth* v. *Knipe*, 3 Bing. N. C. 387: *Clutterbuck* v. *Combes*, 5 B. & Ad. 400; 2 Nev. & M. 209: *Ex p. King*, 3 N. & M. 437: *Dagley* v. *Kentish*, 2 B. & Ad. 411; 1 Dowl. 330; *per Vaughan*, B., 2 Dowl. 658: *Ex p. Bowles' Trustees*, 1 Scott, 583; 1 Bing. N. C. 632,: *Doe* d. *Palmer* v. *Roe*, 4 Dowl. 95: *Clarkson* v. *Parker*, 7 Dowl. 87, overruling *Wilson* v. *Gutteridge*, 3 B. & C. 158; 4 D. & R. 736, *S. C.*: *Anon.* 2 Chit. Rep. 155: and see *R.* v. *Back*, 9 Price, 349; Tidd, 9th ed. 327.

(*a*) *Ex p. King*, 3 N. & M. 437.

(*b*) *Weymouth* v. *Knipe*, 3 Bing. N. C. 387; 3 Scott, 764.

(*c*) *Weston* v. *Poole*, 2 Str. 1056: *Gregg's case*, 1 Salk. 89: *Penson* v. *Johnson*, 4 Taunt. 724.

(*d*) Tidd, 9th ed. 332. In *Woollaston* v. *Weston*, 4 Dowl. 3, the court made an order for the taxation, though four years had elapsed from the delivery of the bill, and the client had fully acquiesced in it, and paid money on account.

(*e*) *Clarke* v. *Taylor*, Barnes, 124.

(*f*) MS. H. 1820: *Doe* d. *Thwaites* v. *Roe*, 3 D. & R. 226: *Nuttal* v. *Marr*, 3 D. & R. 33: *Benton* v. *Bullard*, 4 Bing. 561: *Lee* v. *Wilson*, 2 Chit. Rep. 63. In this latter case, the court granted the application, it being plainly shewn that some of the items would not be allowed on taxation, but upon the terms of the defendant's paying the costs of the appli-

Taxation.

delay of the defendant for more than a month, in objecting to the bill, is an admission that he thinks it to be reasonable. The bill, when taxable, cannot be taxed, or the unreasonableness of the items questioned, at the trial of an action upon it (*g*). The court have referred a bill for taxation at the instance of an executor, although it was sworn that it was approved of by the testator, and that he had made payments on account of it (*h*). But after the bill has been settled and paid, and the payment has been long acquiesced under, the courts will not refer it to be taxed as a matter of course (*i*): thus, where an attorney was employed to sue for some property at his own risk, and he was to have one-third of the sum to be recovered instead of costs, and he accordingly recovered a sum of money, paid it over to the parties, and received one-third according to the agreement; the parties, eleven years afterwards, applied to have that sum refunded, or that the attorney should deliver a bill of his charges for the business done, and refund the balance after taxation; but Littledale, J., held, that the application could not be entertained, however the court might deal with such a case if the application had been made shortly after the transaction; yet, after such a lapse of time, it was too late to impeach it (*k*). But under special circumstances distinctly pointed out, as, if there be a very gross error, or if the business was never performed, or the charges were fraudulent, or very gross, or the like, the court will refer it to be taxed (*l*). A client, however, may pay his attorney's bill, in order to prevent an action, and afterwards move the court to have it taxed: and if it appear that the attorney has been overpaid, the court will oblige him to refund the surplus (*m*). Where a bill, under such circumstances, was reduced by the master upon taxation, it was holden that the client could not recover the surplus by action; but his remedy must be by application to the court (*n*).

By whom applied for.

The application to refer an attorney's bill for taxation must be made by the party chargeable by the bill, and it will not be granted at the instance of a third party; therefore, where a party, after having paid certain costs, brought an action against another upon an indemnity which he had given him against these costs, the court refused to refer the costs to the master for taxation; although they advised the plaintiff to have them taxed, in order to avoid a suit in equity (*o*). In another case the court refused to order an attorney's bill to be taxed at the instance of a third person, where the client had before admitted the amount to be due, and declined taxing the

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cation, the costs of taxation, and the costs of the cause as between attorney and client.

(*g*) *Williams* v. *Frith*, 1 Doug. 198: *Hooper* v. *Till*, Id. 199: *Anderson* v. *May*, 2 B. & P. 237; 3 Esp. 167, *S. C.*: *Hewitt* v. *Ferneley*, 7 Price, 234. *Lee* v. *Wilson*, 2 Chit. Rep. 65: *Hellings* v. *Gregory*, 1 C. & P. 627.

(*h*) *Woollaston* v. *Weston*, 4 Dowl. 3.

(*i*) Sayer on Costs, 323: *Hooper* v. *Till*, 1 Doug. 199: *Manning* v. *Brown*, 3 Dowl. 31; and see Tidd, 9th ed. 332: *Ex p. Shipdem*, 6 D. & R. 339: *Wilkinson* v. *Forster*, 7 Moore, 496: *Johnes* v. *Lloyd*, 10 Price, 62: *Drax* v. *Scroope*, 2 B. & Ad. 581; 1 Dowl. 69, *S. C.*: *Glascott* v. *Castle*, 2 Tyr. 302; 1 Dowl. 317; 2 C. & J. 355, *S. C.*: *Pistor* v. *Dunbar*, 1 Anst. 186: *Horlock* v. *Smith*, 2 Myl. & Cr. 495, 528.

(*k*) *Ex p. Yeatman*, 4 Dowl. 304; 1 Harr. & W. 510, *S. C.*

(*l*) Ib.: and see *Grover* v. *Heath*, 2 Dowl. 285: *Manning* v. *Brown*, 3 Dowl. 31.

(*m*) 2 G. 2, c. 23, s. 23, *ante*, 76, MS. E. 1814: and see *Williams* v. *Frith*, 1 Doug. 198: *Hooper* v. *Till*, Id. 199.

(*n*) *Gower* v. *Popkin*, 2 Stark. 85: *March* v. *Munns*, MS. K. B. 27 Nov. 1832.

(*o*) 1 Barnard, 144; and *ante*, 76 (*x*).

bill, such client having since become bankrupt, and the application being made for the purpose of reducing his claim, so as to prevent his being a good petitioning creditor (*p*). So, where an ejectment was brought for a forfeiture, and the tenant, before appearance, came to an agreement with the lessor, by which he was to pay the lessor's attorney his bill of costs in the action, and the bill was accordingly delivered and paid; the tenant having afterwards applied to have the bill taxed, Coleridge, J., refused it, holding that the court had no power to refer an attorney's bill for taxation on the application of any person but the client (*q*). But, where the party who employed the attorney was obliged to sue in the name of another, it was holden, that this circumstance did not prevent him from having the bill taxed (*r*).

To what court or judge applied for.

Where an attorney has delivered his bill, an application to have it referred to the master for taxation must be made to the court, or a judge of the court, in which the greater part of the business has been done (*s*). In ordinary cases, the application must be made at chambers, as the court will not entertain it (*t*); and *the court* will not, it seems, in any case listen to the motion, unless the affidavits state, that the greater part of the taxable items in the bill are for business done in the court to which the application is made (*u*); but on an application at chambers the bill itself may be produced.

Proceedings on, and subsequent to, application to tax.

To obtain this reference—*Take out a summons requiring him to attend for that purpose before a judge* (*x*), *at the expiration of two days or more after taking it out, and serve it two days before it is attendable* (*y*). *If the attorney do not attend, after waiting half an hour, an order may be made as of course* (*z*); *the party undertaking* (*a*) *thereby to pay what shall be found due upon the taxation.* It has been said that it is discretionary in the judge, where an action is brought on the bill, to require this undertaking to pay what is due (*b*). But that case was decided, it seems, on the incorrect supposition that the courts had a common-law jurisdiction to tax attornies' bills, and it is conceived that the judge is not at liberty to use his discretion as to this undertaking which the statute requires. And it has been since decided, that where there is more than one party for whom the business has been done, an order to tax can be obtained only on the undertaking of *all* the parties (*c*). And where an attorney's bill was referred for taxation, but there was no undertaking, and the amount of the judgment had been previously paid into court under an interpleader rule, more than one-sixth having been taxed off, the plaintiff applied for costs against the attorney; but the court held, that as the money was not paid in for the purpose of taxation, it was not equivalent to an undertaking; and that, without an undertaking, they had no jurisdiction to

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(*p*) *Clutterbuck* v. *Coombes*, 5 B. & Ad. 400; 2 Nev. & M. 209.

(*q*) *Doe* d. *Palmer* v. *Roe*, 4 Dowl. 95; 1 Harr. & W. 339, *S. C.*

(*r*) *Re Masters*, 1 Harr. & W. 348; 4 Dowl. 18, *S. C.*

(*s*) 2 G. 2, c. 23, s. 23: *Jones* v. *Bywater*, 2 Tyr. 402.

(*t*) *Bassett* v. *Giblett*, 2 Dowl. 650.

(*u*) *Ex p. King*, 3 Dowl. 4; 3 Nev. & M. 437, *S. C.*

(*x*) See *Bassett* v. *Giblett*, 2 Dowl. 650.

(*y*) R. H. 2 W. 4, r. 91; *ante*, 75, n. (*q*).

(*z*) Tidd, 9th ed. 335. See form, Chit. Forms, 13.

(*a*) See form of undertaking, &c., Chit. Forms, 14.

(*b*) *Watson* v. *Postern & Another*, 1 Dowl. 556; 2 C. & J. 370; 2 Tyr. 406, *S. C.*

(*c*) *Hobby* v. *Pritchard*, 2 M. & W. 124.

order costs to be paid under 2 *G.* 2 (*d*). The judge may, it seems, order only a particular part of the bill to be taxed (*e*). The summons to tax, though served, will not operate as a stay of proceedings from its return, so as to prevent the attorney issuing a writ, until the applicant has signed a consent (which is filed with the judge's clerk) to pay the amount of the taxation (*f*). It should, therefore, in prudence, be signed immediately on obtaining the order, if not before, in order to avoid an action. The judge's order ought to include an undertaking by the client to pay what is due, otherwise it would seem no attachment can be obtained for the non-payment (*g*). *Get an appointment from one of the masters on the order; and serve a copy of the order and appointment on the attorney.* "One appointment only shall be deemed necessary for proceeding in the taxation of costs or of an attorney's bill (*h*)." *Afterwards, at the time appointed, attend before the master, and he will tax the bill.* He may, upon the taxation, receive affidavits, but cannot, except by special direction in the order, receive *vivâ voce* testimony (*i*).

Masters to tax costs indiscriminately in any of the courts.

By stat. 7 *W.* 4 & 1 *V. c.* 30, *s.* 23, reciting that it would tend to the despatch of business, and would assimilate the practice and promote uniformity in the allowance of costs, if the masters of the said courts appointed or to be appointed under this act were empowered to tax costs which have arisen or may arise in each of the said courts, indiscriminately, it is enacted, "that from and after the 1st January, 1838, the masters of the said courts appointed or to be appointed as aforesaid, are hereby authorized, empowered, and required, subject to such rules and orders as hereinafter mentioned, to tax all bills of costs indiscriminately, which shall have arisen or which may arise in cases of a civil nature in any of the said courts, or in the Court of Error in the Exchequer Chamber, although such costs may not have arisen in respect of business done in the court to which such masters may belong; and the judges of the said courts, or any eight or more of them, of whom the chiefs of each of the said courts shall be three, shall and they are hereby required, by any rule or order to be from time to time made either in term or vacation, to establish such regulations as may be necessary for the purpose of enforcing uniformity of practice in the allowance of costs in the common-law courts, and of insuring, as far as may be practicable, an equal division of the business of taxation amongst the masters of the said courts; and such judges shall appoint some convenient place in which the said business of taxation shall be transacted for all the said courts." Before this enactment, where an attorney's bill for business done in the Common Pleas and in the Court of Queen's Bench was referred to the prothonotary of the Common Pleas for tax-

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(*d*) *Rogers* v. *Peterson*, 7 Dowl. 187.

(*e*) See *Jones* v. *Roberts*, 2 Dowl. 656.

(*f*) *Williams* v. *Roberts*, 1 C. M. & R. 676; 3 Dowl. 513; 1 Gale, 56, *S. C. Query*, whether in the Exchequer the consent is not to be entered in the judge's book

(*g*) *Ryalls* v. *Emerson*, 2 Dowl. 357; *Ex p. Ward*, 1 H. & W. 112; 3 Dowl. 541, *S. C.* Except, perhaps, by making the undertaking itself a rule of court. (Id. note).

(*h*) R. H. 2 W. 4, r. 92. Before this rule there was one in the K. B., E. T. 32 G. 3; 4 T. R. 580, that "in every appointment to be made by the master, the party on whom the same was served should attend such appointment without waiting for a *second*, or in default thereof, the master should proceed *ex parte* on the first appointment:" also in the Common Pleas there must have been *three* appointments, in case of non-attendance, before the prothonotary could proceed *ex parte*. (Tidd, 9th ed. 336, 680).

(*i*) *Noy* v. *Reynolds*, 1 H. & W. 14.

ation, and he referred such part of it as related to business done in the Court of Queen's Bench to the master, the master's taxation was deemed the taxation of the prothonotary, and any objection to it must have been made to the Court of Common Pleas, and not to the Court of Queen's Bench (*k*).

Mode of taxation between attorney and client.

A special agreement between an attorney and his client, as to the amount of the charges of the former, is not binding on the master on taxation; but he may exercise his discretion as to allowing charges made in accordance with it (*l*). The master cannot in the taxation inquire into the fact, whether the business charged for was agreed to be done for costs out of pocket (*m*); or whether acts done by the attorney were useful (at least under the usual order (*n*)); but he may tax off such of the bill as he may deem to have been unnecessarily incurred (*o*). Where an attorney, being instructed to bring an action for rent, brought assumpsit for use and occupation, without previously inquiring as to the nature of the holding, and upon its afterwards being found to be by deed, he was obliged to discontinue, and bring another action, and in taxing his bill the master allowed his costs in both actions; the court ordered the master to review his taxation, leaving the attorney to bring his action for the other costs (*p*). Although some of the items in the bill may have no relation to the business of the court in which the order for taxation was made, if there be items for conveyancing, for parliamentary business, for fees paid to a proctor (*q*), for business done in a criminal court (*r*), charges for holding a court leet (*s*), or the like, the master may, nevertheless, it seems, tax these items as well as the other parts of the bill (*t*).

Attachment for balance.

If the judge's order for taxation does not order the defendant to pay what is due, no attachment can be obtained for the non-payment (*u*).

Review of.

If the taxation be erroneous, the court will, on a motion for that purpose, order the master to review it.

No action pending taxation.

Where a reference for taxation has been obtained, no action can be commenced pending the taxation, even though the client delays obtaining an appointment (*x*); but it may after taxation, even pending an application as to the costs (*y*).

Costs of Taxation between attorney and client.

Costs of Taxation.] By stat. 2 *G.* 2, *c.* 23, *s.* 23, which regulates the taxation of costs between *attorney and client* (*z*), if the bill, when taxed, be less by a sixth part than the bill delivered, the attorney shall pay the costs of taxation; but if not less by a sixth part, the court, at discretion, may charge the attorney or client with such costs, according to the reasonableness or unreasonableness of the bill (*a*).

(*k*) *R.* v. *Jones*, 1 Dowl. 424.

(*l*) *Drax* v. *Scroope*, 1 Dowl. 69; 2 B. & Ad. 581, *S. C.*, and cases there cited: *Re Masters*, 4 Dowl. 18.

(*m*) *Evans* v. *Taylor*, 2 Dowl. 349.

(*n*) *Jones* v. *Roberts*, 2 Dowl. 656.

(*o*) *Per Patteson*, J., *Heald* v. *Hall*, 2 Dowl. 163.

(*p*) *Cliffe* v. *Prosser*, 2 Dowl. 21.

(*q*) *Hooper* v. *Till*, Doug. 199.

(*r*) *R.* v. *Partridge*, Tidd, 9th ed. 329.

(*s*) *Luxmore* v. *Lethbridge*, 1 D. & R. 511; 5 B. & Ald. 898, *S. C.*

(*t*) *Wilson* v. *Gutteridge*, 4 D. & R. 736; 3 B. & C. 157, *S. C.*

(*u*) *Ryalls* v. *Emerson*, 2 Dowl. 357.

(*x*) *Sheriff* v. *Gresley*, 5 Nev. & M. 491.

(*y*) *Hewitt* v. *Bellott*, 2 B. & Ald. 745.

(*z*) See the words of the act, *ante*, 76.

(*a*) And see the rule of H. T. 2 W. 4, r. 2, *post*, as to the indorsement of debt and costs on the back of the writ, and by which it is ordered, that if more than one-sixth of the costs shall be disallowed, the plaintiff's attorney shall pay the costs of taxation.

Costs of taxation where bill reduced 1 6th or more must in general be paid by attorney.

This enactment, compelling the attorney to pay the costs of taxation, *in the event of a sixth part being taken off the bill*, is, it seems, *imperative;* and it is not in the discretion of the court to relieve him therefrom (*b*). Where, however, the attorney has delivered a bill a month before he brings an action, and the client waits until the action is brought without taxing the bill, he is not entitled to the costs of such taxation made after action brought, although more than a sixth is taken off (*c*); unless, perhaps, where the action is evidently brought to avoid these costs (*d*). And where the usual undertaking has not been signed by the client, it has been held, that he will not be entitled to the costs of taxation even though more than one-sixth be taxed off (*e*).

With respect to what is a reduction of the bill by one-sixth within the meaning of the act, it has been considered, that even when more than a sixth is deducted, but the deduction arises not from the taxation of particular items, but by a whole branch of the bill being disallowed, because the client is not the party liable for it, and that some other party was, the court will order the client to pay the costs of taxation (*f*). But in a more recent case, where the master on taxation of a bill of costs decided that one of the actions in which the costs had been incurred had been improperly brought, and on that ground disallowed the costs, by which more than one-sixth of the bill was taken off, it was held that the client was entitled to the costs of the taxation (*g*).

It was laid down, at a time when it was considered that an executor or administrator plaintiff was not liable to the costs of a successful defendant, that the court will not order the executor or administrator of an attorney, in any case, to pay the costs of taxation, even where more than a sixth part has been deducted by the master, or even in a case where the bill has been delivered by the attorney himself in his lifetime (*h*); but, perhaps, the court might now decide differently (*i*). A defendant who, upon compromising the suit, has undertaken to pay the plaintiff's costs as between attorney and client, is entitled to the costs of the taxation had under the plaintiff's authority, if more than one-sixth has been deducted (*j*).

Where bill re-

Where *less* than a sixth is disallowed by the master, the

(*b*) *Mills* v. *Revett*, 1 A. & E. 856; 3 N. & M. 767, *S. C.*: *Higgins* v. *Woolcott*, 5 B. & C. 760; 8 D. & R. 589, *nom. Dickens* v. *Woolcot*, *S. C.*: *Featherstonehaugh* v. *Reece*, 1 C. & M. 495; 2 Dowl. 30, *S. C.*: *Swinburne* v. *Hewit*, 7 Dowl. 314.

(*c*) *Harbin* v. *Miles*, 9 B. & C. 755: *Coates* v. *Nask*, Id. 757, n.: *Benton* v. *Bullard*, 4 Bing. 561: *Jay* v. *Coaks*, 8 B. & C. 635; 3 M. & R. 35, *S. C.*: *Featherstonehaugh* v. *Reece*, *ubi supra*.

(*d*) *Toomer* v. *Fuller*, 2 Dowl. 195.

(*e*) *Howard* v. *Groom*, 1 H. & W. 355; 4 Dowl. 21, *S. C.*

(*f*) *Mills* v. *Revett*, 1 A. & E. 356; 3 N. & M. 767, *S. C.*: *White* v. *Milner*, 2 H. Bl. 357: see *Woollison* v. *Hodgson*, 2 Dowl. 360.

(*g*) *Morris* v. *Parkinson*, 2 C. M. & R. 178; 3 Dowl. 744, *S. C.* *Parke*, B., there observed, "It is not necessary to say whether the decision in *White* v. *Milner*, be right or wrong, because this is distinguishable from that case. There the sum was struck out because the defendant was not chargeable with it, and it ought to have been charged to another person. In the present case, the sum in question was disallowed because the attorney ought not to have charged this item at all, and, therefore, it ought never to have been inserted in the bill." In *Ex parte Imman*, Buck, C. C. 129, it was held that the attorney ought to pay the costs, the reduction being caused by the disallowance of a sum he had paid for extra fees to the commissioners of bankruptcy for travelling expenses. And see some able observations on the subject of the taxation of attorney's bill in the 1 Jurist, p. 466, &c.

(*h*) *Weston* v. *Pool*, 2 Str. 1056.

(*i*) See *Stevenson* v. *Stimpson*, 1 Jurist, 466. K. B. *cor. Patteson*, J.: but see *Alson* v. *Oxford*, 1 Myl. & Cr. 26.

(*j*) *Sadler* v. *Palfreyman*, 1 A. & E. 717; 3 Nev. & M. 599.

duced less than 1-6th, are in discretion of court.

court generally oblige the client to pay the costs of taxation, though it is in their discretion to do otherwise (*k*); and this discretion is exercised according to the reasonableness or unreasonableness of the charges in the bill; and it seems to be a settled rule, that where an attorney wilfully inserts any item of charge, even one shilling, which he must know ought not to have been charged, he will not be entitled to the costs of taxation, even though less than a sixth has been taxed off (*l*).

How recovered.

Whether a sixth be deducted or not, the costs of taxation can be obtained only by application to the *court*, unless the parties consent that they may be included in the master's *allocatur*. It should seem that a judge at chambers has no power to allow the costs: the act does not give such power, nor does any other statute. In the Common Pleas, where an attorney is entitled to the costs occasioned by the taxation of his bill, he ought to apply for them at the time; and cannot recover them by motion after making a subsequent settlement (*m*). The costs of the taxation thus allowed cannot form the subject of a set-off, or of an action; they cannot even be deducted from a set-off of the attorney's bill in respect of the taxation of which they were awarded (*n*); the remedy for them is by attachment, or (since 1 & 2 *V. c.* 110) by execution. Where a client gave his acceptance for the amount of a bill of costs, but afterwards had the bill taxed, and more than one-sixth was deducted, the bill having been dishonoured, the court, upon application, allowed the attorney to pay the costs of taxation to the holders in part payment of the bill, instead of paying them to the client (*o*). On application for costs of taxation, the allocatur cannot be impeached (*p*).

What items may be inserted to avoid costs.

It may be here observed, that an attorney employed to defend an action, and receiving from his client the debt and costs, for the purpose of being paid over to the plaintiff, is not entitled to make that sum an item in his bill, so as to increase the amount of it (*q*). But an attorney has a right to introduce into his bill disbursements made by him for his client, although he has no discretion as to their amount, if there is no specific appropriation, of money paid by his client to him, to such disbursements (*r*). Where costs in a suit were taxed as between party and party, and the residue after taxation paid to the attorney of the successful party, the attorney afterwards delivered his bills to his client under an order of court for such delivery, and for a general reference of the bills for taxation; they included, among other matters, costs reduced upon a prior taxation, but not taxed, for which the attorney gave credit: it was held, that he was entitled to insert the reduced and not the original amount of costs; and that, on taxation of the bills, the client could not add the sum formerly

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(*k*) *Hurst* v. *Dixon*, Barnes, 118: *Barker* v. *Bishop of London*, Id. 14, n.: *Hindle* v. *Shackleton*, 1 Taunt. 536: see *Mills* v. *Revett*, 3 N. & M. 767: *Yea* v. *Yea*, 2 Anst. 494: *Webb* v. *Stone*, 1 Anst. 260: *Gale* v. *Packington*, 1 M'Clel. & Y. 354. In *Ellwood* v. *Pearce*, 8 Bing. 83; 1 M. & Scott, 159; 1 Dowl. 251, *S. C.*, the Court of C. P. would not allow the attorney the costs of taxation of his bill, where *nearly* one-sixth part was disallowed: and see *Baker* v. *Mills*, 2 Dowl. 382; 2 C. & M. 415, *S. C.*

(*l*) *Holderness* v. *Barkworth*, 3 M. & W. 341: 6 Dowl. 392, *S. C.*

(*m*) *Whitfield* v. *James*, 1 Bing. 207; 8 Moore, 40, *S. C.*

(*n*) *Field* v. *Bezant*, 5 B. & Ad. 357.

(*o*) *Woollison* v. *Hodgson*, 2 Dowl. 351; see 3 Dowl. 178.

(*p*) *Swinburn* v. *Hewit*, 7 Dowl. 314.

(*q*) *Woollison* v. *Hodgson*, 2 Dowl. 360.

(*r*) *Harrison* v. *Ward*, 4 Dowl. 39.

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deducted from these costs to the sum taxed off from the general amount of the bills, in order to make the whole reduction exceed one-sixth of such amount (*s*).

Attorney's remedy for costs.

Attorney's Remedy for Costs.] If the bill have not been taxed, the attorney's remedy for his costs is by action of assumpsit or debt: if taxed, he has the option of proceeding by action or attachment: or (since 1 & 2 *V. c.* 110) execution. In the action, upon the plea of non-assumpsit or *nunquam indebitatus*, the plaintiff is required only to give general evidence of the business being done, to prove the retainer either directly or from circumstances (*t*). That the charges are reasonable, is considered admitted by the defendant's not having had the bill taxed, supposing the taxation could have been had: otherwise, proof of such reasonableness must be adduced (*u*). It is sufficient to give in evidence a judge's order to tax the bill, the defendant's undertaking to pay what shall appear to be due, and the master's allocatur thereon (*x*). If the defendant has pleaded that the bill was taxable, and that a signed bill was not delivered in due time according to the statute, then, but not otherwise, the plaintiff must establish the delivery (*y*). The Nisi Prius record (which now states the time of issuing the writ) will, it seems, conclusively shew whether the action was commenced or not till the expiration of a month after the delivery of the bill (*z*). The delivery of a bill is conclusive evidence against an increase of charge, in a subsequent bill, on any of the items contained in it: and presumptive evidence against any additional items (*a*). The bill may be proved by a copy, without giving notice to produce the original (*b*). Nor is it requisite that the parties examining should read the two bills alternately (*c*). No proof of

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(*s*) *Mills* v. *Revett*, 1 A. & E. 856: and see *Hays* v. *Trotter*, 3 N. & M. 174: *Franklin* v. *Featherstonehaugh*, Id. 779.

(*t*) As to these proofs, see Rosc. on Evid. 260; 2 Stark. on Evid. 79. Where, by custom, the lessor's attorney draws a lease, to be paid for by the lessee, the attorney must look, in the first instance, to the lessor, who may afterwards recover from the lessee the amount paid for the lease. (See *Grissell* v. *Robinson*, 3 Bing. N. C. 10). But where a lessor and lessee, in the presence of lessor's attorney, signed an agreement that a lease should be prepared by lessor's attorney, and paid for by lessee, the lease was prepared accordingly; but lessor, who had only a life estate, dying, the lease was never executed: Held, that lessor's attorney was entitled to recover of lessee the charge for drawing the lease. (*Webb* v. *Rhodes*, 3 Bing. N.C. 732). As to counterparts of leases, see *Jennings* v. *Mayor*, (8 C. & P. 61). A., wishing to borrow money on a mortgage of land, delivered the title-deeds to B., the intended mortgagee, for examination, and said that he would pay all expenses: B handed the deeds to his own attornies to be investigated: the negotiation went off, and the attornies being requested by A. to return his deeds, refused to do so till he paid their bill of costs: on assumpsit brought by A. against the attornies, to recover back the money so paid, Held, that the defendants could not be considered as having acted for both parties in the negotiation, and, therefore, had not a lien against A. as his attornies. That, supposing A. liable to B. for the costs incurred, B. could not communicate to his own attornies a lien upon A.'s deeds by handing them to the attornies for investigation. That the undertaking of A. to B., if it amounted to a promise to pay these costs, did not entitle B.'s attornies to detain the deeds, as it established no privity between them and A.; and that A. might have brought trover for the deeds, and was entitled to recover in this action. (*Pratt* v. *Vizard*, 5 B. & Ad. 808; 2 N. & M. 455, *S. C.*) See *Ladd* v. *Lynn*, 2 M. & W. 265, as to the husband's liability for the expenses of a deed of separation. As to the expenses of a deed of appointment, see *Hayward* v. *Fiott*, (8 C. & P. 59). As to the expenses of deeds between vendors and purchasers, see Dixon on title-deeds, p. 462, *et seq.* Sugden's Vend. and Purch., 247.

(*u*) Peake, Ev. 262—264: *Anderson* v. *May*, 2 B. & P. 237: *Williams* v. *Frith*, 1 Doug. 198.

(*x*) *Lee* v. *Jones*, 2 Camp. 496.

(*y*) *Lane* v. *Glenny*, 2 N. & P. 258: *Robinson* v. *Rowland*, 6 Dowl. 271. As to the proof of the delivery, see Rosc. on Evid. 260.

(*z*) See the cases of *Webb* v. *Pritchet*, 1 B. & P. 263; 2 Camp. 496, n.

(*a*) *Loveridge* v *Botham*, 1 B. & P. 49.

(*b*) *Colling* v. *Treweek*, 6 B. & C. 394: *Anderson* v. *May*, 3 Esp. 167; 2 B. & P. 237: *Philipson* v. *Chace*, 2 Camp. 110: *Fyson* v. *Kemp*, 6 C. & P. 71.

(*c*) *Fyson* v. *Kemp*, 6 C. & P. 71.

plaintiff's actually being an attorney, or of his having taken out the annual certificate, is required (*d*). Proof of his being retained as such suffices (*e*). The disproof lies on the defendant (*e*).

Defences to action on attorney's bill.

In an action on an attorney's bill, if the bill contain a taxable item, the defendant may plead and set up as a defence, that a bill was not delivered according to the statute (*ante*, 76); or that the plaintiff was uncertificated at the time of doing the business, and did not obtain his certificate within the year (*ante*, 34); or that the business, though done in the attorney's name, was really done wholly or in part for the benefit of an unqualified person (*ante*, 43); or that the plaintiff had not exercised reasonable diligence and skill, whereby plaintiff incurred the costs sought to be recovered (*f*); or that plaintiff was not properly enrolled (*g*); or that the plaintiff agreed to be paid in gross for prosecuting the action in respect of which the charges which plaintiff seeks to recover were incurred (*h*); or that the plaintiff agreed to charge only the money out of pocket, which he has paid him (*i*); or that the plaintiff agreed to charge nothing; and evidence, that, when the attorney's agent went before the master to have the bill taxed, he admitted such was the case, will suffice (*j*). But the defendant cannot set up any damage suffered from the negligence or ignorance of the attorney, as a defence (*k*); unless where the negligence or ignorance has had the effect of rendering the proceeding sought to be charged for wholly ineffective. (*l*). Neglect of the client's instructions is no defence where the object of the instructions is unjustifiable delay (*m*). It is no defence that the business was done on Sunday (*n*). Before 7 *W.* 4 & 1 *V. c.* 56, it would have been, in all cases, a defence that the business was done in the attorney's name, in a court in which he was not admitted; but that statute, as we have seen, (*ante*, 40), enables attornies admitted in any superior court of law to recover costs for business done in any other, (after signing the roll, &c., *ante*, 41), as if admitted. This statute, however, is not retrospective (*o*). Re-admitted attornies are within it (*p*).

Attorney's securities for costs.

Attorney's Securities for Costs.] The court will not allow an attorney to take or act upon a warrant of attorney or mortgage for costs to be incurred (*q*). But if such a security be given for costs already incurred, and also for costs to be incurred, it will nevertheless be a good security for the former (*r*).

(*d*) *Berryman* v. *Wise*, 4 T. R. 367.

(*e*) *Pearce* v. *Whale*, 5 B. & C. 38; 7 D. & R. 512, *S. C.*: *Sparling* v. *Haddon*, C. P. Westm. 29 May, 1832.

(*f*) *Montriou* v. *Jefferys*, R. & M. C. N. P. 452: and see *Hopkinson* v. *Smith*, 7 Moore, 237; 1 Bing. 13, *S. C.*: *Taylor* v. *Glassbrook*, 3 Stark. 75.

(*g*) *Humphreys* v. *Harvey*, 1 Bing. N. S. 62.

(*h*) Com. Dig. Champetry, B. 14; Hob. 117; Tidd. 9th ed. 325: *Thwaites* v. *Macpherson*, 3 C. & P. 341; 1 M. & M. 199, *S. C.*: *Stanley* v. *Stanley*, 7 Bing. 369: but see *Williams* v. *Protheroe*, 5 Bing. 309; 3 Y. & J. 129, *S. C.*: *Williamson* v. *Henley*, 6 Bing. 299: *Gillett* v. *Rippon*, 1 M. & M. 406.

(*i*) *Parker* v. *Harcourt*, 5 Esp. 249.

(*j*) *Ashford* v. *Price*, 3 Stark. 185.

(*k*) *Templer* v. *M'Lachlan*, 2 New Rep. 136: *Johnson* v. *Alston*, 1 Camp. 176: *Dax* v. *Ward*, 1 Stark C. N. P. 409: *Passmore* v. *Birnie*, 2 Stark. 59.

(*l*) Ib.: *Hill* v. *Featherstonehaugh*, 7 Bing. 569: 3 Moo. & P. 541: *Shaw* v. *Arden*, 9 Bing. 287; 2 Moo. & Sc. 341; 1 Dowl. 705, *S. C.*

(*m*) *Johnson* v. *Alston*, 1 Camp. 176: and see *ante*.

(*n*) *Peate* v. *Dicken*, 1 C. M. & R. 122; 3 Dowl. 171, *S. C.*

(*o*) *Newton* v. *Spencer*, 4 Bing. N. C. 174; 5 Scott, 489.

(*p*) *Ex p. Martin*. 7 Dowl. 334: *Ex p. Thompson*, 5 Bing. N. C. 380.

(*q*) *Jones* v. *Hunter*, 1 Dowl 462: *Jones* v. *Tripp*, Cro. Jac. 322.

(*r*) *Holdsworth* v. *Wakeman*, 1 Dowl. 532.

Attorney's Lien for costs.

On deeds and papers.

Attorney's Lien for Costs.] An attorney has a lien for his general balance of costs, upon all deeds and papers in his hands belonging to his client; and the court will not order them to be delivered up, until he is paid or otherwise satisfied (*ante*, 64) (*s*). Thus where a mortgagee placed the title-deeds of the mortgaged estate in his attorney's hands, and the estate was sold, it was held that the attorney might retain the title-deeds from the purchaser, until costs due to him from other mortgagee were satisfied (*t*). And if a bill of exchange be given to him for his costs, he may, perhaps, retain his client's deeds, &c., until such bill is paid; at least the lien continues if the bill be afterwards dishonoured (*u*). He has also a lien upon papers belonging to a bankrupt, not only for his bill for business done, but for the costs of an action brought against the bankrupt, subsequently to the issuing of the commission, to recover the amount of his bill (*x*). And an agent for an attorney dying intestate and insolvent pending a suit wherein he was plaintiff, has a lien for his costs upon a *postea* of which the agent has obtained possession after the death of the intestate (*y*). And even a town-clerk has a lien on papers of the corporation, with respect to which he has done work as an attorney or solicitor, though not on such as he holds merely as town-clerk (*z*). But where a person gave deeds to another for the purpose of satisfying himself as to their sufficiency to secure an annuity he agreed to grant him, and the other gave them to a third person for the purpose of investigating the title, but the treaty for the annuity afterwards went off for some reason not connected with any objection to the title; it was holden that the third person could not retain the deeds for his costs of investigating the title, for he was not employed by the party to whom the deeds belonged (*a*). And it has even been held, that where an attorney prepares a deed, and that deed is afterwards executed, he cannot, after execution, retain the deed for his costs of preparing it (*b*). The right of lien depends on the right of the client to the deeds (*c*); and if the right of the client be limited to a certain extent, the attorney has a lien to the same extent only (*d*).

On money and costs.

If money belonging to the client come to the attorney's hands, he may retain so much of it as will satisfy his bill for costs (*e*). Even the official assignee of a client has no right to money in a solicitor's hands without satisfying his lien (*f*). He has also a lien for his costs upon money recovered by his client (*g*), or awarded to him (*h*), in a cause in which the

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(*s*) As to a solicitor's lien in equity, see 2 Sch. & Lef. 279; 13 Ves. 161; 18 Ves. 282. It seems, that the rules with respect to lien are the same in equity as at law; but a court of equity would perhaps grant relief where there are equitable circumstances in the case, of which a court of law could not take notice. (See *per* the Lord C. B., *Oxenham* v. *Esdaile*, 2 Y. & J. 499).

(*t*) *Ogle* v. *Story*, 1 N. & M. 474.

(*u*) *Stevenson* v. *Blakelock*, 1 M. & Sel. 535: and see *Esdaile* v. *Oxenham*, 3 B. & C. 225: *Oxenham* v. *Esdaile*, 2 Y. & J. 493.

(*x*) *Lambert* v. *Buckmaster*, 4 D. & R. 125; 2 B. & C. 616, *S. C.*: and see *Noble* v. *Kersey*, 4 C. & P. 90: *Crofton* v. *Poole*, 1 B. & Ad. 568: *Jones* v. *Turnbull*, 2 M. & W. 601; 5 Dowl. 591, *S. C.*: *Re Sharpe*, 1 Dowl. 142.

(*y*) *Taunton* v. *Goforth*, 6 D. & R. 384.

(*z*) *R.* v. *Sankey*, 5 Ad. & El. 423.

(*a*) *Hollis* v. *Claridge*, 4 Taunt. 807: and see *Re Sharpe*, 1 Dowl. 432: *Pratt* v. *Vizard*, 2 N. & M. 455; 5 B. & Ad. 808, *S. C.*

(*b*) *Anon.* 1 L. Raym. 738: *sed vide Green* v. *Farmer*, 4 Burr. 2218: *Cotterell* v. *Hooke*, 1 Doug. 100.

(*c*) *Oxenham* v. *Esdaile*, 2 Y. & J. 493.

(*d*) *Hollis* v. *Claridge*, 4 Taunt. 807.

(*e*) *Welch* v. *Hole*, 1 Doug. 238.

(*f*) *Ex p. Bowden*, 2 D. & Chit. 182: *Jones* v. *Turnbull*, 5 Dowl. 591.

(*g*) *Middleton* v. *Hill*, 1 M. & Sel. 240: *Glaister* v. *Hewitt*, 8 T. R. 69: *Randle* v. *Fuller*, 6 Id. 456: *Mitchell* v. *Oldfield*, 4 Id. 123.

(*h*) *Ormerod* v. *Tate*, 1 East, 464: and see *Irving* v. *Viana*, 2 Y. & J. 70.

attorney was employed; and this, even although the client had previously become a bankrupt (*i*). Or he may stop it *in transitu*, by giving notice to the opposite party not to pay it until his claim for costs be satisfied, and then moving the court to have the amount of his costs paid to him in the first instance (*k*); and if, notwithstanding such notice, the other party pay the money to the client, he is still liable to the attorney for the amount of his lien (*l*), and the attorney in such a case shall not be prejudiced by any collusive release given by his client (*m*). But, unless such notice be given, the client may, if done *bonâ fide*, without any collusion, or fraudulent conspiracy to cheat the attorney of his costs, compromise with the other party, and give him a release, without the intervention of his attorney; and the attorney in such a case can afterwards look to his client only for payment (*n*). Therefore, where a plaintiff, pending the action, compromises it with the defendant, without consulting his attorney (*o*), the attorney cannot proceed in the action to recover his costs (*p*); unless there have been some collusion or fraudulent conspiracy between the parties to cheat the plaintiff's attorney of his costs (*q*). And it seems to be the most prudent course to apply to the court for a rule, directing the party in collusion with the client to pay to the attorney the sum recovered, to the amount of his lien (*r*); or, in gross cases, for leave to proceed with the action for the recovery of his costs. Where the parties collusively settled an action without the knowledge of the plaintiff's attorney, by the defendant's giving a bill for 24*l.*, of which 19*l.* was for the debt, and 5*l.* for the costs, although the latter actually amounted to 24*l.*, the bill having been deposited in the hands of a third party, the court, upon application, ordered it to be delivered up to the plaintiff's attorney, in satisfaction of his costs (*s*). Should the attorney proceed in the action, on motion to stay proceedings he will not be allowed the costs of unnecessary steps (*t*). Even after notice from the plaintiff's attorney to the defendant, the parties may compromise without regard to the attorney's claim for costs, if the action be for *unliquidated* damages; *e. g.* an action for excessive distress for poor rates (*u*).

Compromise in fraud of lien on costs.

Lien on judgments.

Where the plaintiff, after judgment, employed a new attorney to enter satisfaction on the roll, the court, upon appli-

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(*i*) *Griffin* v. *Eyles*, 1 H. Bl. 122.

(*k*) *Welch* v. *Hole*, 1 Doug. 238.

(*l*) *Read* v. *Dupper*, 6 T. R. 361.

(*m*) *Ormerod* v. *Tate*, 1 East, 464; *Gould* v. *Davis*, 1 Dowl. 288; 1 C. & J. 415; 1 Tyr. 380, *S. C.*

(*n*) *Welch* v. *Hole*, 1 Doug. 238: *Chapman* v. *Haw*, 1 Taunt. 341.

(*o*) Where the attorney of the defendant in an ejectment sent to the lessor of the plaintiff (a female), who had succeeded in the ejectment, and in the absence of her attorney obtained her signature to a paper which he took away, though at the time she said she wished for time to consult her attorney, the court ordered it to be given up to be cancelled. (*Re Oliver*, 1 Harr. & W. 79).

(*p*) *Jordan* v. *Hunt*, 3 Dowl. 666: *Chartwood* v. *Berridge*, 1 Esp. 345: *Graves* v. *Eades*, 5 Taunt. 429; 1 Marsh. 113, *S. C.*: *Rooke* v. *Wasp*, 5 Bing. 190; 2 M. & P. 304, *S. C.*: *Nelson* v. *Wilson*, 6 Bing. 568; 4 M. & P. 385, *S. C.*: *Wyllie* v. *Phillips*, 3 Bing. N. C. 770: but see *Toms* v. *Powell*, 6 Esp. 40; 7 East, 536; 3 Smith, 554, *S. C.*: *Cole* v. *Bennett*, 6 Price, 15: *Gould* v. *Dairs*, 1 Tyr. 382: *Young* v. *Redhead*, 2 Dowl. 119: *Bloomfield* v. *Blake*, Id. 272.

(*q*) *Swaine* v. *Senate*, 2 New Rep. 99: *Graves* v. *Eades*, 1 Marsh. 113: *Nelson* v. *Wilson*, 6 Bing. 568; 4 M. & P. 385, *S. C.*: see *Martin* v. *Francis*, 2 B. & Ald. 402; 1 Chit. Rep. 241, *S. C.*: and see *Young* v. *Redhead*, 2 Dowl. 119: *Jordan* v. *Hunt*, 3 Id. 666.

(*r*) *Read* v. *Duppa*, 6 T. R. 361.

(*s*) *Gould* v. *Davis*, 1 Tyr. 380; 1 Dowl. 288, *S. C.*

(*t*) *Wyllie* v. *Phillips*, 3 Bing. N. C. 776.

(*u*) *Ex p. Hart*, 1 B. & Ad. 660; 1 Dowl. 324, *S. C.*

Lien on judgments.

cation, discharged the defendant out of custody, although the attorney's lien was not satisfied; for they had no power to detain the defendant in custody after satisfaction had been entered on the roll (*x*). And where the defendant was arrested, and the plaintiff's attorney directed the officer not to let him go at large without his express consent, as he had a lien on the judgment for his costs, but the officer, by the plaintiff's authority, discharged the defendant, it was holden, that the sheriff was not liable to the attorney for his costs (*y*).

And where a plaintiff, after charging the defendant in execution, died, and the defendant's wife took out administration, the court held that the plaintiff's attorney had no longer any lien on the judgment for his costs, and ordered the defendant to be discharged out of custody (*z*).

Set-off of judgments, or awards, when subject to lien.

It has always been the practice of the Court of Queen's Bench, that if two parties obtain judgments, the one against the other, and one of them applies to the court to have his judgment set off against the judgment of the other, the court will permit him to do so only upon the terms of his satisfying the lien which the attorney of the opposite party has upon the judgment for his costs in that particular suit (*a*); and the same where the rights of the parties arise from separate awards (*b*). But the practice was different in the Common Pleas, where the attorney's lien for costs was held to be subject to the equitable claims that existed between the parties in the cause (*c*). And also in the Queen's Bench it was held, that the attorney had a lien on the judgment obtained by his client, against the opposite party, to the extent of his costs of that cause only (*d*). And the plaintiff in that court might have set off interlocutory costs in the *same* cause, payable by him to the defendant, against the debt and costs so incurred by him on the final result of the cause, notwithstanding the objection of the defendant's attorney on the ground of his lien, which only attached on the general result of the costs &c. of the cause (*e*). But now, by rule of all the courts of *H. T.* 2 *W.* 4, *r.* 93, "no set-off of damages or costs between parties shall be allowed, to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought: provided, nevertheless, that *interlocutory costs* in the *same* suit, awarded to the adverse party, may be deducted." This rule applies only to cases of set-off between *adverse* parties in separate suits (*f*); and therefore, where there are several defendants, and some succeed, and some do not, the unsuccessful defendants may set off the costs due to the successful one,

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(*x*) *Mare* v. *Smith*, 4 B. & Ald. 466: *Bloomfield* v. *Blake*, Id. 272: and see *Abbott* v. *Rice*, 3 Bing. 132; 10 Moore, 489, *S. C.*

(*y*) *Martin* v. *Francis*, 2 B. & Ald. 402.

(*z*) *Pyne* v. *Erle*, 8 T. R. 407.

(*a*) See *Mitchell* v. *Oldfield*, 4 T. R. 123: *Morland* v. *Hammersley*, 2 H. Bl. 441, n.: *Middleton* v. *Hill*, 1 M. & Sel. 240: *Randle* v. *Fuller*, 6 T. R. 456: *Vansandau* v. *Burt*, 1 D. & R. 168: *Harrison* v. *Bainbridge*, 2 B. & C. 800; 4 D. & R. 363, *S. C.*; 5 D. & R. 399; 3 B. & C. 535, *S. C.*: *Simmons* v. *Mills*, 8 Taunt. 526.

(*b*) MS. E. T. 1814; and see *post*, Book I. Part I. Ch. 6, s. 6.

(*c*) *Bridges* v. *Smith*, 1 Dowl. 242; 8 Bing. 29; 1 M. & Scott, 93, *S. C.*: *Thrustout* v. *Crofter*, 2 W. Bl. 326; Tidd, New Pract. 181.

(*d*) *Stephens* v. *Weston*, 3 B. & C. 535; 5 D. & R. 399, *S. C.*: *Watson* v. *Maskell*, 1 Scott, 286; 1 Bing. N. C. 366, *S. C.*

(*e*) *Howell* v. *Harding*, 8 East, 362: *Lang* v. *Webber*, 1 Price, 375. *Doe* v. *Allsop*, 9 B. & C. 760; Tidd, New Pract. 182.

(*f*) *George* v. *Elston*, 3 Dowl. 419; 1 Hodges, 63; 1 Bing. N C. 513, *S. C.*: and see *Lees* v. *Kendall*, 3 A. & E. 707; 5 N. & M. 340, *S. C.*

notwithstanding the effect of it would be to deprive the attorney of his lien (*g*). It gives the attorney a lien on the judgment for his costs as between *attorney* and *client* (*h*); in the particular cause only, and not for his general balance (*i*). No set-off of judgments will be allowed under this rule, even though they arise out of the same award, without satisfying the attorney's lien (*k*). Also, where, upon a reference of two causes, damages in the first were ordered by the award to be set off against costs in the second, it was held that this could only be done subject to the lien of the attorney of the plaintiff in the first cause, for his costs (*l*). As regards the set-off of *interlocutory* costs in the same suit due to one party, they may be set off against final costs due to the other party, without regard to the attorney's lien (*m*).

As to the practice of setting off one judgment, &c., against another, without reference to the attorney's lien, see *post*, *Book* I. *Part* I. *Chap.* 4, *Sect.* 6.

Agent's lien.

The lien of a town agent upon money and papers received in a cause, for his bill in that particular cause, has been already noticed (*ante*, 46).

Delivery of deeds, &c., when lien satisfied.

It is the duty of the attorney, if required, on having his lien satisfied, to deliver up to his client all deeds, drafts, copies, papers, monies, &c., belonging to the client in his hands. This duty (as has been already more particularly noticed, *ante*, 64 to 67) will be summarily enforced by the court.

(*g*) See last note.

(*h*) *Watson* v. *Maskell*, 3 Dowl. 638; 1 Bing. N. C. 727; 1 Hodges, 73, *S. C.*

(*i*) *Watson* v. *Maskell*, 1 Bing. N. C. 366.

(*k*) *Domett* v. *Helyer*, 2 Dowl. 540.

(*l*) *Cowell* v. *Butterley*, 10 Bing. 432; 4 M. & Scott, 265; 2 Dowl. 780, *S. C.*: and see *Cadell* v. *Smart*, 4 Dowl. 760: *Doe* v. *Sinclair*, 5 Dowl. 26; 3 Scott, 42, *S. C.*

(*m*) *Holliday* v. *Lawes*, 3 Bing. N. C. 774: see *Doe* v. *Carter*, 8 Bing. 330; Dowl. 269. *S. C.*, in which case, though the set-off of interlocutory costs was allowed, it was so subject to the attorney's lien. At all events, they may be so set off where the payment of them, at the time they are adjudged, is not, strictly speaking, a condition precedent to ulterior proceedings.

CHAPTER III.

1. TERMS AND RETURNS.—COMPUTATION OF TIME.

2. ROUTINE OF THE BUSINESS OF THE COURTS, &C.—CIRCUITS. —ATTENDANCE AT CHAMBERS.

INTROD.

1. *Terms and Returns—Computation of Time.*

The Terms.

The Terms.] THERE are four terms in each year: Hilary, Easter, Trinity, and Michaelmas. Previous to the passing of 11 *G.* 4 *&* 1 *W.* 4, *c.* 70, Hilary and Michaelmas terms were called *fixed* terms, because they invariably began on certain fixed days in the year; Easter and Trinity were called *movable* terms, because their commencement was regulated by movable feasts, namely, Easter Day and Trinity Sunday. But now the commencement and duration of all these terms are fixed by the statutes 11 *G.* 4 *&* 1 *W.* 4, *c.* 70, *s.* 6, and 1 *W.* 4, *c.* 3, *s.* 3. By the first of these enactments, *Hilary term* begins on the 11th and ends on the 31st January; *Easter term* begins on the 15th April and ends on the 8th May; *Trinity term* begins on the 22nd May and ends on the 12th June; and *Michaelmas term* begins on the 2nd and ends on the 25th November; but if the whole or any number of the days intervening between the Thursday before and the Wednesday next after Easter-day fall within *Easter term*, there are to be no sittings in banc on any of such intervening days; and the commencement of the ensuing Trinity term is in such case to be postponed, and its continuance prolonged for an equal number of days of business. The other enactment, reciting that "it is expedient to remove all doubts that may exist as to the *duration* of the terms in any case that may occur," enacts, "that in case the day of the month, on which any term according to the act aforesaid is to end shall fall to be on a *Sunday*, then the Monday next after such day shall be deemed and taken to be the last day of the term; and that, in case any of the days between the *Thursday before* and *the Wednesday next after Easter* shall fall within *Easter term*, then such days shall be deemed and taken to be a part of such term, although there shall be no sittings in banc on any of such intervening days" (*a*). Neither of the above statutes say on what day the term shall *begin*, in case the day fixed for its commencement be a *Sunday;* in such case, however, the day so fixed must, for the purpose of computation, be considered as the first day of the term (*b*), although as the courts do not

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(*a*) See the rule, E. T. 2 W. 4, and cases *post*, 94, shewing the construction of this part of the act.

(*b*) Although the first day of the term be a Sunday, the first return shall be calculated from that day. (*Doe* v. *Roe*, 1 C. & J. 483; 1 Dowl. 63).

sit, no judicial act can be done or supposed to be done till the following Monday (*c*).

Essoign abolished.

Formerly, the first *general return day* of the term (which was called the essoign day) was the day on which the court sat to receive *essoigns;* but when essoigns were no longer allowed to be cast in personal actions, the court discontinued sitting on that day (*d*). Still such essoign way was, until the 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 6, for many purposes considered as the first day of the term (*e*). Thus, judgments (which were considered in law as having relation to the first day in term) related to the essoign day in actions by original (*f*). But that statute has, it seems, done away with the essoign day for all purposes as part of the term (*g*).

Return days, &c., of writs.

Of writs for commencement of personal actions.

Return Days, &c., of Writs.] Since the 2 *W.* 4, *c.* 39, writs for the *commencement* of personal actions do not specifically mention any return day whatever, the return day being regulated by the service or execution of the writ, and being formerly in the case of a writ of capias or detainer the very day of its execution (*h*). That act (*s.* 11), after reciting that, "according to the present practice, in certain cases, no proceedings can be effectually had on any writ returnable within four days of the end of any term, until the beginning of the ensuing term, whereby an unnecessary delay is sometimes created:" for remedy thereof, enacts, "That if any writ of summons, capias (*i*), or detainer (*i*), issued by authority of this act, shall be *served* or *executed on any day*, whether in *term* or *vacation*, all necessary proceedings to judgment and execution may, except as hereinafter provided, be had thereon without delay, at the expiration of eight days from the service or execution thereof, on whatever day the last of such eight days may happen to fall, whether in term or vacation: Provided always, that if the last of such eight days shall in any case happen to fall on a *Sunday*, *Christmas Day*, or any day appointed for a public fast or thanksgiving, in either of such cases the following day shall be considered as the last of such eight days; and if the last of such eight days shall happen to fall on any day between the *Thursday* before and the *Wednesday* after *Easter-day*, then in every such case the *Wednesday* after *Easter-day* shall be considered as the last of such eight days: Provided also, that if such writ shall be served or executed on any day between the tenth day of *August* and the twenty-fourth day of *October* in any year, special bail may be put in by the defendant in bailable process, or appearance entered either by the defendant or the plaintiff on process not bailable, at the expiration of such eight days: Provided also, that no declaration, or pleading after declaration, shall be filed or delivered between the said tenth day of *August* and twenty-

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(*c*) This was decided by the courts in several cases in T. T. 1831; and see Tidd's Supp. 220, n.

(*d*) *Argent* v. *Dean of St. Paul's*, 16 East, 7.

(*e*) *Belk* v. *Broadbent*, 3 T. R. 185.

(*f*) *Whittaker* v. *Whittaker*, 8 B. & C. 768: *Harry* v. *Broad*, 2 Salk. 626: and see *Samuel* v. *Evans*, 2 T. R. 576: *Greenway* v. *Fisher*, 7 B. & C. 436; 1 M. & R. 330, *S. C.*: *Eyles* v. *Warren*, 4 M. & Sel. 174

(*g*) *Price* v. *Hughes*, 1 Dowl. 448.

(*h*) See *Hodgson* v. *Mee*, 5 N. & M. 302; 3 A. & E. 765, *S. C.*

(*i*) Now abolished: 1 & 2 Vic. c. 110, enacts, "that all personal actions in her Majesty's superior courts of law at Westminster shall be commenced by writ of summons."

fourth day of *October*." This statute is confined to cases in which mesne process within its provisions (*k*) has been served or executed. And where a judge's order is obtained in *vacation*, it has been decided by the Court of Exchequer that it cannot be made a rule of court till the following term (*l*).

The *proviso* in the above statute, excepting the period between the *tenth* of *August* and *twenty-fourth* of *October*, is applicable only to declarations, and pleadings after declaration; and a defendant arrested within that interval must put in and justify bail before a judge at chambers, in the same way as in any other part of the vacation (*m*).

Of other writs.

The *writ of distringas* to enforce the defendant's appearance on a writ of summons, also a *writ of exigent proclamation*, and other writs subsequent to the writ of capias or distringas in proceedings to *outlawry*, must be made returnable in *term on a day certain*; and all *other* writs, not above mentioned, are returnable in *term on a day certain*, with the exception of those in an ejectment founded on a supposed original, or in replevin, or other suit removed from an inferior court by an original writ of *pone*, *recordari facias loquelam*, or *accedas ad curiam*, which are returnable on a *general* return day.

Essoign day, or first general return day of term.

The first *general return* day for every term is the fourth day before the day of the commencement of the term, both days being included in the computation. If that day be a Sunday, then the first general return day is the Monday following. This first general return day of the term is called the *Essoign day* of the term, because the court formerly on that day sat to receive essoigns; but essoigns (as we have just seen, *ante*, 91) are no longer allowed to be cast in personal actions (*n*).

Day of exception.

The day after the essoign day is called the *Day of Exception;* because on that day the plaintiff might enter his exception and obtain a *ne recipiatur*, to prevent the defendant's essoign from being received. On the third day, the sheriff formerly returned his writs into court, and they were then delivered into the custody of the *Custos Brevium;* the third day was therefore called the *Retorna Brevium* day. The sheriff, however, now returns his writs at once into the office of the *Custos Brevium*. The fourth day, or *quarto die post*, called the Appearance-day, or *Dies amoris*, was the day given, by the favour and indulgence of the court, to the defendant for his appearance; and on this day the parties appeared in court, and had their appearance recorded by the proper officer.

Retorna Brevium day.

Appearance day, or dies amoris.

General return days in term.

There were also *three other general return days* in the term upon which some writs must have been made returnable; but now, by the 1 *W.* 4, *c.* 3, *s.* 2, "all writs now usually returnable before any of his Majesty's courts of King's Bench, Common Pleas, or Exchequer, respectively, on general return days, that shall be made *returnable* after the first day of January in the year of our Lord one thousand eight hundred and thirty-one, may be made returnable *on the third day exclusive before*

(*k*) 1 & 2 V. c. 110, s. 2, enacts, "that all personal actions in the superior courts at Westminster shall be commenced by writ of summons."

(*l*) *R.* v. *Price*, 2 C. & M. 212; 4 Tyr. 60; 2 Dowl. 233, *S. C.*

(*m*) *R.* v. *Shff. of Middlesex*, in *Woolluston* v. *Wright*, 2 C. & M. 333; 4 Tyr. 60; 2 Dowl. 286, *S. C.*

(*n*) *Argent* v. *Dean of St. Paul's*, 16 East, 7, 8, n.

the commencement of each term, or on any day, not being Sunday, between that day and the third day exclusive, before the last day of the term; and the day for appearance shall, as heretofore, be the third day after such return, exclusive of the day of the return, or, in case such third day shall fall on a Sunday, then on the fourth day after such return, exclusive of such day of return.

Computation of Time.

Days not expressed to be clear days reckoned exclusive of first.

Computation of Time.] The number of days allowed by the practice of the court for appearing, pleading, &c., was in general (when not otherwise expressed) reckoned *exclusively* in actions by bill in the Queen's Bench, and *inclusively* in actions by *original* in that court, or in the Common Pleas. But by the general rule of all the courts of *H. T.* 2 *W.* 4, *r.* 8, it is ordered, that "in all cases in which any particular number of days, *not expressed* to be *clear* days, is prescribed by the rules or practice of the courts, the same shall be reckoned *exclusively* of the first day, and *inclusively* of the last day, unless the last day shall happen to fall on a *Sunday*, *Christmas Day*, *Good Friday*, or a day appointed for a *public fast* or *thanksgiving* (as to which see *ante*, p. 23); in which case the time shall be reckoned *exclusively* of that day also." This rule is applicable to all cases; and though, before the making it, in the case of pleas in abatement, it was requisite that they should be delivered in four days *in*clusive after declaration, the days are now to be reckoned *ex*clusive (*o*).

In computing from an act first day excluded.

Besides this rule, the doctrine in computing the time *from* an act done has lately been to *exclude* the first day, at least, when the act was not done to the party himself, so that he might not therefore know of it immediately (*p*). If plaintiff be discharged from an illegal imprisonment on the 14th of December, and he must wait a month before commencing his action for it, the commencement of his action on the 14th of January would be in time (*q*). If a month's notice of action be requisite, the month begins on the day the notice is served; and, therefore, if notice be served on the 28th of April, it expires on the 27th of May, and the action may be commenced on the 28th of May (*r*).

Fraction of day noticed.

The court will take notice of the *fraction* of a day, if it be necessary for the purposes of justice (*s*).

Month, lunar.

In legal proceedings, the term month generally means a *lunar*, and not a calendar one (*t*).

Days between Thursday before and Wednesday after Easter.

By *R. E.* 2 *W.* 4, "the days between *Thursday* next before, and the *Wednesday* next after *Easter-day*, shall not be reckoned or included in any rules, or notices, or other proceedings, except notices of trial and notices of inquiry in any of the courts of law at Westminster." But writs may be returnable on

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(*o*) *Ryland* v. *Wormald*, 2 M. & W. 393; 5 Dowl. 581, *S. C.*

(*p*) *Lester* v. *Garland*, 15 Ves. 248: *Pellew* v. *Inhabitants of Wonford*, 9 B. & C. 134: *Hardy* v. *Ryle*, Id. 603: and see *R.* v. *Justices of West Riding of Yorkshire*, 4 B. & Ad. 685; 1 N. & M. 426, *S. C.*: *R.* v. *Goodenough*, 2 A. & E. 463: *R.* v. *Justices of Cumberland*, 4 N. & M. 378: *Buxton* v. *Spiers*, 2 C. M. & R. 601: *Webb* v. *Fairmaner*, 3 M. & W. 473.

(*q*) *Hardy* v. *Ryle*, 9 B. & C. 603.

(*r*) *Castle* v. *Burditt*, 3 T. R. 623: *Watson* v. *Pears*, 2 Camp. 294: *Dakins* v. *Wagner*, 3 Dowl. 535.

(*s*) *Sadler* v. *Leigh*, 3 East, 407: *Thomas* v. *Desanges*, 2 B. & Ald. 586: *Ex p. Farquhar*, 1 M. & M. 7: *Godson* v. *Sanctuary*, 1 N. & M. 52.

(*t*) See *Soper* v. *Curtis*, 2 Dowl. 237: *Talbot* v. *Lirfield*, 3 Bur. 1415; 1 Bla. Rep. 450, *S. C.*

them (*u*); and the days are reckoned as searching days for writs of *scire facias*, &c., lodged with the sheriff (*x*). The rule, it seems, extends to pleadings (*y*), and all other proceedings, except notices of trial and inquiry (*z*).

Days between 10th Aug. and 24th Oct.

By *R. M.* 3 *W.* 4, *r.* 12, "in case the time for pleading to any declaration, or for answering any pleadings, shall not have expired before the 10th day of *August* in any year, the party called upon to plead, reply, &c., shall have the same number of days for that purpose, after the 24th day of October, as if the declaration or preceding pleading had been delivered or filed on the 24th of *October*; but, in such cases, it shall not be necessary to have a second rule to plead, reply," &c. (*See post, further, Book I. Part I. Chap.* 3, *Sect.* 2).

2. *Routine of Business of the Court—Circuits—Attendance at Chambers.*

The Sittings in Banc in Term.

The Sittings in Banc and in Bail Court.] The courts now sit every day in full term, excepting Sundays, and the days between the Thursday next before and the Wednesday next after Easter-day, or any of them, when they fall in term. Before the alteration of the terms by 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 6 (*ante*, p. 26), the courts never sat on the feast of the Purification, Ascension-day, or Midsummer-day. But if Midsummer-day happened on Friday next after Trinity Sunday, which was the first day in full term, it was *dies juridicus* by stat. 32 *H.* 8, *c.* 21; and they now sit on all these days.

The courts sit in *banc* every morning at ten o'clock, during the *term*. The *Puisne Judges* sit by rotation in each term, or otherwise, as they agree among themselves, so that no greater number than *three* of them sit at the same time in banc for the transaction of business in term, unless in the absence of the *Lord Chief Justice* or *Chief Baron* (*a*).

Sittings in Vacation under 1 & 2 *V.* c. 32.

The courts of Q. B., C. P., and Exchequer, may, at their discretion, hold sittings in banc in vacation, at such times as were appointed for holding sittings at Nisi Prius in London and Middlesex, for the purpose of disposing of business there pending and undecided in such courts, respectively (*b*). And such sittings shall be holden in pursuance of a rule or order of the court, of which a week's notice shall be given in the Gazette (*c*). And the rules and orders made at such sittings shall have the same effect as if made in term time (*d*).

The sittings in Bail Court.

In the Court of Queen's Bench one of the puisne judges, while the others are sitting in banc, usually sits apart from them in the *Bail Court*, at ten every morning, "for the business of adding and justifying bail, discharging insolvent debtors, administering oaths, receiving declarations required by statute,

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(*u*) *Lilly* v. *Gompertz*, 1 Dowl. 376: *Hall* v. *Welchman*, 2 C. & J. 472; 1 Dowl. 566, *S. C.*

(*x*) *Armitage* v. *Rigbye*, 5 Ad. & Ell. 76.

(*y*) *Harrison* v. *Tait*, 4 Bing. N. C. 433; 6 Dowl. 611, *S. C.*: see *Blackburn* v. *Peat*, 2 Dowl. 293; 2 C. & M. 244, *S. C.*

(*z*) *Charnock* v. *Smith*, 3 Dowl. 607. This rule shews the construction which ought to be put on the 11 G. 4, & 1 W. 4, c. 70, s. 6, and 1 W. 4, c. 3, s. 3, *ante*, 90.

(*a*) 11 G. 4 & 1 W. 4, c. 70, s. 1.

(*b*) 1 & 2 V. c. 32, s. 1.

(*c*) 1 & 2 V. c. 32, s. 2.

(*d*) 1 & 2 V. c. 32, s. 3.

hearing and deciding upon matters on motion, and making rules and orders in business depending in the court" (*e*). This business may still be transacted by the court sitting in banc; generally, however, all simple matters of practice are decided by the single judge in this Bail Court. In cases of difficulty, indeed, if the judge entertain any doubt as to the propriety of granting a rule, he refers the application to the court sitting in banc, or grants a rule *nisi*, against which, cause is shewn before such court. The *common paper* is disposed of in this Bail Court, and a separate *peremptory paper* of all motions relating to practice is made out and cleared in the same manner as in the court sitting in banc.

No appeal from Bail Court to full court.

A rule made in the Bail Court is not more liable to be re-opened than a rule made in the full court; therefore, such a rule will not be permitted to be re-opened and argued in full court, after the term in which it was made, although the judge, who heard the case, sanction the application to the full court, unless, perhaps, in case of palpable mistake (*f*).

Early sitting of single judge in C. P. and Exch.

In the Common Pleas and Exchequer there is not a separate court, as the Bail Court in the Queen's Bench, for transacting business before a single judge; and the business is usually transacted before the whole court. But in the Common Pleas one of the puisne judges generally attends in court at a quarter before ten in the morning during term, for the purpose of taking justifications of bail, discharging insolvent debtors, administering oaths, and receiving declarations required by statute. In the Exchequer also, one of the puisne barons attends in court at ten every morning during term (except on the last day, when he sits in the Exchequer Chamber) for a similar purpose, and deciding matters on motion.

Paper days in Q. B., C.P., and Exch.

In each of the courts there are certain days in each term called *Paper Days*, because the court, on those days, hear the causes which have been entered in the paper for *argument* before they enter upon motions. In the Court of Queen's Bench Tuesdays and Fridays are *paper* days on the civil side; Wednesdays and Saturdays on the crown side. In the Common Pleas formerly the *paper* days were Mondays and Thursdays only (*R. H.* 42 *G.* 3); but by *R. M.* 47 *G.* 3, (*C. P.*), it was ordered, that all special arguments on demurrer, and other special arguments in that court, be heard on the day next before the sitting day at *Nisi Prius* in Middlesex, and the day next after the sitting day at *Nisi Prius* in London, and on no other days. It seems, however, that, according to the present practice, these paper days are those of the sitting days at *Nisi Prius*. In the Exchequer, Mondays and Wednesdays are the *paper* days. In the Queen's Bench, no cause can be set down in the paper for argument on the first paper day of the term, nor on the last day of the term; nor can any (*g*) demurrer, &c., be set down for any of the three days preceding the last day of term. And by *R. T.* 12 *G.* 1 (C. P.) no cause shall be put in the book of that court to be argued after the last day of argument, unless the court be thereupon moved, and shall order it. Also

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(*e*) 11 G. 4 & 1 W. 4, c. 70, s. 1.

(*f*) *Todd* v. *Jeffery*, 2 N. & P. 443; 7 A. & E. 519, *S. C.*: and *R.* v. *Shff. of Devon*, 5 N. & M. 416 (b); 2 Ad. & El. 296.

(*g*) See R. M. 38 G. 3, K. B.

in the Queen's Bench the causes set down in the paper for argument must be argued in the order in which they stand entered; and they shall not be adjourned to any future day, by consent or otherwise, unless the court, for reasonable cause, verified by affidavit, and upon application at least two days before the day of argument, shall otherwise order; and all such causes remaining undetermined at the end of any term shall, without any new entry, be continued in the books kept by the clerk of the papers, to come on in the next term in the order in which they stand (*h*).

Peremptory papers.

In the Queen's Bench, all rules enlarged till the following term, and rules for new trials which stand over from one term to another (*i*), are set down in what is termed the *Peremptory Paper* (*j*); eight for the first day of the term, and the same for every following day, until the whole shall be disposed of (*k*). A list of them shall, after every term, be fixed up in the offices both on the crown and civil side, specifying the particular days on which the respective motions are to come on; and a copy of such lists shall be delivered to each of the judges the day before the beginning of term (*l*). The rules thus entered in the peremptory paper shall be heard on the respective days for which they are made peremptory, unless special grounds, by affidavit or otherwise, be shewn to the court for postponing them (*m*); and they shall not be enlarged during the term, or put off from the appointed day, by the consent of counsel or attornies, without leave of the court (*n*).

In the Common Pleas, enlarged rules are set down in the *peremptory* or *remanet* paper, and called on after the common motions are disposed of. All rules for new trials which stand over, are set down in the same paper, and proceeded in at the pleasure of the court; and such matters as have been argued, and in which the court have not given judgment, are likewise set down in the peremptory paper (*o*).

Mondays and Thursdays motion days in Q. B.

Mondays and Thursdays, not being *paper days* in the court of Queen's Bench, are usually occupied in *motions*, and in any other business which the court may have appointed for those days.

Pre-audience and going through the bar in Q. B.

In the Queen's Bench the counsel have pre-audience in motions in the order of their precedence; those within the bar first, as the attorney-general, the solicitor-general, the queen's serjeants, the queen's counsel, &c.; then the serjeants and barristers without the bar, beginning from the centre to the left, and then from the centre to the right of each row, until all the counsel in court shall have moved. This is usually termed "going through the bar." The motion then recommences with the attorney-general, and goes through the bar in the same order as long as it is convenient for the court to sit. On the last day of term this order of moving is reversed. It is usual to call upon the bar to make one round of undisputed motions before any are made requiring argument. Upon *paper days*,

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(*h*) R. M. 30, G. 2, r. 2, K. B.: 1 Bur. 52.

(*i*) R. H. 44 G. 3; 1 Smith, R. 198.

(*j*) There are now two Peremptory Papers: one for rules relating to practice and other matters, which may be disposed of by the single judge sitting in the Bail Court; and the other for such special rules as require the decision of the four judges sitting in banc. (Chap. Pract. 78).

(*k*) R. M. 17 G. 3; H. 6 G. 3.

(*l*) R. H. 6 G. 3.

(*m*) R. H. 36 G. 3.

(*n*) R. E. 41 G. 3.

(*o*) 1 Tidd, 9th. ed. 606.

the court proceed to hear the causes entered in the paper argued in their order; and afterwards, if they have time, will hear motions. Upon Mondays and Thursdays the Court of Queen's Bench first go through the bar; then proceed to any other business which may have been appointed for those days; and, lastly, again hear motions until the court rises.

What cannot be moved on the last day of term.

Upon the *last day* in term, counsel cannot move for an attachment, except for non-payment of costs on the master's *allocatur* (*p*), or against the sheriff for not returning the writ or bringing in the body (*q*), nor move that a party may answer the matters of an affidavit (*r*), or for the master's report after the examination of a party upon interrogatories, unless with the leave of the court, or under some very special circumstances (*s*); nor can he shew cause against a rule for setting aside an award (*t*); nor will any rule *nisi* obtained on that day operate as a stay of proceedings (*u*).

Sittings at Nisi Prius in Term.

Sittings at Nisi Prius in and after Term.] Once every week during term, and for several days after term, one of the judges (usually the chief justice, but sometimes one of the puisne judges), sits at *Nisi Prius*, at Westminster, and at the Guildhall, London, *to try causes* in which the jury process has been directed to the sheriffs or other returning officers of Middlesex and London respectively. It seems that the sittings in term are not regarded as one sitting in law, so that a trial at any sitting day would have relation to the first day of the sittings (*x*).

In Exchequer.

Formerly, in the Exchequer, there was but one sitting day in term for *London* and one for *Middlesex* (*y*). But by a general rule of that court of *M. T.* 1 *W.* 4, *r.* 2, *s.* 14, it is ordered, that "there shall be *two* days appointed for the trials of causes at *Nisi Prius* in term in *London*, and the like in *Middlesex*, to be named by the lord chief baron of that court, previous to the commencement of each term; and that, on such nomination, the said lord chief baron shall also appoint the hour at which the court will sit on each of those days." The days appointed in pursuance of this rule for the sittings in term in *London*, are on the sixth, and *last* day but two in the term (*z*). In *Middlesex*, they are on the *seventh*, and last day but one in the term (*z*). After term, by rule of that court of *H. T.* 1 *W.* 4, "the sitting day at *Nisi Prius* at the *Guildhall* in and for the city of *London*, shall be the *second* day after every term; and such sitting shall be adjourned until such day as the court shall then direct." In Middlesex, the day of sitting after the term is the *seventh* day after the term (*a*).

Sittings at Nisi Prius after term.

By the 1 *G.* 4, *c.* 55, *s.* 1, *the sittings after term* might be continued during the entire vacation. But now, by the 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 7, "not more than *twenty-four days*, ex-

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(*p*) 5 Bur. 2686, K. B.

(*q*) 1 Bur. 651, n. K. B. In the Com. Pleas, where the rule to bring in the body expires on the last day of term, the plaintiff may move for an attachment at the rising of the court on that day, and the attachment shall issue on the day following, if bail above be not then perfected, or the defendant rendered. (R. T. 3d G. 3, C. P.; 1 B. & P. 312).

(*r*) *Jacob's case*, 4 Bur. 2502: *Ex p. Anon.* 2 Dowl. 227.

(*s*) *R.* v. *Wheeler*, 1 W. Bl. 311.

(*t*) R. M. 36 G. 3, K. B.

(*u*) See *Gronow* v. *Pointer*, 3 Dowl. 571.

(*x*) *Johnson* v. *Budge*, 3 Dowl. 207.

(*y*) Dax, Pr. 81.

(*z*) Dax, Pr. 82; and see 1 C. & J. 281 (*b*).

(*a*) Dax, Pr. 82; 1 C. & J. 281 (*b*); and see Tidd. Pract. 9th ed. 753; Tidd, New Pract. 459.

clusive of Sundays, after any Hilary, Trinity, and Michaelmas term, nor more than *six days*, exclusive of Sundays, after any Easter term, to be reckoned consecutively immediately after such term, shall be appropriated to sittings in London and Middlesex for the trial of issues of fact arising in any of the said courts: Provided, that if any *trial at bar* (*b*) shall be directed by any of the said courts, it shall be competent to the judges of such court to appoint such day or days for the trial thereof as they shall think fit; and the time so appointed, if in vacation, shall, for the purpose of such trial, be deemed and taken to be a part of the preceding term: Provided also, that a day or days may be specially appointed, at any time not being *within* such twenty-four days, for the trial of any cause at *Nisi Prius*, with the *consent of the parties* thereto, their counsel, or attornies."

Separate sittings at Nisi Prius.

Until lately, only one judge could sit at *Nisi Prius*, either in Middlesex or London; but now, by 1 *G.* 4, *c.* 55, *s.* 2, the chief justice or other judge of the court, and also such one of the puisne judges as the chief justice may appoint, may sit at *Nisi Prius*, in separate courts, at the same time, for the trial of causes in Middlesex or London; and the marshal and other officers of *Nisi Prius* shall appoint persons approved of by the chief justice to act for them in such additional *Nisi Prius* court. And now, by 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 4, (*post*, 100), any one of the judges of the superior courts at Westminster, to whatever court he may belong, is authorized to sit in London and Middlesex for the trial of issues arising in any of such courts.

Judges may try issues from any court.

Sittings may be held at any convenient place.

Formerly, the sittings for Middlesex must have been in Westminster Hall; but they may now, with the consent of her Majesty, under her sign manual, be holden at any place in the city of Westminster the chief justice may deem convenient for the purpose (*c*); and the trials in such places may, in all records, process, indictments for perjury, &c., be alleged and laid to have been had in Westminster Hall (*c*). However, this act and the 3 *G.* 4, *c.* 87, as to the Exchequer, though continuing in force, were only acted upon whilst the courts at Westminster Hall were re-building.

The Circuits.

The Circuits.] In the vacation after Hilary and Trinity terms, the judges of the three superior courts at Westminster make their *circuits*, and try, at *Nisi Prius*, in each county which they visit, those causes in which the jury process has been directed to the sheriff or other returning officer of such county. The records in all these causes (with the exception of such as are to be tried in counties palatine) are made up in the superior courts at Westminster. The *Nisi Prius* records are taken down by the parties to the county where the venue is laid, or to which the jury process has issued, there to be tried before these justices; after which they are returned to the attornies of the prevailing parties, with the *postea* indorsed on them, for the purpose of having the judgment signed, and of carrying that judgment into execution. In counties palatine, the records of the causes to be tried there are sometimes made

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(*b*) *R.* v. *Pinney*, 3 B. & Ad. 947, was the case of a trial at bar.

(*c*) 1 G. 4. c. 21, s. 1.

up in the superior courts at Westminster, sometimes in the courts of such counties palatine.

Orders may be made on, by Judge of any Court.

The judges upon circuits are empowered by stat. 1 *G.* 4, *c.* 55, *ss.* 5, 6, to grant summonses and make orders, upon circuit, in causes depending in any of the courts at Westminster, in which the issues, if brought to trial, would be tried upon their circuits respectively, in the same manner as if they were judges of the court in which such causes are so depending. This power of a judge on circuit is strictly confined to those cases in which the issues of trial would be tried on his circuit; therefore, when a cause had been referred by an order of *Nisi Prius*, and the judge during the assizes made a second order to enable the defendant to give a notice of set-off, it was holden that after the order of reference the judge was *functus officio*, and that the statute did not authorize a second order (*d*).

Attendance at Chambers.

Attendance at Chambers.] Besides their attendance in court, according to a rotary arrangement made among themselves, one at least of the judges belonging to each of the three superior courts of common law attends regularly every day at the judge's chambers, Rolls' Garden, Chancery-lane. The same judge usually attends during a week, and at the expiration of that period he is relieved by one of his learned brethren; but this regulation, indeed every part of the arrangement, so far as regards personal attendance, is necessarily subject to variation, and is, in fact, frequently departed from, upon considerations of public convenience, and with reference to the number and urgency of other claims on the time of the judge. During the periods when the judges are on circuit, the one who remains in town transacts the greater portion of the chamber business for several successive weeks, being occasionally assisted by the two judges who travel the home circuit, and who sometimes avail themselves of the short intervals between the termination of the assizes at one county town, and the day appointed for opening the commission at another, to return to London for this purpose. The regular time of attendance at chambers is from ten to one o'clock in vacation, and from three to five in term time; but unless the judge's official duties peremptorily require his presence elsewhere, he usually remains until he has disposed of all the applications waiting, and in this way the sittings are frequently protracted until an advanced hour of the evening (*e*). The judge in attendance sits at his own private chamber, attended by his clerk, an officer to whom a great portion of the ministerial duties connected with the business transacted at chambers is necessarily intrusted, and who continues in attendance after the judge has withdrawn, for the despatch of those duties. When it becomes necessary to give in evidence a deposition sworn at a judge's chambers, a copy delivered out by the judge's clerk, and attested by his signature, is sufficient without examination with the original deposition (*f*). On some rare occasions, as matters of personal convenience, as in

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(*d*) *Ashworth* v. *Heathcote*, 6 Bing. 596; 4 Moo. & P. 306. See further *post*, Vol. II. Book IV. Part I. Chap. 34.

(*e*) See *Duncan* v. *Scott*, 1 Camp. 101; Peake's Evid. 36.

(*f*) *Duncan* v. *Scott*, 1 Camp. 101; Peake's Evid. 36.

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case of slight indisposition, but more frequently as matter of indulgence to parties granted under peculiar circumstances, the chamber business, or some portion of it, is transacted by the judge at his own private residence (*g*).

Power of Judges, and Course of Proceedings at Chambers.

The power of the judges and course of proceedings at these chambers will be noticed *post*, *Vol. II. Book IV. Part I. Chap.* 34 (*h*). It may be here, however, observed, that by the 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 4, "every judge of the said courts, to whatever court he may belong, shall be and is hereby accordingly authorized to sit in London and Middlesex, for the trial of issues arising in any of the said courts, and to transact such business at chambers or elsewhere, depending in any of the said courts (*i*), as relates to matters over which the said courts have a common jurisdiction (*k*), and as may, according to the course and practice of the court, be transacted by a single judge." And the 1 & 2 *V.* *c.* 45, *s.* 1, *ante*, 7, extends the jurisdiction of a judge of any of the superior courts of law at chambers to all business usually transacted out of court, though not business in which the courts have a common jurisdiction. Where a statute gives only the *court* a power to interfere, a judge at chambers cannot in general do so (*ante*, 8). And where a statute directs an application to be made to a judge at chambers the court cannot entertain the application in the first instance (*l*). It would seem that a judge at chambers has no power over a rule of the full court, unless by consent of the parties. On the other hand, the full court have a right to review the order or decision of a judge at chambers, unless by any statutory enactment or rule of court such order or decision is made conclusive (*m*).

(*g*) Bagley's Pract. 15, 16.

(*h*) The whole history of the power of a judge at chambers is reviewed in *R.* v. *Almon*, Wilmot's notes, 264.

(*i*) An affidavit sworn before a commissioner of C. P. in vacation was held to be "business depending in court," within this statute, so as to empower the lord chief baron at chambers to grant an order for the arrest of the defendant. (*Griffin* v. *Taylor*, 6 Dowl. 620; 6 Scott, 141, *S. C.*)

(*k*) See *Barnes* v. *Jackson*, 1 Bing. N. C. 545; 1 Hodges, 59; 3 Dowl. 404, *S. C.*; *Miller* v. *Miller*, 1 Hodges, 31; 3 Dowl. 409, *S. C.*

(*l*) See *per Coleridge*, J., *Harvey* v. *O'Meara*, 7 Dowl. 725.

(*m*) See *per Coleridge*, J., in *King* v. *Myers*, May 27, 1837, K. B.: and see further, Book IV. Part I. Chap. 34.

BOOK I.

PROCEEDINGS PREVIOUS AND SUBSEQUENT TO A TRIAL BY JURY ON THE MERITS.

◆

PART I.

Book
Part I.

MAIN PROCEEDINGS IN THE ACTION.

BEFORE commencing an action against a party, the practitioner should carefully ascertain whether there be a legal cause of action; and if there be, then who should be the plaintiff and who the defendant in the action.

The next step, whether it is intended to arrest the defendant or not, must, in all cases except that of proceeding against an insolvent under 1 *&* 2 *V. c.* 110, *s.* 85 (*a*), be the suing out of a ***writ of summons*** against the defendant, in order to compel an appearance. The form and requisites of this process and proceedings to compel an appearance where the defendant can be served with it, will be treated of in the First Chapter of this Part.

Where the defendant cannot be served with the writ of summons, the plaintiff, in order to compel an appearance, must proceed to sue out a *writ of distringas*. This writ, and the proceedings on it will be treated of in the Second Chapter.

On an appearance being entered either by the defendant, or by the plaintiff for him, under the above process, the plaintiff proceeds in the action by *declaring &c.*, which proceedings will form the subject of the Third and subsequent Chapters of this Part.

The mode of proceeding under 1 *&* 2 *V. c.* 110, in case it be intended to hold the defendant to bail during the course of the action, will be found in the Second Part of this book, to which it has been transferred in this edition, in consequence of 1 *&* 2 *V. c.* 110, since which act bailable proceedings are altogether collateral to the main proceedings in the action.

(*a*) See *Turnor* v. *Darnell*, 7 Dowl. 346.

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Part I.

CHAPTER I.

PROCEEDINGS TO COMPEL APPEARANCE BY WRIT OF SUMMONS, WHERE THE DEFENDANT CAN BE SERVED WITH IT.

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Writ of summons the commencement of personal actions.

EXCEPT in replevin and other actions removed from inferior courts, and cases under the 85th section of 1 & 2 *V. c.* 110 (*a*), the writ of summons is now the only process by which a personal action can be commenced in any of the superior courts of law (*b*). Even in cases where it is intended to hold the defendant to bail, under the third section of 1 & 2 *V. c.* 110, the writ of summons should, it seems (*c*), be sued out in the first instance before making the application for an order to arrest; but a defendant in custody, under an arrest in pursuance of such order, if not previously served with a copy of such writ of summons, may be lawfully served therewith (*d*). The act 1 & 2 *V. c.* 110, for the abolition of imprisonment for debt &c., has made no change in the form or mode of proceeding under the writ of summons.

May be issued against any person.

The writ may be issued by or against *any* person; and this whether the action be brought against any person entitled to the privilege of peerage or of parliament, or of the court wherein such action shall be brought, or of any other court, or to any other privilege, or by or against any other person (*e*). However, an attorney is still entitled to his privilege of being sued in the court of which he is an attorney, and the writ of summons must therefore, unless the attorney has otherwise lost such privilege, be in that court, or he may plead in abatement to the declaration (*f*).

Form of the writ.

Form of the Writ.] The statute 2 *W.* 4, *c.* 39, *s.* 1, prescribes the form of this writ of *summons;* and by sect. 16 enacts, that all such proceedings as are mentioned in the writ may be taken in default of defendant's appearance. The following is the form:

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to C. D., *of* ——, *in the county of* ——, *greeting. We command you* [or "*as before,*" or "*often we have commanded you*"] *that within eight days after the service of this writ on you, inclusive of the day*

(*a*) *Turnor* v. *Darnell*, 7 Dowl. 346.

(*b*) 1 & 2 V. c. 110, ss. 1 & 2.

(*c*) This has been the constant practice, and it was so noticed by *Alderson*, B., in *Turnor* v. *Darnell*, *supra*. But in *Holborn* v. *Tucker*, at chambers, 4 Sept. 1839, *Maule*, B., intimated that the point had undergone reconsideration.

(*d*) 1 & 2 V. c. 110, s. 5.

(*e*) 2 W. 4, c. 39, s. 1.

(*f*) See *post*, Vol. II. Book III. Part II. Ch. 3, s. 2.

of such service, you do cause an appearance to be entered for you in our Court of Queen's Bench, [or, "*Common Pleas*," or, "*Exchequer of Pleas*"], *in an action on promises*, [or *of debt*, &c., as the case may be], *at the suit of* A. B. *And take notice, that, in default of your so doing, the said* A. B. *may cause an appearance to be entered for you, and proceed therein to judgment and execution. Witness* [name of the chief justice, or, in the Exchequer, the name of the chief baron], *at Westminster, the —— day of* [day of issuing the writ], *in the —— year of our reign*, [or, "*in the year of our Lord* ——"].

The following memorandum must be subscribed on the writ:

"N.B. *This writ is to be served within four calendar months from the date thereof, including the day of such date, and not afterwards.*"

The same statute also prescribes certain *indorsements* to be made on the writ; but as there are other requisite indorsements, and as they form no part of the writ itself, they will be noticed more conveniently hereafter.

Form of, given by 2 W. 4, c. 39, must be adopted.

The statute of 2 *W.* 4, *imperatively* requires that this form should be adopted (*g*), and any material variation from it would not only render it *irregular*, but in some cases absolutely *void*. Where the plaintiff's name was not stated in the writ as the person who would enter an appearance for the defendant if he did not comply with the exigency of the writ, the court set it aside for irregularity (*h*). But where, in an action against several defendants, the writ stated, that, in default of their entering an appearance themselves, the plaintiff "may cause an appearance to be entered for *you*," without adding the words "and *each* of you," it was held by *Patteson*, J., that the words "for *you*" must be taken distributively as applying to each of the defendants, and, therefore, that the notice was sufficient (*i*). Where the name of the chief clerk was omitted in the writ, *Taunton*, J., refused to set it aside for irregularity, it not being required by the form prescribed by the act (*j*).

We shall proceed to notice the particular parts and requisites of this writ of summons, together with the memorandum and indorsements to be made thereon;—the mode of suing it out,—how it is to be continued by subsequent writs,—and the consequences of any defects therein.

Direction of, and parties' names and residence, &c.

Direction of, and Parties' Names and Residence, &c.] It will be observed, that the writ must be directed to the defendant himself, and not to any sheriff or officer.

Defendant's name in.

It is proper that the writ should in general set forth the true christian and surname of the *defendant* in full. But in all actions upon bills of exchange or promissory notes, or other written instruments, any of the parties to which are designated by the initial letter or letters, or some contraction of the christian or first name or names, it shall be sufficient to designate such persons by the same initial letter or letters, or contraction of the christian or first name or names, instead of stating the christian or first name or names in full (*k*). And, indepen-

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(*g*) *Smith* v. *Crump*, 1 Dowl. 519: and see *Davies* v. *Porter*, 2 Id. 538: *Richards* v. *Stuart*, 10 Bing. 319; 3 M. & Scott, 774. *S. C.*

(*h*) *Smith* v. *Crump*, 1 Dowl. 519.

(*i*) *Engleheart* v. *Eyre*, 2 Dowl. 145.

(*j*) *Wilson* v. *Joy*, 2 Dowl. 182.

(*k*) See 3 & 4 W. 4, c. 42, s. 12. The rule, H. T. 2 W. 4, r. 32, is not applicable to serviceable process.

Statement of defendant's name.

dently of this, it seems, that in mere serviceable process, although the defendant be designated therein by a wrong christian or surname, or by no christian name, or by initials, that will not be a ground for setting it aside (*l*). And, since the 3 & 4 *W.* 4, c. 42, s. 11, it seems that no material advantage whatever can be taken of the misnomer; for, although formerly the defendant might have pleaded the misnomer in abatement if the mistake was carried into the declaration (*m*), yet now by that statute "no plea in abatement for a misnomer shall be allowed in any personal action, but that, in all cases in which a misnomer would but for this act have been by law pleadable in abatement in such actions, the defendant shall be at liberty *to cause the declaration to be amended* (*n*), at the costs of the plaintiff, by inserting the right name, upon a judge's summons, founded on an affidavit of the right name; and, in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the judge shall think fit" (*o*). Even where in an action not on a written instrument, the defendant is described in the writ and declaration by his initials, the only remedy is by summons to amend under this act, and the court will not set aside the proceedings for irregularity (*p*). This application should, it seems, be made within the time allowed for pleading in abatement, and if the time expire in vacation, it should be made to a judge in chambers (*q*).

If the defendant appear by his wrong name, the plaintiff may declare against him by that name; or, if he appear by his right name, the plaintiff may declare against him thereby, stating in his declaration that he was sued by the wrong name (*r*). If the defendant do not appear, the plaintiff cannot appear for him in his right name, according to the statute (*s*); nor can he appear for him in the name by which he is sued, and afterwards declare against him in his right name (*t*). His only course would in such case be to appear for the defendant in the wrong name, and declare against him by that name, which would only subject him to being compelled by the judge's order above mentioned to amend the declaration by inserting the right name, at his costs (*u*); or, if the plaintiff discover the real name before the defendant has appeared to the

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(*l*) *Sargant* v. *Gordon*, 7 D. & R. 258: *Rolph* v. *Peckham*, 6 B. & C. 164; 9 D. & R. 214, S. C.: *Sumner* v. *Batson*, 11 Moore, 39; but *quære* whether, since the rule of M. T. 3 W. 4, r. 10, the total *omission* of the christian name would not be a ground for setting the writ aside

(*m*) *Morley* v. *Law*, 2 B. & B. 34; 4 Moore, 369, S. C.: *Clerk of Taunton Market* v. *Kimberley*, 2 Bl. Rep. 1120; and see *Gardner* v. *Walker*, 3 Anst. 935: *Jewett* v. *Charnock*, 6 M. & Sel. 45.

(*n*) The declaration, therefore, cannot be set aside as *irregular*; and the court refused to set it aside, even where the plaintiff declared by an initial for his christian name. (*Lindsay* v. *Wells*, 3 Bing. N. C. 777).

(*o*) The act, it seems, applies to *plaintiffs* as well as defendants. (See *Lindsay* v. *Wells*, 3 Bing. N. C. 777). It was decided before this enactment, that though the plaintiff declare by a wrong christian name, it is no ground of nonsuit at the trial, if it be shewn that the defendant knew that the action was brought by the person who actually sues. (*Boughton* v. *Frere*, 3 Camp. 29).

(*p*) *Rust* v. *Kennedy*, 4 M. & W. 586; 7 Dowl. 190, S. C.

(*q*) *Hinton* v. *Stevens*, 1 H. & W. 521.

(*r*) See *Doe* v. *Butcher*, 3 T. R. 611: *Hole* v. *Finch*, 2 Wils. 393: *R.* v. *Roper*, 6 M. & Sel. 327, 339.

(*s*) *Doe* v. *Butcher*, 3 T. R. 611: *Greenslade* v. *Rotheroe*, 2 N. R. 132: *Dring* v. *Dickenson*, 11 East, 225.

(*t*) *Dring* v. *Dickenson*, 11 East, 225: *Downey* v. *Cannon*, 10 East, 328: *Mestaer* v. *Hertz*, 3 M. & Sel. 45.

(*u*) See *Smith* v. *Patten*, 6 Taunt. 115; 1 Marsh. 474, S. C.: *Reeves* v. *Slater*, 7 B. & C. 486; 1 M. & R. 265, S. C.: *Oakley* v. *Giles*, 3 East, 167: *Cole* v. *Hindson*, 6 T. R. 234, 236: *Crawford* v. *Satchwell*, 2 Stra. 1218.

writ served, he might give the defendant notice not to appear, and serve him with a fresh writ in the right name.

Name of dignity.

If the defendant has a name of dignity, as duke, earl, &c., he should be described by that name accordingly; but it is unnecessary to describe a peer as having privilege of peerage, or a member of parliament as having privilege of parliament (*x*). Describing an earl as B. S., "commonly called" the earl of S., would be bad (*y*).

Defendant's residence.

The place and county of the *residence*, or supposed residence, of the *defendant*, or wherein the defendant is, or is supposed to be, must be mentioned in the writ and copy. This is imperatively required by the 2 *W.* 4, *c.* 39, *s.* 1, and if not mentioned, or it be improperly mentioned, it would afford a ground for setting aside the writ (*z*), or the service of the copy, if the application for that purpose were made to the court, or a judge in vacation, within the eight days limited for the defendant's appearance; but the writ itself would not be void (*z*). It is to be observed, that the insertion of the *supposed* residence will suffice; and the court, or a judge, on such application, would not try a disputed question of residence, if the plaintiff had reasonable grounds for supposing that the residence mentioned in the writ was the correct one (*a*). The object of inserting this residence is for the purpose of having the copy of the writ served in the proper county (*b*). It is not necessary that the number of the defendant's house, or the parish, should be stated; describing defendant as of "Tufton-street, in the county of Middlesex," is sufficient (*c*). Where the defendant was described as residing in Yorkshire, whereas he really resided at Kingston-on-Hull, and an application was made to set aside the writ on that ground, and, on shewing cause, it appeared that the defendant resided at a house within twenty yards of the boundary line of Yorkshire, in a street which, though having a different name from that in which the defendant lived, was a continuation of it; *Littledale*, J., held, that as the act says, "supposed to be," the description was sufficient, and discharged the rule with costs (*d*). So, where the defendant was described as of Newcastle-upon-Tyne, in the county of Northumberland, although Newcastle-upon-Tyne is a town and county of itself, yet, as the parliamentary borough of Newcastle-upon-Tyne includes some townships in the county of Northumberland, and the defendant did not shew that he did not reside in that part of the borough which is not in the county of Northumberland, the writ was held to be good (*e*). Where the defendant's place of abode could not be discovered at the time of issuing the writ of summons, it was held enough to describe her as of her last known place of abode (*f*). Where a corporation, or the like, is the defendant, a description as of the place where its functions are exercised would, it seems, be sufficient.

(*x*) *Cantwell* v. *Earl Stirling*, 1 M. & Scott, 297; 8 Bing. 174, *S. C*

(*y*) MSS. C. P. 9th Nov. 1836.

(*z*) R. M. 3 W. 4, r. 10.

(*a*) *Jelks* v. *Fry*, 3 Dowl. 37.

(*b*) See *Welch* v. *Langford*, 2 Dowl. 498: *Baffle* v. *Jackson*, Id. 505: *Jelks* v. *Fry*, 3 Dowl. 37: *Lewis* v. *Newton*, 2 C. M. & R. 732; 4 Dowl. 355, *S. C.*

(*c*) *Cooper* v. *Wheal*, 4 Dowl. 281; 1 H. & W. 525, *S. C.*

(*d*) *Jelks* v. *Fry*, 3 Dowl. 37: see *Lewis* v. *Newton*, 2 C. M. & R. 732; 4 Dowl. 355, *S. C.*

(*e*) *Rippon* v. *Dawson*, 5 Bing. N. C. 206; 7 Dowl. 247, *S. C.*

(*f*) *Norman* v. *Winter*, 5 Bing. N. C. 279; 7 Dowl. 304, *S. C.*

Plaintiff's name.

A misnomer of the *plaintiff* in the writ incurs, it seems, the same trifling consequences as the misnomer of the defendant above noticed (*g*). At all events, it is no ground of nonsuit at the trial, if it be shewn that the defendant knew that the action was brought by the person who actually sues (*h*). Where a plaintiff, after issue joined, applied to amend the proceedings, a mistake having been made in his christian name, both in the writ and declaration, the court refused the application, as the defendant could not then make any objection to it (*i*).

Character in which parties sue and are sued.

It is not necessary, in any case, whether or not the plaintiff be suing or the defendant be sued, *in autre droit*, (as executor, administrator, assignee, or the like), to describe him as such in the writ of summons (*k*), nor need a plaintiff who sues *qui tam* so describe himself (*l*). It may be advisable, however, in an action against an executor or administrator, so to describe him, in order to shew and give him notice that the action is against him in that character, and render him liable for a *devastavit* (*m*). It should seem that if the party be called in the writ executor or assignee, no attention need be paid to it in declaring, unless he is described in the writ as suing or being sued "*as*" executor or "*as*" assignee, &c. (*n*).

Addition.

The *addition* either of the plaintiff or defendant (*o*) need not be inserted in the writ.

Number of parties.

Number of Parties.] The names of all the plaintiffs should be inserted in the writ, and no more. Formerly, in nonbailable actions, the plaintiff was allowed to join *four* defendants for separate causes of action in one writ, and to declare against them severally (*p*); but now, by *R. M.* 3 *W.* 4, *r.* 1, the writ must contain the names of all the defendants, if more than one in the action, and must not contain the names of any defendant in more actions than one. If the writ be at the suit of one plaintiff only, and the declaration at the suit of two, or *vice versâ*, the court, or a judge, will set aside the declaration for irregularity, if the application be made before the usual time for pleading has expired; and so, if the writ be against one defendant, and the declaration against two, or if the writ be against two defendants, and a separate declaration against each (*q*). But if the writ be against two defendants, and the declaration against one, that would not be irregular, if the plaintiff entirely dropped his proceedings against the other (*r*); and especially if the action were for a tort (*s*). If there be

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(*g*) See *Lindsay* v. *Wells*, 3 Bing. N. C. 177: *Morley* v. *Law*, 2 B. & B. 34; 4 Moore, 369, *S. C.*: *ante*, 104.

(*h*) *Boughton* v. *Frere*, 3 Camp. 29: and see *Moody* v. *Aslatt*, 1 C. M. & R. 771; 5 Tyr. 492; 3 Dowl. 486, *S. C.*

(*i*) *Moody* v. *Aslatt*, 3 Dowl. 486.

(*k*) *Ashworth* v. *Ryal*, 1 B. & Ad. 19: *Ilsley* v. *Ilsley*, 2 C. & J. 330; 2 Tyr. 214, *S. C.*: *Knowles* v. *Johnson*, 2 Dowl. 653: *Watson* v. *Pilling*, 6 Moore, 66; 3 B. & B. 4, *S. C.*

(*l*) *Weaver's Company* v. *Forrest*, 2 Stra. 1232: *Lloyd* v. *Williams*, 2 Bl. Rep. 722; 3 Wils. 141, *S. C.* But if he do, he must declare as such. (*Delves* v. *Strange*, 6 T. R. 158).

(*m*) See *Rees* v. *Morgan*, 3 N. & M. 205; 5 B. & Ad. 1035, *S. C.*

(*n*) *Supra*, n. (*k*): *Douglas* v. *Irlam*, 8 T. R. 16: *Hally* v. *Tipping*, 3 Wils. 61. See *Atwood* v. *Rattenbury*, 5 Moore, 209.

(*o*) *Morris* v. *Smith*, 1 Gale, 103; 3 Dowl. 698; 2 C. M. & R. 120; 5 Tyr. 523, *S. C.*

(*p*) *Anon.* Com. R. 74: *Holland* v. *Johnson*, 4 T. R. 695.

(*q*) *Pepper* v. *Whalley*, 1 Bing. N. C. 71; 2 Dowl. 821, *S. C.*: and see *Carson* v. *Dowling*, 4 Dowl. 297; 1 H. & W. 507, *S. C.*

(*r*) See *Caldwell* v. *Blake*, 3 Dowl. 456; 2 C. M. & R. 249; 5 Tyr. 618, *S. C.*: *Evans* v. *Whitehead*, 2 M. & R. 367: *Bowles* v. *Bilton*, 2 C. & J. 474: *Knowles* v. *Johnson*, 2 Dowl. 653: and see the former rule of E. T. 8 G. 4.

(*s*) See *Wilson* v. *Edwards*, 3 B. & C. 734; 5 D. & R. 622, *S. C.*

several defendants and several writs, all the defendants should be named in each.

Form of action must be stated.

Form of Action.] It will be seen that the form of the writ of summons as prescribed by the act requires the form of action to be concisely stated in it, giving as an example the actions on promises and debt, and requiring the description therein to be "an action on promises," or "an action of debt." In following such example, it would be proper in other actions to describe them accordingly, as an action "of covenant," "of detinue," "on the case," or "of trespass," as the case may be. Describing the action of *assumpsit* as an action of "trespass on the case," or of "*trespass on the case* upon promises," would be bad, and the writ might be set aside as irregular (*t*). So, where the description was "an action on the case promises," the writ was set aside (*u*). But where the description was "action promises," omitting the word "on," *Littledale*, J., held, that the omission, being a mere clerical error, did not interfere with the validity of the writ (*x*). And where the writ was in "trespass on the case," and had no indorsement of the sum demanded, and the particulars of demand which had been delivered shewed a claim for wages, the court refused to set aside the writ for irregularity, the plaintiff not having declared (*y*). Describing an action for a libel as an action of "libel" (*z*), or an action for slander as an action of "slander" (*a*), would do. But in such and the like cases, to avoid all question, as a general rule, the action had better be described as "on the case."

Omission of, irregular.

If the form of action be improperly described or wholly omitted in the writ, the court, or a judge, would set it aside, if the application be made in due time (*b*). An improper description or omission only in the *copy* which has been served is a ground for setting aside the service, but not the writ itself (*c*).

Variance in declaration from form stated in writ.

If the form of action be stated in the writ, and the plaintiff declares in any other form of action materially differing from it; thus, if the writ be in an action on promises and the declaration in debt, or if the writ be an action on the case and the declaration upon promises, or the like, the court, or a judge, would set aside the declaration if the application were made before the time limited for the defendant's pleading is expired (*d*), upon the ground that there is no process to warrant it. But where the action is stated in the writ to be "on the case," the declaration may be in trover (*e*), or, it would seem, any other species of action on the case. Where the writ was "in a special action," and the declaration was on promises, the court refused to set aside the declaration, saying, that the irregularity was not in the declaration, but in the writ (*f*).

(*t*) *Richards* v. *Stewart*, 3 M. & Scott, 774; 10 Bing. 319; 2 Dowl. 752, *S. C.*: *King* v. *Skeffington*, 1 C. & M. 363; 1 Dowl. 686; 3 Tyr. 318, *S. C.*: and see *Ward* v. *Tummon*, 1 Ad. & El. 619; 4 N. & M. 876, *S. C.*

(*u*) *Youlton* v. *Hall*, 7 Dowl. 186; 4 M. & W. 582, *S. C.*

(*x*) *Cooper* v. *Wheale*, 4 Dowl. 281.

(*y*) *Davies* v. *Jones*, 1 C. M. & R. 582; 3 Dowl. 164, *S. C.*: and see *Caldwell* v. *Blake*, 3 Dowl. 656.

(*z*) *Pell* v. *Jackson*, 2 Dowl. 445.

(*a*) *Davies* v. *Parker*, 2 Dowl. 573.

(*b*) See R. M. 3 W. 4, r. 10.

(*c*) *Chalkley* v. *Carter*, 4 Dowl. 480; 1 T. & G. 210, *S. C.*

(*d*) *King* v. *Skeffington*, 1 C. & M. 363; 1 Dowl. 686, *S. C.*: and several other cases, not reported, have settled this. *Quære*, if the court would, in such case, set aside the *writ*. (See *Davies* v. *Jones*, 1. C. M. & R. 582; 5 Tyr. 182; 3 Dowl. 164, *S. C.*: *Caldwell* v. *Blake*, 3 Dowl. 656; 2 C. M. & R. 249, *S. C.*: *Edwards* v. *Dignam*, 2 Dowl. 240). *Semble*, not.

(*e*) *Bate* v. *Bolton*, 4 Dowl. 160.

(*f*) *Moore* v. *Archer*, 4 Dowl. 114.

Return of, and time for appearance on.

Return of, and Time for Appearance on.] Formerly, all writs for the commencement of personal actions must have been made returnable in *term* time. Now, however, it will be seen that the writ of summons does not specify any particular return day, and the return day is now considered the day of the service of the writ on him. The defendant must, within eight days after that service inclusive of the day of such service, enter an appearance, (as pointed out *post*, 121), on whatever day the last of such eight days may happen to fall, whether in term or vacation. If, however, the last of such eight days fall on a Sunday, Christmas-day (*g*), or any day appointed for a public fast or thanksgiving, in either of such cases the following day is to be considered as the last of such eight days: and if the last of such eight days fall on any day between the Thursday before and the Wednesday after Easter-day, then the Wednesday after Easter-day is to be considered as the last of such eight days; and if the writ be executed on any day between the 10th of August and the 24th of October, an appearance may be entered by the defendant at the expiration of such eight days, but no declaration or pleading after declaration can be filed or delivered between the said 10th of August and 24th of October (*h*).

It will be seen *post*, 109, that the writ is in force only, and cannot be executed after four calendar months from the day of its date, including such day.

The writ should require the defendant to enter an appearance "in our Court of Queen's Bench," or "Common Pleas," or "Exchequer of Pleas," as in the form prescribed, *ante*, 102 (*i*). If, however, it required him to enter it "in our court before us," or otherwise shewed what court was meant, it would not, perhaps, be defective on that account (*k*).

Date of summons.

Date and Teste.] The process before the Uniformity of Process Act, 2 *W.* 4, *c.* 39, must always have been tested on some day in term, not being Sunday (*l*). If sued out in vacation, it must have been tested as of the previous term, (usually the last day of it), or it would have been void (*m*). Now, however, by sect. 12 of that act, "every writ issued by authority of this act shall bear *date* on the day on which the same shall be issued," and this whether in term or vacation. If not dated at all, or if dated on a day different from the day on which it was issued, it would be irregular (*n*), and might be set aside by the court, or a judge, if the application were made in due time (*o*). The omission or mistake would not be cured by any indorsement on the writ (*p*). If tested on a Sunday, it would be void (*q*). If by

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(*g*) See *Wheeler* v. *Green*, 7 Dowl. 194.

(*h*) See 2 W. 4, c. 39, s. 11.

(*i*) See *Mayhew* v. *Hoadley*, 6 Dowl. 629.

(*k*) See Tidd, 9th ed. 150.

(*l*) *Hart* v. *Weston*, 5 Burr. 2586; 2 Bla. Rep. 683, *S. C.* An original writ may now, as formerly, bear *teste* either in term or vacation; (Style, 402); but it must not bear *teste* before the cause of action has accrued. (2 Bur. 967). It must be tested in the Queen's name, at Westminster, or wherever the Chancery is holden. (3 Bla. Com. 274). Original writs, however, since the 2 W. 4, c. 33, are no longer the means of commencing *personal* actions. (See *post*, Vol. II. as to the proceedings in *Ejectment* and *Replevin*).

(*m*) See *Young* v. *Wilson*, 5 Taunt. 664: *Johnson* v. *Smith*, 2 Bur. 964.

(*n*) See R. M. 3 W. 4, r. 10.

(*o*) As to which, see *post*, 118; and further *post*, Vol. II. Book IV. Part I. Ch. 17.

(*p*) *Anon.* 1 Dowl. 654: and see *Miller* v. *Rowden*, 1 Price, N. R. 104; 1 C. & J. 563: 2 Tyr. 112, *S. C.*

(*q*) *Howson* v. *Shackleton*, 4 Dowl. 48; 1 H. & W. 342, *S. C.*

mistake a wrong King's name be inserted in the commencement of the writ, it is fatal; and this although the name of the chief justice or chief baron of the court be inserted (*r*). It seems immaterial whether the day and year be stated in words at length or in figures (*s*).

Not to be issued till cause of action complete.

The writ must not be issued until there is a complete cause of action, otherwise there would be a good defence to the action (*t*); or in a clear, undisputed case, the court would set aside the proceedings (*u*).

Teste of.

The writ of summons and *alias*, &c., shall be *tested* in the name of the lord chief justice, or lord chief baron, of the court from which the same shall issue; or in case of a vacancy of such office, then in the name of a *senior puisne* judge of the said court (*x*). If not so, it would be irregular, and might be set aside accordingly, upon an application made in due time (*y*).

Duration of the writ.

Duration of the Writ.] The writ remains in force only, and cannot be executed after, four calendar months from the date of it, including the day of such date; but if it be not served within that time it may be continued by an *alias*, and, if necessary, by a *pluries* writ, as hereafter mentioned. Though there be not eight days remaining of the four months when the writ is served, the eight days to enter an appearance must be still reckoned, as in other cases (*z*).

Memorandum to be subscribed.

Memorandum to be subscribed.] This writ of summons, and also an *alias* or *pluries* writ, must have the formal memorandum, noticed *ante*, 103, subscribed to it, otherwise the total omission thereof might, perhaps, render the writ void, or any material variance therefrom would render the writ and proceedings thereon irregular (*a*); and the same might be set aside accordingly.

Indorsements on.

Indorsements on.] The writ must be indorsed with several *memoranda*, or notices.

Of name and place of abode of attorney or plaintiff.

1. It must be indorsed with the *name and place of abode of the attorney* actually suing out the same; and if such attorney be not an attorney of the court in which the writ is sued out, then also with the name and place of abode of the attorney of such court in whose name the writ is taken out (*b*); but if *no* attorney be employed for that purpose, then with a memorandum expressing that the same has been sued out by the *plaintiff in person*, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's residence, if any such there be (*c*). Also, if the attorney suing out the writ sues out the same as agent for an attorney in the country, the name and

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(*r*) *Drury* v. *Davenport*, 6 Dowl. 162: see *Elvin* v. *Drummond*, 4 Bing. 278; 12 Moore, 523, *S. C.* But that case was decided upon process issued before the Uniformity of Process Act.

(*s*) See *Butler* v. *Cohen*, 4 M. & Sel. 335: *Eyre* v. *Walsh*, 6 Taunt. 333: *sed vide Grojan* v. *Lee*, 5 Taunt. 651.

(*t*) *Alston* v. *Underhill*, 1 C. & M. 492; 1 Dowl. 26, *S. C.*: *Thompson* v. *Dicas*, 2 Id. 93: 1 C. & M. 768, *S. C.*

(*u*) *Lamb* v. *Pegg*, 1 Dowl. 447: *Kerr* v. *Dick*, 2 Chit. Rep. 11.

(*x*) See 2 W. 4, c. 39, s. 12.

(*y*) R. M. 3 W. 4, r. 10, *post*, 118.

(*z*) 2 W. 4, c. 39, s. 10.

(*a*) R. M. 3 W. 4, r. 10.

(*b*) The enactment applies to serviceable as well as bailable process. (*Gibson* v. *Carr*, 4 Dowl. 618). If this be not complied with, the court will only order the proceedings to be stayed until a proper attorney be appointed: though they will make the attorney whose name is indorsed pay the costs of the application. (*Constable* v. *Johnson*, 1 C. & M. 88).

(*c*) 2 W. 4, c. 39, s. 12.

Indorsement on summons of name and place of abode.

place of abode of such attorney in the country must be indorsed on the writ (*d*). We have seen (*ante*, 51), that the attorney whose name is indorsed on the writ must, after a demand in writing made on him, declare whether the writ was sued out by his authority, and also declare the name and place of the abode of his client, if ordered; for an omission of this indorsement, or any deceptive description therein, the court in term, or a judge in vacation, will set aside the proceedings for irregularity (*e*), if the application be made in due time. But the omission would not render the writ void (*f*). The form of this indorsement, as required by the schedule to the 2 *W.* 4, *c.* 39, should be as follows:—" *This writ was issued by E. F., of* ——, [if sued out as agent for an attorney in the country, here say, '*as agent for G. H., of* —— ——'], *attorney for the said A. B.* [the plaintiff]. Or, if sued out by the plaintiff in person—'*This writ was issued in person by the plaintiff within named, who resides at*——,' [mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be"]. If the attorney be one of a firm, it is best to indorse the name of the firm. Where the writ was indorsed, " Milne & Co., agents for S.," without specifying the christian name, it was held sufficient (*g*). So, where it was indorsed in the name of the plaintiff's attornies, although some of them, whose names were given, had quitted the business (*h*). The statute, it will be observed on reference, does not require the city to be mentioned, where the writ is sued out by an attorney; but where the writ is issued by the plaintiff in person, the form directs mention to be made of the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence. It is quite enough, with regard to an attorney, if such a description be given as can mislead nobody (*i*). A description of the attorney's abode, as of " Ely Place," is sufficient (*k*); so is a description " Gray's Inn, London" (*l*), or " Gray's Inn Square, London" (*m*); or No. 10, Gray's Inn Square, Holborn (*n*); but it seems " Southampton Buildings" is not (*o*). Where the indorsement on the writ was "Old Jewry, London," but in the copy " London" was omitted, it was held bad (*p*). Where the indorsement was thus, " This writ was issued by W. L., of No. 32, Great James Street, Bedford Row, *agent* for the plaintiff in *person*, who resides at Barmouth," it was held insufficient (*q*). Where the plaintiff sued in *person*, and the indorsement was thus: " This writ was issued by C. L., *of* No. 6, B. Street, Brunswick Square, the plaintiff within named in person," the Court of Exchequer seemed to consider it insufficient, as it ought to have stated

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(*d*) R. M. 3 W. 4, r. 9.

(*e*) R. M. 3 W. 4, r. 10, *post*, 118: and see 2 G. 2, c. 23, s. 22: *La Grue* v. *Penny*, 2 H. Bla. 600: *Chapman* v. *Ryall*, Barnes, 415: *Oppenhein* v. *Harrison*, 1 Burr. 20: *Williams* v. *Lewis*, 1 Chit. Rep. 611. See form of demand, Chit. Forms, 17.

(*f*) R. M. 3 W. 4, r. 10: *post*, 118.

(*g*) *Pickman* v. *Collis*, 3 Dowl. 429; 1 Gale, 47, *S. C*: *Dawes* v. *Salomonson*, C. P. T. 1838; 2 Jurist, 519.

(*h*) *Hartley* v. *Rodenhurst*, 4 Dowl. 748.

(*i*) See *per* Parke, B., 7 Dowl. 176.

(*k*) *Engleheart* v. *Edwards*, 6 Leg. Obs. 138.

(*l*) *Engleheart* v. *Eyre*, 2 Dowl. 145; *Jelks* v. *Fry*, 3 Id. 37: *Jelks* v. *Fry*, 3 Dowl. 37.

(*m*) *King* v. *Monkhouse*, 2 Dowl. 221; 2 C. & M. 314, *S. C.*: and see *Arden* v. *Jones*, 4 Dowl. 120.

(*n*) *Youlton* v. *Hall*, 7 Dowl. 175.

(*o*) *Rust* v. *Chine*, 3 Dowl. 565.

(*p*) *Smith* v. *Pennell*, 2 Dowl, 654.

(*q*) *Lloyd* v. *Jones*, 1 M. & W. 549; 5 Dowl. 161, *S. C.*

that he *resided* at the place (*r*); but according to a more recent case, such a description would suffice (*s*). And where attornies, who were plaintiffs in person, described themselves as "R. & C. A., who reside at No. 1, Clifford's Inn Passage, Fleet Street, in the city of London," without mention of the parish, it was held sufficient (*t*). Where the indorsement was, "This writ was issued by E. F., of &c., attorney for the said *plaintiff*," instead of "for the said A. B.," as in the form given by the statute, it was held sufficient (*u*).

2. Indorsement of debt and costs on.

2. By *R. H.* 2 *W.* 4, *r.* 11, it is ordered, "That, upon every bailable writ and warrant (*x*), and upon the copy of any process served for the payment of any debt, *the amount of the debt shall be stated*, and the amount of what the plaintiff's attorney claims for the *costs* of such writ or process, arrest, or copy and service and attendance to receive debt and costs; and that upon payment thereof, within four days, to the plaintiff or his attorney, further proceedings will be stayed. But the defendant shall be at liberty, notwithstanding such payment, to have the costs taxed; and, if more than one-sixth shall be disallowed, the plaintiff's attorney shall pay the costs of taxation" (*y*). And by *R. M.* 3 *W.* 4, *r.* 5, it is ordered, "That that rule shall be applicable to all writs of *summons*, *distringas*, *capias*, and *detainer*, issued under the authority of the said act (*z*), and to the copy of every such writ." This indorsement must be in the following form:—"*The plaintiff claims £—— for debt and £—— for costs; and if the amount thereof be paid to the plaintiff or his attorney within four days from the service hereof, further proceedings will be stayed*" (*a*). The amount indorsed should not be more than is really due; at least it should not be such a sum as would mislead the defendant, and prevent him from settling the action; if it were, the proceedings might be stayed on payment of the real debt, with the costs of the writ only, provided the application be made promptly (*b*). In addition to the debt, the plaintiff may insert in the indorsement a claim for interest, if he names in it a day from which it is to be calculated (*c*). If the plaintiff claims *damages* besides the debt, the case is not within the above rule, and no indorsement need be made (*d*). It is not necessary to make it in an action on a bail-bond, or replevin-bond (*e*); or in an action for penalties under the Municipal Corporation Act (*f*). The rule applies to process issued against attornies, as well as against other persons (*g*).

(*r*) *Lewis* v. *Davison*, 3 Dowl. 272; 1 C. M. & R. 655, *S. C.*

(*s*) *Yardley* v. *Jones*, 4 Dowl. 45; 1 H. & W. 332, *S. C.*

(*t*) *Arden* v. *Jones*, 4 Dowl. 120.

(*u*) *Hennah* v. *Wyman*, 1 Gale, 105; 2 C. M. & R. 239; 3 Dowl. 673, *S. C.* The indorsement in the schedule of the 2 W. 4, c. 39, is only an *example*. (*Per* Parke, B. Id.)

(*x*) This rule appears to be inapplicable to the bailable capias given by 1 & 2 V. c. 110.

(*y*) A sum demanded by the attorney, and paid by the defendant, in addition to that indorsed on the writ, will not be reckoned in taxation, so as to entitle the defendant to costs. (*Ward* v. *Gregg*, 5 Dowl. 729).

(*z*) 2 W. 4, c. 39.

(*a*) *Jones* v. *Price*, 2 Dowl. 410.

(*b*) *Elliston* v. *Robinson*, 2 Dowl. 241; 2 C. & M. 343, *S. C.*

(*c*) *Capello* v. *Brown*, 3 Dowl. 166; 1 C. M. & R. 575, *S. C.*: *Rogers* v. *Godbold*, Id. 106: *Sealey* v. *Hearne*, Id. 196.

(*d*) *Perry* v. *Patchett*, 2 Dowl. 667; 1 C. M. & R. 87, *S. C.*

(*e*) *Smart* v. *Lovick*, 3 Dowl. 34: *Rowland* v. *Dakeyne*, 2 Dowl. 832: *Robinson* v. *Hawkins*, Bail Court, Q. B. M. T. 1837, *cor. Littledale*, J.

(*f*) *Davies* v. *Lloyd*, 6 Dowl. 173.

(*g*) *Tomkins* v. *Chilcote*, 2 Dowl. 187: and see *Lewellin* v. *Norton*, 4 B. & Ald. 368; 1 Dowl. 416, *S. C.*: *Long* v. *Wordsworth*, 4 B. & Ad. 367.

Indorsement of debt and costs on summons.

If this indorsement be not made, or be improperly made(*h*), although the writ will not be absolutely void, yet it will be irregular, and, unless amended, the court or a judge might set aside the writ (*i*). The court or a judge, however, may allow an amendment of a variance or mistake in it, upon the terms of the plaintiff's paying the costs of the application, and giving the defendant four more days' time to pay the debt and costs (*j*). The affidavit on motion to set aside process, for want of such an indorsement, should state that the action was for a debt (*k*).

Amendment of this indorsement.

Where a cause is proper to be tried before the sheriff, under the writ of trial act, but by mistake, a larger sum indorsed on the writ than the plaintiff claims, and than is allowed by the act, the court will allow the indorsement to be amended (*l*).

Stay of proceedings after the four days.

Where the defendant fails to pay the debt and costs within the time mentioned in the indorsement, he is not entitled to a stay of proceedings on payment of the sum so indorsed (*m*). But where the defendant, after the service of a writ of summons, paid the debt to the plaintiff's clerk, without costs, and the plaintiff's attorney, with a view to recover his costs, proceeded to deliver a declaration, the court ordered the proceedings to be stayed on payment of the costs of the writ of summons (*n*).

Indorsement of day of service of.

3. The person serving the writ must indorse on it the day of the week and month of the service thereof (*o*); and by *R. M.* 3 *W.* 4, *r.* 3, "the person serving a writ of summons shall, within three days at least after such service, indorse on such writ the day of the week and month of such service, otherwise the plaintiff shall not be at liberty to enter an appearance for the defendant according to the statute; and every affidavit upon which such an appearance shall be entered shall mention the day on which such indorsement was made" (*p*). The following is the form of such indorsement: "*This writ was served by me, X. Y., on C. D., on ——, the—— day of ——,* 1839. *X. Y.*"

When dispensed with.

Where the defendant had improperly got possession of the writ, the court allowed an appearance to be entered without this indorsement, and ordered the defendant to pay the costs (*q*).

How sued out.

How sued out.] In order to sue out the writ of summons, *prepare a præcipe for the office* (*r*); *also get a blank writ of summons,* (*which may be had at the stationer's, or elsewhere*), *and fill it up according to the directions pointed out in the preceding pages. Take them to one of the masters of the court out of which*

(*h*) An indorsement requiring the debt and costs to be paid within four days after "arrest or service," is sufficient, as the word "arrest" may be treated as surplusage. (*Sutton* v. *Burgess*, 1 C. M. & R. 770; 3 Dowl. 489, *S. C.*)

(*i*) *Ryley* v. *Boissomas*, 1 Dowl. 333: *Jones* v. *Price*, 2 Id. 410.

(*j*) See *Urquhart* v. *Dick*, 3 Dowl. 17: *Turner* v. *Gill*, Id. 30: *Shirley* v. *Jacobs*, Id. 101; 1 Scott, 67, *S. C.*: *Colls* v. *Morpeth*, Id. 23: *Cooper* v. *Waller*, 3 Dowl. 167: *Tabram* v. *Thomas*, Ib.

(*k*) *Curwin* v. *Moseley*, 1 Dowl. 432.

(*l*) *Edge* v. *Shaw*, 4 Dowl. 189; 2 C. M. & R. 415, *S. C.*: *Frodsham* v. *Round*, 4 Dowl. 569; 1 H. & W. 667, *S. C.*: but see *Trotter* v. *Bass*, 1 Scott, 403; 1 Bing. N. C. 516; 3 Dowl. 407, *S. C.*

(*m*) *Bowditch* v *Slaney*, 4 Dowl. 140; 2 Scott, 197: 2 Bing. N. C. 142, *S. C.*

(*n*) *Wyllie* v. *Phillips*, 3 Bing. N. C. 776.

(*o*) 2 W. 4, c. 39, s. 1.

(*p*) See form of affidavit, Chit. Forms, 16.

(*q*) *Brooke* v. *Edredge*, 2 Dowl. 647.

(*r*) The *præcipe*, or note of instructions, states the county, nature of the writ, names of the parties, and cause of action, concisely, with the name of the plaintiff's attorney, and date. See the form, Chit. Forms, 15.

the writ is to be issued, who will sign the writ (*s*); *leave the* præcipe *with him. Then take the writ to the seal office, and get it sealed. Indorse it with the indorsements directed* ante, 109, *excepting, of course, the indorsement of the day of service. Make a copy of it, together with these indorsements, for the purpose of serving such copy on the defendant. If there be two or more defendants, it may be requisite to have several writs* (*t*), *in order to enable the party or parties serving the same to swear to a service of a copy of the writ, if called upon so to do. In such case, let each writ correspond with the other. If the same person can serve all the defendants, then one writ will suffice. In either case make copies for service on each defendant. Serve the defendant as directed* infra, *and indorse on the writ the day of such service, as directed* supra. *If the defendant cannot be served within the four calendar months from the date of the writ, inclusive of such date, then you must sue out an* alias or pluries *writ of summons, as directed* post, 117; *or else, which would be most expedient, obtain a writ of* distringas, *as directed in the next Chapter.* The plaintiff may, if he chooses, issue at the same time concurrent writs, describing the defendant of different counties; and this is usual, if it is doubtful in which of those counties the defendant may be found. But he is liable only to the costs of the writ with a copy of which he is served (*u*).

Re-sealing.

If there be a mistake in the writ, it may, before the service thereof, be re-sealed, and the mistake cured (*x*). Where a writ of summons, tested in time to save the Statute of Limitations, was re-sealed in consequence of an alteration, and was not served until after the six years had expired, it was held, that the re-sealing did not amount to a re-issuing of the writ, and that it was not necessary to shew when the re-sealing took place (*y*).

Service of the Writ.

In what Place.

Service of the Writ.] The writ may be issued into any county in England or Wales. *But it must be served in the same manner as formerly adopted in the county in which the defendant is described in the writ as residing, or within* 200 *yards of the border of it, and not elsewhere* (*z*). Also places, parcel of one county and situate in another, may be deemed as part of each county, and the writ may be served accordingly (*a*). This does not, however, apply to a county of a borough or city (*b*).

If there be any dispute as to the boundaries of the county, the court will not determine the matter upon motion (*c*). Indeed, in the affidavit in support of a motion to set aside the service of process, on account of its being served in a wrong county, it must, it seems, be expressly stated, not only that the place where the writ was served is not within the county in which the defendant is described in the writ to

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(*s*) It seems, however, from the case of *Burt* v. *Jackson*, (2 Dowl. 747; 3 M. & Scott, 553, *S. C.*), that this signing is not necessary in the Court of Common Pleas; and, if the seal of that court be impressed upon it, that will suffice.

(*t*) This was held to be regular in *Angus* v. *Coppard*, Exch. 23 Nov. 1837, provided there is only one *præcipe;* but the defendants will be jointly liable only to the costs of one writ.

(*u*) *Dunn* v. *Harding*, 10 Bing. 553; 4 M. & Scott, 450; 2 Dowl. 803, *S. C.: Angus* v. *Coppard*, 3 M. & Wels. 57.

(*x*) See *Braithwaite* v. *Lord Montford*, 2 C. & M. 408, and MS., K. B., M. T. 1835.

(*y*) *Braithwaite* v. *Lord Montford*, 2 C. & M. 408.

(*z*) 2 W. 4, c. 39, s. 1.

(*a*) 2 W. 4, c. 39, s. 20.

(*b*) *Davis* v. *Sherlock*, 7 Dowl. 530.

(*c*) *Drew* v. *Marriott*, 1 Wils. 77: and see *Chace* v. *Joyce*, 4 M. & Sel. 412.

Service of Writ of Summons.

reside, but that it is not within 200 yards of the border thereof, or upon the confines of it (*d*), and that there is no dispute as to boundaries (*e*). But where a *latitat* was served in a wrong county, and it was sworn that the place of service was "full five miles from any part of the county" into which it issued, this was deemed a sufficient affidavit to set aside the service, without swearing as to the service not having been on the confines, or that there was no dispute as to the boundaries (*f*). It cannot, it seems, be served upon the defendant whilst attending the court upon any cause in which he is concerned (*g*); the principle of which decision might, perhaps, be extended to many of the other cases of temporary privilege from arrest, mentioned *post (Book I. Part II. Chap.* 1, *Sect.* 3*)*.

Privilege.

At what Time served.

The service must be effected before the expiration of four calendar months from the date of the writ, including the day of such date (*h*). A defendant in custody upon an arrest made in pursuance of 1 & 2 *V. c.* 110, *s.* 3, and not previously served with a copy of the writ of summons, may be lawfully served therewith (*i*). It may be served late at night (*k*), though, of course, this is not recommended, except in urgent cases. If served on a Sunday, however, the service will be void (*l*), and no subsequent act of the defendant will be deemed a waiver of this irregularity (*m*).

By whom.

It may be served either by the attorney or his clerk, or, in fact, by any person who can read and write, so as to be able to swear that he served a true copy of the writ (*n*), and to make the indorsement already mentioned.

How.

It is a copy of the writ of summons, and not the writ itself, that should be served (*o*). In serving the copy it is not necessary to shew the writ itself (*p*), unless the defendant demand it at the time of, or, as it seems, immediately after, the service (*q*).

The copy of the writ must be served personally upon the defendant (*r*), or each of the defendants, if there be more than one (*s*), and no difficulty in effecting personal service will dispense with it (*t*). Therefore, leaving the copy at the defendant's house (*u*), or with his shopman or servant &c. (*x*),

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(*d*) *Storer* v. *Rayson*, 4 D. & R. 739: 3 B. & C. 156, *S. C*: *Webber* v. *Manning*, 1 Dowl. 24: *Coulson* v. *King*, 2 C. & J. 474.

(*e*) *Anon.* v. *Warlters*, 1 Chit. Rep. 14; Id. 333: *Webber* v. *Manning*, 1 Dowl. 24: *Thompson* v. *Burton*, Id. 428.

(*f*) *Lloyd* v. *Smith*, 1 Dowl. 372.

(*g*) *Cole* v. *Hawkins*, 2 Str. 1094.

(*h*) Formerly, when the return day was mentioned in the writ, the writ must have been served on or before that day; (*Whale* v. *Fuller*, 1 H. Bla. 222); but a service at any time on the return day, (*Haynes* v. *Jones*, 3 Taunt. 404), even after the rising of the court, (*Maud* v. *Barnard*, 2 Burr. 812), was sufficient.

(*i*) 1 & 2 V. c. 110, s. 5.

(*k*) *Robertson* v. *Douglas*, 1 T. R. 191: *Maud* v. *Barnard*, 2 Burr. 812: *Anon.*, 2 Chit. Rep. 357: *Upton* v. *M'Kenzie*, 1 D. & R. 172: *Priddle* v. *Cooper*, 1 Bing. 66.

(*l*) 29 C. 2, c. 7, s. 6.

(*m*) *Taylor* v. *Phillips*, 3 East, 155.

(*n*) See Ca. Prac. C. B. 34; Pr. Reg. 945; and see 2 Barnard, 399.

(*o*) Before the 2 W. 4, c. 39, in proceedings by original, &c., it was a copy of the process, that is, a copy of the *capias* and not of the original, which must in all cases have been served. (*Peter* v. *Reignier*, Barnes, 410). So, where the process was directed to a county palatine, a copy of the process issuing from this court, with or without the mandate, or of the mandate, must have been served. (*Byers* v. *Whittaker*, Barnes, 406; Pr. Reg. 344; 2 Barnard, 318). There was no occasion to serve both. (*Ashbrook* v. *Townley*, 2 B. & Ad. 416). But see *Earl of Shrewsbury* v. *Haycroft*, (3 Moo. & P. 471; 6 Bing. 194, *S. C.*), which is overruled in K. B.

(*p*) *Worley* v. *Glover*, 2 Str. 877: *Parchand* v. *Woolley*, Barnes, 302: *Boswell* v. *Roberts*, Id. 422.

(*q*) *Thomas* v. *Pearce*, 4 D. & R. 317; 2 B. & C. 761, *S. C.*: *Edgar* v. *Farmer*, Hardw. 188: *Westley* v. *Jones*, 5 Moore, 126: *Petit* v. *Ambrose*, 6 M. & Sel. 274.

(*r*) Lofft, 253.

(*s*) See *Worley* v. *Bull*, Pr. Reg. 351: *Smith* v. *Muller*, 3 T. R. 627: *Christie* v. *Walker*, 8 Moore, 33; 1 Bing. 48, *S. C.*

(*t*) See *per Patteson*, J., *Thomson* v. *Pheney*, 1 Dowl. 411.

(*u*) *Digby* v. *Thompson*, 1 Dowl. 363.

(*x*) *Thomson* v. *Pheney*, 1 Dowl. 441.

How served.

is not sufficient. And sending process by the post in a letter, which the defendant refuses to receive, is not good service, although the refusal may have been wilful, and accompanied by long avoidance of service (*y*).

But it is not necessary to leave the process in the actual corporal (*z*) possession of the defendant; for, whether the party touches him, or puts it into his hand, is immaterial for the purpose of personal service. Personal service may be where you see a person, and bring the process to his notice (*a*). And if, after your informing the defendant of the nature of the process and tendering the copy, he refuses to receive it; then, placing it on his person (*b*), or throwing it down in his presence (*c*), or leaving it at his house (*d*), would be sufficient service. Where a writ was put through the crevice of a door to the defendant, who had locked himself in, the service was deemed sufficient (*e*); and the same, where it was inclosed in a letter, which was proved to have been received by the defendant, and that he took out the copy (*f*). Where a father eluded the service of process, and the process was served at his house on his son, who said his father was within, and that he should receive the process, and it did not otherwise appear but that it had come to the defendant's hands, the service was deemed sufficient (*g*). And in other similar cases the courts have dispensed with strict personal service when it appeared that the process had come to the possession of the defendant (*h*). And, although the defendant and his witnesses deny the service, yet if it be doubtful upon the affidavits on both sides whether the service was personal or not, the court will not interfere or set it aside (*i*).

On husband and wife.

Where the process is against *husband and wife*, service on the husband will be sufficient; and if he do not enter an appearance for both, the plaintiff may do so in pursuance of the statute (*k*).

On corporation.

If the writ be against a *corporation aggregate*, it should be served on the mayor, or other head officer, or on the town-clerk, clerk, treasurer, or secretary of such corporation.

On inhabitants of hundred or county.

If it be against a *hundred*, or other like district, it should be served on the high constable, or any of the high constables thereof. And if against the *inhabitants of a county* of a city or town, or the inhabitants of a franchise, liberty, city, town, or place, not being part of a hundred or other like district, it should be served on some peace-officer thereof (*l*).

On printer &c. of newspaper.

In an action against a printer, publisher, or proprietor of a

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(*y*) *Redpath* v. *Williams*, 11 B. Moore, 333; 3 Bing. 443, *S. C.* *Aliter*, if, from the knowledge of the handwriting, or otherwise, it could be shewn that defendant knew that the letter contained the writ, *semble*. (See *Aldred* v. *Hicks*, 5 Taunt 186; 1 Marsh. 8, *S. C.*)

(*z*) *Digby* v. *Thompson*, 1 Dowl. 363: *Thomson* v. *Pheney*, Id. 441.

(*a*) *Per Patteson*, J., *Thomson* v. *Pheney*, K. B. Bail Court, 12th June, 1832; MS. 1 Dowl. 411, *S. C.*: and see *Phillips* v. *Ensell*, 2 Dowl. 684; 1 C. M. & R. 374, *S. C.*

(*b*) *Bell* v. *Vincent*, 7 D. & R. 233.

(*c*) See *per Patteson* J., 1 Dowl. 443.

(*d*) *Wood* v. *Dodgson*, Barnes, 278: *Bates* v. *Maddison*, 1 Tidd. 168: see *Pigeon* v. *Bruce*, 8 Taunt. 410.

(*e*) *Smith* v. *Wintle*, Barnes, 405.

(*f*) *Boswell* v. *Roberts*, Barnes, 422: and see *Aldred* v. *Hicks*, 5 Taunt. 186: *Arrowsmith* v. *Ingle*, 3 Id. 234.

(*g*) *Rhodes* v. *Innes*, 7 Bing. 329; 5 M. & P. 153; 1 Dowl. 215, *S. C.* See the remarks of *Patteson*, J., on this case, 1 Dowl. 442: and per Lord *Abinger*, C. B., *Williams* v. *Pigot*, 5 Dowl. 320.

(*h*) *Williams* v. *Pigot*, 5 Dowl. 320: *Phillips* v. *Ensell*, 2 Dowl. 684: *Rhodes* v. *Innes*, *ubi supra*: see *per cur*. *Herbert* v. *Darley*, 4 Dowl. 726.

(*i*) *Morris* v. *Coles*, 2 Dowl. 79.

(*k*) *Buncombe* v. *Love*, Barnes, 406 *Collins* v. *Shapland*, Id. 412.

(*l*) 2 W. 4, c. 39, s. 13.

Book I. Part I.

newspaper, service of any writ, subpœna, rule, order, or process, at the house or place mentioned in the declaration of the proprietorship, &c., shall be deemed sufficient service (*m*).

On trading or other company, under 7 W. 4 & 1 V. c. 73.

Also, in an action against a trading or other company or body, within the meaning of the 7 *W.* 4 & 1 *V.* c. 73, the service of any summons, demand, or notice, or any writ or other proceeding at law or in equity, or otherwise, on the clerk of the company or body, or its being left at the head office for the time being of the company or body, or in case such clerk of the said office shall not be found or known, then service thereof on any agent or officer employed by the said company or body, or by leaving the same at the usual places of abode of such agent or officer, will be good and sufficient service of the same respectively on the said company or body (*n*).

Indorsing day of service.

The person who serves the writ must, within three days at least after such service, indorse on it the day of the month and week of the service, as noticed *ante*, 112 (*o*), otherwise the plaintiff cannot enter an appearance for the defendant according to the statute; and the affidavit upon which such appearance is to be entered must state the day when such indorsement was made (*p*).

The mode of proceeding by *distringas* when it is found impossible to serve the defendant, in consequence of his keeping out of the way to avoid being served, is noticed in a subsequent part of this work.

Irregularity in service.

Motion to set aside for.

Irregularity in Service.] If there be any irregularity in the service of the writ, or the copy vary from the original, the application to the court must be to set aside the service (or the service and copy of the writ (*q*)) and the subsequent proceedings, but you cannot apply to set aside the writ itself (*r*). But if the writ is irregular, and the service regular, then you must apply to set aside the writ (*s*).

Affidavit on motion.

Where a personal service has been sworn to, the court will not interfere, upon motion, to set it aside, however positively the defendant, and other persons, may swear to negative the personal service, if it be left in doubt by the *affidavits* on the other side whether there was a sufficient service or not (*t*). If a defendant seek to set aside proceedings, on the ground of not having been served with process, it must appear by his *affidavit* that he is the defendant in the cause (*u*). And it is not a sufficient ground for setting the proceedings aside, that the service of the writ was not made directly and personally upon the defendant, and especially after a positive *affidavit* of personal service on the plaintiff's part; but the defendant must go on further to shew, that neither the writ nor copy came to his knowledge or possession (*x*). If such circumstances be shewn, as satisfy the court that process has come to the possession of the defendant, that is deemed a sufficient per-

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(*m*) 6 & 7 W. 4, c. 76, s. 9.

(*n*) 7 W. 4 & 1 V. c. 73, s. 16.

(*o*) 2 W. 4, c. 39, s 1.

(*p*) R. M. 3 W. 4, r. 3.

(*q*) *Argent* v. *Reynolds*, 6 Dowl. 480.

(*r*) *Chalkeley* v. *Carter*, 4 Dowl. 480; 1 T. & G. 210, *S. C.*: see *Huggett* v. *Parkin*, 1 Bing. 65.

(*s*) *Hasker* v. *Jarmaine*, 1 C. & M. 408; 1 Dowl. 654. *S. C.*: see *Cohen* v. *Watson*, 3 Tyr. 238, *S. C.*: *post*, 118.

(*t*) *Morris* v. *Coles*, 2 Dowl. 79.

(*u*) *Johnson* v. *Smallwood*, 2 Dowl. 588: and see *France* v. *Wright*, 3 Id. 325.

(*x*) *Phillips* v. *Ensell*, 2 Dowl. 684; 1 C. M. & R. 374; 4 Tyr. 814, *S. C.*

sonal service (*y*). And the court will not set aside proceedings, on an *affidavit* of the defendant, that he had not been personally served, accompanied by an affidavit of his daughter, that she received and opened a letter containing the copy of the writ (*z*).

Motion, when to be made.

An application to set aside service for irregularity should be made as soon as possible, and, at all events, within the time limited for entering an appearance (*a*).

Plaintiff's proceedings on finding irregularity.

On the other hand, if the plaintiff discover an irregularity in the service of the process, before defendant has appeared, he may give him notice not to appear thereto, and issue fresh process, and serve him afresh; and this would afford an answer to defendant's subsequent application to the court or a judge to set aside the irregular service. But, if the defendant has really incurred any costs (which would be allowed him on the taxation) before the service of such notice, the plaintiff should tender them, otherwise the court or a judge might compel him to pay them.

Alias and pluries writs.

Alias, Pluries, and concurrent Writs.] If the defendant, or, in the case of several defendants, if all of them be not served with the copy of the writ of summons within four calendar months from the day of the date of it, including such day, you may continue the writ by, and sue out, an *alias* writ of summons, and after that a *pluries*, as the case may require, until the defendant, or all the defendants, in case of several, be served (*b*). Or, if it be not possible to serve the defendant, then you must proceed by writ of *distringas*, to compel an appearance, as mentioned in the next chapter; or else you must proceed to outlaw him, as mentioned in the second volume of this work, *Book IV. Part I. Ch.* 2. Where the plaintiff had leave to quash a *distringas* to compel appearance for the purpose of taking out process of outlawry, and issued a *distringas* for the purpose of outlawry, but never delivered it to the sheriff nor took any proceedings on it, it was held, that he might continue his writ of summons by *alias* and *pluries* to compel an appearance notwithstanding the *distringas* (*c*). These *alias* and *pluries* writs, when issued into the same county as the writ of summons, differ only in form from the first writ of summons, in inserting after the words "we command you," the words "as before," or in the case of a *pluries*, "as often we have commanded you," &c. (*d*). When issued into *another* county than the first writ of summons, the *alias* or *pluries* writ should describe the defendant as of the place of his residence in the county into which it is issued, and also as late of the place of which he was described in the first writ of summons. In other respects the *alias* or *pluries* writ (into a different county) is the same as an *alias* or *pluries* into the same county as the first writ of summons (*e*). *They are sued*

(*y*) *Williams* v. *Piggott*, 1 M. & W. 574: and see *Rhodes* v. *Innes*, 7 Bing. 329; 5 Moore & P. 153; 1 Dowl. 215. *S. C.*

(*z*) *Herbert* v. *Darley*, 4 Dowl. 726. And see Tidd, New Pract. 112.

(*a*) *Child* v. *Marsh*, 3 M. & W. 433; 6 Dowl. 576, *S. C.*

(*b*) 2 W. 4, c. 39, s. 10; R.M. 3 W. 4, r. 6.

(*c*) *Norman* v. *Winter*, 5 Bing. N. C. 279; 7 Dowl. 504, *S. C.*

(*d*) The schedule of 2 W. 4. c. 39. prescribes the form. See it, Chit. Forms, 16.

(*e*) R. M. 3 W. 4, r. 7, prescribes the form. And see it, Chit. Forms, 16.

Alias and pluries writs of summons.

out and indorsed, &c., in the same manner as the writ of summons, ante, 109, 112. They may, it should seem, be sued out and dated accordingly, and continuances entered at any time after the first or preceding writ, unless you intend to avail yourself of the writ, in order to take the case out of the statute of limitations, when some particular proceedings must be adopted thereon, as noticed in the second volume of this work, *Book IV. Part I. Ch.* 1 (*g*).

It is not necessary that the first writ should be returned before you sue out the *alias*, or the *alias* returned before you sue out the *pluries*, unless the writ has been sued out for the purpose of saving the statute of limitations, or of proceeding to outlawry (*h*). Also, by leave of the court, or a judge, a writ of *alias* or *pluries* summons or a *distringas* may be issued and bear teste after the previous writ of summons has expired (*i*). These *alias* and *pluries* writs should correspond strictly with the preceding writs; for, if the writ of summons, for instance, be against the defendant by one christian name, and the *alias* or *pluries* by another, the court will, it seems, set aside the proceedings (*k*).

Concurrent writs.

There may be concurrent writs issued into different counties at the same time, though the defendant will be liable only to the costs of the one with which he is served (*l*). Where the copy of the first writ was served by mistake upon a wrong person, service of a copy of an *alias* afterwards upon the right person was holden regular (*m*).

Defects in writ, how and when taken advantage of.

Defects in Writ, how and when taken Advantage of.] We have already seen, in the preceding pages, in what respects the writ may be defective. As regards the mode of taking advantage of such defect, or of a variance between the writ and declaration, the defendant cannot take such advantage either by plea in abatement, for the court will not now grant *oyer* of the writ (*n*), nor by writ of error (*o*). But for some defects in the writ which we have pointed out, the court or a judge will set it, or the service and proceedings thereon, aside. And, by the rule of *M. T.* 3 *W.* 4, *r.* 10, "if the plaintiff or his attorney shall omit to insert, or indorse, on any writ or copy thereof, any of the matters required by the said act, (2 *W.* 4, *c.* 39), to be by him inserted therein or indorsed thereon, such writ or copy thereof shall not, on that account, be held *void* (*p*), but may be set aside as irregular, upon application to the court out of which the same shall issue, or to any judge." Where there is an objection in point of form, which applies as well to the writ as the copy, the defendant cannot move to set aside merely the *service* of the writ, but he must move to set aside both the

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(*g*) See *Nicholson* v. *Leman*, 2 Dowl. 296.

(*h*) *Gregory* v. *Des Anges*, 3 Bing. N. C. 85; 5 Dowl. 193, *S. C.* The point, however, seems to be still open. (See *Norman* v. *Winter*, 5 Bing. N. C. 279, per *Tindal*, C. J.)

(*i*) *Norman* v. *Winter*, 5 Bing. N. C. 279; 7 Dowl. 304, *S. C.*

(*k*) See *Corbett* v. *Bates*, 3 T. R. 660.

(*l*) *Dunn* v. *Harding*, 4 M. & Scott, 450; 10 Bing. 553, *S. C*: *Angus* v. *Coppard*, 3 M. & W. 59.

(*m*) *Clarke* v. *Johnson*, 2 B. & Cres. 95; 3 D. & R. 254, *S. C.*

(*n*) *Boats* v. *Edwards*, 1 Doug. 227: *Deshons* v. *Head*, 7 East, 363.

(*o*) See 1 Saund. 318 a; *King* v. *Bishop of Carlisle*, Barnes, 9.

(*p*) As to when a writ is not void, see *Gurney* v. *Hopkinson*, 3 Dowl. 189, where it was held, that a writ of *capias*, under 2 W. 4. c. 39, describing the action as "trespass on the case upon promises," is merely irregular and not *void*.

writ and copy; there must be some irregularity in the *service* to warrant a motion to set aside the service only (*q*). We have already seen that, where the copy only is defective, or the service irregular, the application should be to set aside the service (or service and copy) and subsequent proceedings, but not the writ itself (*ante*, 116).

Motion, where and when to be made.

The application to set aside the writ, or the service and proceedings under it, must be made to the court, on a motion supported by affidavit, or to a judge on a summons, who may or may not require such affidavit. It must be made in a reasonable time, and at all events before the defendant has taken any fresh step after knowledge of the irregularity (*r*). As it may be made in vacation, the defendant is not allowed to delay it till the term (*s*). It would seem, from some recent decisions, that it must be made within *four* days after the service (*t*), and at all events it must be made within the eight days and before appearance by the defendant (*u*), or an undertaking to appear (*x*), unless there be some good excuse for the delay. Where a writ of summons was served on the 25th October, an application on the 3rd November to set aside the service for irregularity, the 2nd being Sunday, was held too late, and that it should have been made on the 1st (*y*). If the writ be absolutely *void* (which can rarely be the case) (*z*), it should seem the application might be made after that time.

As to what is a waiver of an irregularity, *see post, Vol. II. Book IV. Part I. Ch.* 17.

Altering the writ without leave.

Altering the Writ without leave.] Formerly, when the return day was specified in the process, a mistake might have been cured by altering the writ, and getting it re-sealed, and serving the defendant again if already served (*a*); and the return day might be altered and postponed from time to time on re-sealing the writ, provided a term did not intervene between the *teste* and the altered return day (*b*). It seems, that now a writ may be altered and re-sealed before it is served, but not afterwards (*c*), without any order of the court or a judge allowing an amendment. But, if altered without being re-sealed, the court or a judge would set aside the proceedings on payment of the debt, without costs, or perhaps the writ would be a nullity (*d*).

(*q*) *Hasker* v. *Jarmaine*, 1 Dowl. 654; 1 C. & P. 408, *S. C.*

(*r*) R. H. 2 W. 4, r. 33.

(*s*) *Cox* v. *Tulloch*, 1 C. & M. 531; 2 Dowl. 47, *S. C.*: *Elliston* v. *Roberts*, 2 C. & M. 343; 2 Dowl. 241, *S. C.*

(*t*) *Chubb* v. *Nicholson*, 1 H. & W. 666: *Tyler* v. *Green*, 3 Dowl. 439: *Edwards* v. *Collins*, 5 Dowl. 227: see *per Littledale*, J., in *Newnham* v. *Nanney*, 5 Dowl. 263: *Hinton* v. *Stephens*, 4 Dowl. 283; 1 H. & W. 521, *S. C.*: *Knight* v. *Warren*, 2 Dowl. 724. 3 M. & Scott, 163, *S. C.*

(*u*) See Ib.: *Fox* v. *Money*, 1 B. & P. 250: *R.* v. *Hare*, 1 Stra. 155: *Steele* v. *Morgan*, 8 D. & Ry. 450: *Child* v. *Marsh*, 6 Dowl. 576; 3 M. & W. 433, *S. C.*, where defendant's residence was wrongly stated: *sed vide Davis* v. *Lawton*, 11 Leg. Obs. 259. It was held in *Chalkeley* v. *Carter*, 4 Dowl. 480; 1 T. & G. 210, *S. C.*, that an entry of an appearance by a plaintiff for a defendant did not operate as a waiver of an objection to the copy of the writ

(*x*) See *Holliday* v. *Lawes*, 3 Bing. N. C. 541: *Anon.* 1 Chit. 129: *Homfray* v. *Kenning*, 2 Chit. 236.

(*y*) *Tyler* v. *Green*, 3 Dowl. 439.

(*z*) See *Hanson* v. *Shackleton*, 4 Dowl. 48; 1 H. & W. 342, *S. C.*: *Gurney* v. *Hopkinson*, 3 Dowl. 189; 1 C. M. & R. 587, *S. C.*: *Child* v. *Marsh*, 6 Dowl. 576.

(*a*) *Israel* v. *Middleton*, 1 Chit. Rep. 321: *Anon.* Id. 398.

(*b*) *Durden* v. *Hammond*, 1 B. & C. 111; 2 D. & Ry. 211, *S. C.*

(*c*) *Glenn* v. *Wilks*, 4 Dowl. 322.

(*d*) *Siggers* v. *Sampson*, 2 Dowl. 746; 3 M. & Scott, 194. *S. C.*: and see *Anon.* 2 Chit. Rep. 237: *Taylor* v. *Phillips*, 3 East, 155: see *Leigh* v. *Leigh*, 2 Bing. N. C. 464; 2 Scott, 666; 1 Hodges, 411, *S. C.*: *Foot* v. *Sherreff*, 2 Bing. N. C. 528; 2 Scott, 806; 1 Hodges, 412, *S. C.*

Book I. Part I.

Amendment of Writ of Summons.

Amendment of Writ of Summons.] Previously to the passing of the Uniformity of Process Act the courts had the power of amending writs not absolutely void (*f*), provided there was anything to amend by, as for instance the præcipe (*g*); and they permitted amendments in some instances even where there was nothing to amend by (*h*). Now, however, since the introduction of the new writs under the Uniformity of Process Act the courts have come to a determination not to allow any amendments in the writ itself, or in any memorandum or indorsement prescribed by that act, unless great injustice would be caused by the refusal, as for instance in cases where the Statute of Limitations would operate as a bar to a fresh action (*i*); and it seems doubtful whether an amendment will be allowed even in such cases beyond informalities, or mere verbal mistakes (*k*). The Court of Exchequer, in one case, after a plea in abatement of the non-joinder of a co-executrix, as plaintiff, allowed the writ of summons to be amended, by inserting her name on the ground that the Statute of Limitations would have been a bar to a fresh action (*l*). But in a subsequent case (*m*) the Court of Queen's Bench refused a similar amendment, although affidavits were produced showing an equitable claim to the indulgence, and that the statute would be a bar to a fresh action, and that court disclaimed the power exercised by the Court of Exchequer. In a still later case in the Common Pleas, where an action was improperly commenced in the names of two officers of a banking company, (the 7 *G.* 4, *c.* 45, *s.* 9, requiring the action to be brought in the name of one), the court allowed the record to be amended, by striking out the name of one on payment of costs (*n*); and their power to do so does not appear to have been questioned. It is clear that no amendment can be allowed if the writ be *void* (*o*). And the courts refuse to allow an amendment of the copy of the writ (*p*); for that is the act of the party over which the court have no control. But in the forms of indorsement, as prescribed by the rules of court, and not by the act, it seems that the court, or a judge, may allow an amendment (*q*).

(*f*) See *Kenworthy* v. *Peppiat*, 4 B. & Ald. 288.

(*g*) See *Green* v. *Rennett*, 1 T. R. 782: *Adams* v. *Luck*, 6 Moore, 113; 3 B. & B. 25, *S. C.*: *Walker* v. *Hawkey*, 1 Marsh. 399; 5 Taunt. 853, S. C.

(*h*) Thus they allowed the christian names of the defendants, which had been omitted by mistake, to be inserted, (see *Rutherford* v. *Mein*, 2 Smith, 392), and the name of a defendant to be altered; (*Carr* v. *Shaw*, 7 T. R. 299); and the name of a party to be struck out; (*Fox* v. *Clifton*, 1 Chit. Pl. 14, n. 5th ed.); and the name of a party to be inserted as plaintiff or defendant; (*Baker* v. *Neaven*, 1 C. & M. 112, *S. C.*: *Tabram* v. *Tenant*, 1 B. & P. 481, n: but see *Binns* v. *Pratt*, 1 Chit. Rep. 369: *Adamson* v. *Anon.* Id. n.) And in an action against the hundred, under 7 & 8 G. 4, c. 31, the court allowed the proceedings to be amended by substituting the word "borough" for "hundred," there being no hundred, and the time for commencing a fresh action having expired. (*Horton* v. *Inhabitants of Stamford*, 2 Dowl. 96; 1 C. & M. 773; 3 Tyr. 869, *S. C.*)

(*i*) *Lakin* v. *Watson*, 2 Dowl. 633; 4 Tyr. 839, *S.C.*: *Hodgkinson* v. *Hodgkinson*, 3 N. & M. 564: *Partridge* v. *Wellbank*, 5 Dowl. 93.

(*k*) See *Roberts* v. *Bates*, 6 Ad. & El. 783, *per Littledale*, J.

(*l*) *Lakin* v. *Watson*, 2 C. & M. 685; 2 Dowl. 633; 4 Tyr. 839, *S. C*: and see *per cur. Partridge* v. *Wellbank*, 5 Dowl. 93.

(*m*) *Roberts* v *Bate*, 6 Ad. & El. 778.

(*n*) *Holmes* v. *Pinney*, 6 Dowl. 627; the report of same case in 4 Bing. N. C. 454 is mistaken.

(*o*) See *Kenworthy* v. *Peppiat*, 4 B. & Ald. 288.

(*p*) *Byfield* v. *Street*, 3 M. & Scott, 406; 10 Bing. 27; 2 Dowl. 739, *S. C.*: *Nicol* v. *Bayn*, 10 Bing. 339; 3 M. & Scott, 812; 2 Dowl. 761, *S. C.*: *sed vide Hodgkinson* v. *Hodgkinson*, 3 N. & M. 564, *per Taunton*, J.

(*q*) *Shirley* v. *Jacobs*, 1 Scott, 67; 3 Dowl. 101, *S. C*: *Cooper* v. *Waller*, *Tabram* v. *Thomas*, 3 Dowl. 167: and see the cases, *ante*, 112 (*l*).

Appearance after Service of Writ.

When entered by Defendant.

Appearance after Service of Writ of Summons.] Regularly, upon the defendant's being served with a copy of the writ, either he or his attorney should, within eight days after such service inclusive of the day of service, enter an appearance in the action (*r*), or, in default thereof, the plaintiff, upon making and filing an affidavit of the service of the copy of the writ, personally (*s*) on the defendant, may, by the terms of the writ, enter a common appearance for him, and proceed thereon as if the defendant had duly appeared himself (*t*). These eight days are reckoned *inclusive* of the day of the service of the writ: and if the last of the eight days happen to be Sunday, Christmas-day, or a day appointed for a public fast or thanksgiving, the defendant has the entire of the following day to enter his appearance; or if the last of the eight days happen to be any day between the Thursday before and the Wednesday after Easter-day, then the Wednesday after Easter-day must be considered the last of such eight days (*u*). If the defendant enter an appearance within the eight days, the plaintiff may declare immediately, without waiting for their expiration (*x*).

When Plaintiff may enter it.

If the appearance be not entered by the defendant within the eight days, the *plaintiff may enter it for him* on the ninth day, or at any time afterwards, within four terms after the service of the writ, and then proceed in the action (*y*): and if the plaintiff thus enter an appearance for the defendant, and the defendant afterwards also enter one, still the plaintiff may proceed as if no such appearance had been entered by the defendant, and may sign judgment without a demand of plea (*z*). It may be observed, that though the writ be served on a day between the 10th of August and 24th of October, the appearance may be entered either by the defendant or plaintiff at the expiration of the eighth day, though, indeed, no declaration or pleading after declaration can be filed or delivered between the said 10th August and 24th October (*a*).

Where, in consequence of a difficulty in effecting personal service, the plaintiff had obtained a rule for a *distringas*, but before that writ issued, the defendant admitted that the summons had been served on him, the court allowed the plaintiff to enter an appearance for the defendant (*b*).

How entered by Defendant.

If entered by the defendant;—*make out a memorandum for the appearance on paper* (*c*), *and take it to one of the masters, who will thereupon enter the appearance in the form prescribed by the* 2 *W.* 4, *c.* 39, *s.* 2, *pay him* 1*s.* (*d*); *and if an appearance for more than one defendant be entered by the same attorney, pay him* 4*d.* (*d*) *for each additional defendant.* The memorandum of appearance so delivered must be dated on the day of such delivery (*e*). If a defendant enters an appearance in due time

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(*r*) See the form of the writ, *ante*, 103.

(*s*) *Thomson* v. *Pheney*, 1 Dowl. 441: *Digby* v. *Thomson*, 1 Dowl. 363. But under very particular circumstances, perhaps, the court might dispense with it. (See *Rhodes* v. *Innes*, 1 Dowl. 215, 7 Bing 329; 5 M. & P. 153, *S. C.*)

(*t*) See 2 W. 4, c. 39; 5 G. 2, c. 27: *Willett* v. *Wilson*, 2 C. & J. 356.

(*u*) 2 W. 4, c. 39, s. 11. See the former practice as to the time for entering the appearance in actions by original; (*Hunter v. Simpson*, 4 D. & R. 713; 3 B. & C. 110, *S. C.*: *Bosanquet* v. *Rondeau*, Barnes, 245: *Shadwell* v. *Angell*, 1 Bur. 56: 2 Arch. Prac. 2 ed. 335); by bill, (2 Arch. Prac. 2 ed. 345).

(*x*) *Morris* v. *Smith*, 4 Dowl. 198.

(*y*) *Cook* v. *Allen*, 1 Dowl. 676: 1 C. & M. 350, *S. C.*: *Liddler* v. *Cranch*, 5 Dowl. 662.

(*z*) *Davis* v. *Cooper*, 2 Dowl. 135.

(*a*) 2 W. 4, c. 39, s. 11.

(*b*) *Saunders* v. *De Chastelain*, 5 Dowl.

(*c*) See the form, Chit. Forms, 17.

(*d*) R. M. 3 W. 4, r. 2.

(*e*) 2 W. 4, c. 39, s. 2.

which is irregular on account of a mistake in the name, the proper course for him to pursue is to apply to amend that appearance, and not to enter a new one (*f*). The entry of an appearance by the defendant is a waiver of all irregularities in the writ and service.

How entered by Plaintiff.

If entered by the plaintiff;—*first search at the master's office if the defendant have entered an appearance; and if not, then let an affidavit of the service of the summons be made, either before a judge or a commissioner of the court, or before one of the masters or his deputy* (*g*), *by the person who served it* (*h*). *Take it to one of the masters, together with a memorandum for the appearance as above mentioned, and he will enter the appearance.* In the Common Pleas (*i*) and Exchequer (*k*) the affidavit of service might formerly have been taken before a commissioner, who was concerned as attorney for the plaintiff; but it was otherwise in the Queen's Bench; and now, by rule of all the courts of *H. T.* 2 *W.* 4, *r.* 3, "no affidavit of the service of process shall be deemed sufficient, if made before the plaintiff's own attorney or his clerk." If the copy of the writ were served by an officer, the court, upon application, will compel him to make affidavit of service (*l*). The affidavit should, in all cases, describe the kind of writ that was served: for, where it stated generally a service of a "writ of mesne process," the court set aside the proceedings, even after judgment by default (*m*). The affidavit must state that, within three days at least after the service of the writ, the person serving it indorsed on it the day of the week and month of such service; and the affidavit must state positively the day on which such indorsement was made (*n*). Where, however, the defendant snatched the writ out of the hands of the person who served him, and kept it, so that the indorsement could not be made, the court granted a rule ordering him to deliver up the writ, or in case of his not doing so, that an appearance should be entered for him without such indorsement, and that defendant should pay the costs (*o*).

Appearance should state Names, &c., correctly.

Care must be taken that the entry of appearance corresponds with the summons in the names and number of the parties, &c. (*see ante*, 105, 106): or it may be treated as no appearance if there be a material variance. If the defendant be wrongly described in the writ, and appear by such wrong name, the plaintiff may declare against him by such wrong name; or if he appear by his right name, the plaintiff may declare against him in his right name, stating in his declaration that he was sued by the wrong name (*p*). If the defendant in such a case do not appear, the plaintiff's proper course is to appear for and declare against him by the wrong name, which will only subject him to being compelled by a judge's order to amend, by inserting the right name at his costs (*q*).

(*f*) *Bate* v. *Bolton*, 4 Dowl. 677.

(*g*) 5 G. 2, c. 27.

(*h*) See form, Chit. Forms. 16.

(*i*) R. E. 13 G. 2, r. 1, C. P.

(*k*) Doe d. *Cooper* v. *Roe*, 2 Y. & J. 284.

(*l*) *R.* v. *Rudge*, 1 W. Bla. 432.

(*m*) 1 Sellon, 98.

(*n*) R. M. 3 W. 4, r. 3.

(*o*) *Brook* v. *Edridge*, 2 Dowl. 647. 154.

(*p*) See *Doe* v. *Butcher*, 3 T. R. 6 n.: *Hole* v. *Finch*, 2 Wils. 393: *R.* v. *Roper*, 6 M. & Sel. 327, 339: and *ante*, 104.

(*q*) See *Smith* v. *Patten*, 6 Taunt. 115: 1 Marsh, 474, *S. C.*: *Reeves* v. *Slater*, 7 B. & C. 486; 1 M. & R. 265, *S. C.*: *Oakley* v. *Giles*, 3 East, 167: *Coles* v. *Hindson*, 6 T. R. 234, 236: *Crawford* v. *Satchwell*, 2 Str. 1218: and *ante*, 104.

Where it appeared that the defendant, on entering an appearance to the writ of *summons*, had made a mistake in the name of the parties; and notice being given to him of the fact by the plaintiff, he promised to amend, but instead of doing so, entered a new appearance, and then demanded a declaration; and the plaintiff not declaring within the following term, he signed judgment of *non pros:* the court were of opinion, that the defendant had been irregular in not amending the appearance, and therefore directed the judgment to be set aside (*r*).

Should follow the Form in 2 W. 4, c. 39, Sched.

Care should also be taken that the form of appearance prescribed by the schedule of 2 *W.* 4, *c.* 39, be followed; for otherwise the appearance may be treated as null. Where the appearance entered by the defendant was thus worded, "In the Queen's Bench, T. W. plaintiff, G. L. defendant, —— attorney for —— appears for H," it was held, that the plaintiff was right in treating it as null and entering an appearance for the defendant under the statute (*s*).

Undertaking to Appear.

If an attorney undertake to appear for a defendant, he must enter an appearance accordingly, under pain of an attachment, or being struck off the roll (*t*); and it seems that even a verbal undertaking to this effect will be enforced (*u*), but it is safer to require a written one, signed by the attorney (*x*). Such an appearance must be entered within the prescribed time (*y*).

(*r*) *Bale* v. *Bolton*, 4 Dowl. 160, 667; 2 C. M. & R. 365; 1 T. & G. 146, *S. C.*

(*s*) *Warren* v. *Love*, B. C. E. 1839; *Williams*, J., 3 Jurist, 363.

(*t*) R. M. 1654, s. 10: *Anon.* 6 Mod. 42: *Lorimer* v. *Hollister*, 2 Str. 693: *Kilby* v. *Weybery*, 12 Mod. 251: *Mould* v. *Roberts*, 4 D. & R. 719.

(*u*) *Anon.* 2 Chit. 36. But see the cases cited in the next note.

(*x*) *Lorimer* v. *Hollister*, 2 Str. 693; Lofft. 192: and see *Stratton* v. *Burgess*, 1 Str. 114.

(*y*) R. T. 2 W. 4, r. 31.

CHAPTER II.

PROCEEDINGS TO COMPEL APPEARANCE BY WRIT OF SUMMONS AND DISTRINGAS, WHERE THE DEFENDANT CANNOT BE SERVED WITH THE SUMMONS.

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Proceedings by Writ of Summons and Distringas. Statute as to.

Statute as to.] THIS proceeding, by writ of summons and *distringas*, is adopted in all cases where the defendant has a place of residence within England or Wales, but, from his being out of the way, or from other circumstances, he cannot be served with process. This method of proceeding is now provided for by the 2 *W*. 4, *c*. 39, *s*. 3 (*a*), and is as follows:—"In case it shall be made appear by affidavit, to the satisfaction of the court out of which the process issued, or, in vacation, of any judge of either of the said courts, that any defendant has not been personally served with any such writ of summons as hereinbefore mentioned, and has not, according to the exigency thereof, appeared to the action, and cannot be compelled so to do without some more efficacious process, then, and in any such case, it shall be lawful for such court or judge to order a writ of *distringas* to be issued, directed to the sheriff of the county wherein the dwelling-house or place of abode of such defendant shall be situate, or to the sheriff of any other county, or to any other officer to be named by such court or judge, in order to compel the appearance of such defendant; which writ of *distringas* shall be in the form and with the notice subscribed thereto mentioned in the schedule to this act (*b*); which writ of *distringas* and notice, or a copy thereof, shall be served on such defendant, if he can be met with, or, if not, shall be left at the place where such *distringas* shall be executed; and a true copy of every such writ and notice shall be delivered together therewith to the sheriff or other officer to whom such writ shall be directed; and every such writ shall be made returnable on some day in term, not being less than fifteen days after the teste thereof, and shall bear teste on the day of the issuing thereof, whether in term or in vacation; and if such writ of *distringas* shall be returned

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(*a*) See the prior statute, 7 & 8 G. 4, c. 71. It would seem that the statutes take away the right of issuing a *distringas*, and levying issues at common law. See *Watson* v. *Locke*, 2 C. & J. 204: *Pennell* v. *Kingston*, 1 C. & J. 548.

(*b*) See form, *post*, 128.

non est inventus and *nulla bona*, and the party suing out such writ shall not intend to proceed to outlawry or waiver, according to the authority hereinafter given, and any defendant against whom such writ of *distringas* issued shall not appear at or within eight days inclusive after the return thereof, and it shall be made appear by affidavit, to the satisfaction of the court out of which such writ of *distringas* issued, or, in vacation, of any judge of either of the said courts, that due and proper means were taken and used to serve and execute such writ of *distringas*, it shall be lawful for such court or judge to authorize the party suing out such writ to enter an appearance for such defendant, and to proceed thereon to judgment and execution."

This is a material improvement upon the old common law mode of proceeding upon an original writ, by summons, attachment, and *distringas*. For at common law you could not proceed in the action unless the defendant appeared; and, in order to compel an appearance, you were obliged to harass him with a succession of writs of *distringas*, upon each of which you levied issues; which issues the court, indeed, allowed to be sold, from time to time, for the payment of your costs, but they were not allowed to be applied in satisfaction of your debt :—a mode of proceeding so productive of delay and expense, so liable to abuse, and so often adopted for the purposes of oppression, and from other improper motives, that the legislature were at length obliged to interfere, and to alter it by the statute 7 & 8 *G.* 4, *c.* 71, and afterwards by the statute above mentioned (*c*).

The Writ of Summons.

The Writ of Summons.] *The writ of summons must be framed and sued out in the manner already fully noticed in the preceding Chapter.* We have seen (*ante*, 114), that this writ remains in force during four calendar months from the day of its date inclusive. If, after due diligence, and through the defendant's default, *you cannot personally serve him with a copy of the writ, or obtain his attorney's written undertaking to appear, and the defendant has not appeared, then, if you are desirous of enforcing an appearance, you must, after having obtained the leave of the court or a judge for that purpose, issue a writ of distringas.* This writ for the purpose of proceeding to outlawry may issue after a writ of summons which has been continued by *alias* and *pluries* writs, issued to save the Statute of Limitations (*d*). If the defendant has been *personally* served with the summons, or his *attorney have undertaken* to appear for him, of course there would be no occasion for the writ of *distringas*, though he has not appeared : for in the first instance you might enter an appearance for him according to the statute, and, in the second, might compel the attorney to enter an appearance according to his undertaking (*e*); and, as soon as the appearance has been entered, you may proceed in the action as in ordinary cases.

(*c*) The enactments do not extend to process by attachment on a *justicies* in a county palatine. (*Moore* v. *Taylor*, 5 Taunt. 69).

(*d*) *Reade* v. *Youde*, 2 M. & W. 188: *Ray* v. *Dow*, 5 Dowl. 340.

(*e*) *Ante*, 123.

Writ of Distringas, when issued, Affidavit for, &c.

The Writ of Distringas, how and when issued. Affidavit for, &c.] The writ of distringas, whether for the purpose of compelling an appearance or of proceeding to outlawry, cannot be issued without the order of the court in term, or a judge in vacation (*f*), whom you must satisfy as to the necessity for it, before they will grant the order. The application must, according to some cases in C. P., be made, and the writ of *distringas* issued, *within* the *four* calendar months during which the writ of summons is in force (*g*); but in a late case that court, upon reconsideration, held that the plaintiff's right to issue writs of distringas by leave of the court or a judge is not confined to the period during which the summons is in force (*h*). The application cannot be made until the expiration of *eight* days after the last attempt to serve the defendant with the summons (*i*).

Calls and Appointments to serve Writ of Summons.

In general, in order to obtain a *distringas to compel an appearance* it is required that you should make at least *three* (*k*) *several applications* by calling at the defendant's actual or last place of abode (*l*), on three different days and occasions; and that, on each of the first two of such occasions you should apprize the person whom you see of the nature of your business (*m*), and say that you will call again at a future day (*n*), naming the day and hour, and endeavour to make an appointment to see the defendant (*o*), and that on the *last* (*p*) of such occasions you should *leave a copy* of the writ of summons for him (*q*); and that you should, in short, collect such facts as will enable you to swear positively, or to your belief, (stating the reasons for such belief), that he keeps out of the way to avoid the service (*r*). In ordinary cases it should appear that the defendant was at home either when the calls were made, or in the intervening period (*s*). If the defendant's residence is unknown, the party must use his utmost endeavours personally to serve him, and be prepared to swear

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(*f*) 2 W. 4, c. 39, s. 3. See *Farmel* v. *Stanford*, 2 C. & J. 435: *Pennel* v. *Kingston*, 1 Id. 548: *Watson* v. *Locke*, 2 C. & J. 203.

(*g*) *Abbotts* v. *Kelly*, 3 Bing. N. C. 478; 5 Dowl. 478, *S. C.*: *Leman* v. *Leman*, 2 Scott, 506: *Sewell* v. *Browne*, 1 Hodges, 317.

(*h*) *Norman* v. *Winter*, 5 Bing. N. C. 279, 7 Dowl. 304, *S. C.*

(*i*) *Brian* v. *Stretton*, 1 C. & M. 74; 3 Tyr. 163; 1 Dowl. 642, *S. C.*: *Atkins* v. *Lowther*, 24th Nov. 1832, Exch. MS.: *Smith* v. *James*, 20th Nov. 1832, K. B. M.S.: *Hill* v. *Mould*, 3 Tyr. 162, n.

(*k*) See *Gale* v. *Winkes*, 3 Bing. N. C. 294: *Fisher* v. *Goodwin*, 2 C. & J. 94: *Anon.* 1 Dowl. 513.

(*l*) *Johnson* v. *Rouse*, 1 C. & M 26; 3 Tyr. 161; 1 Dowl. 641, *S. C.* Service at the office of an employer, in such a case, is not sufficient. (*Thomas* v. *Thomas*, 2 M. & Scott, 730).

(*m*) *Johnson* v. *Rouse*, 1 C. & M. 26; 3 Tyr. 161; 1 Dowl. 641, *S. C.*: *Evans* v. *Burghart*, B. C., 2 Jurist, 921.

(*n*) *Cross* v. *Wilkins*, 4 Dowl. 279: and see *Fenton* v. *Hill*, C. P., 2 Jurist, 992. But see *White* v. *Western*, 2 Dowl. 451: *Webb* v. *Jenkins*, 7 Dowl. 135: *Anon.* 3 Jurist, 677.

(*o*) *Johnson* v. *Disney*, 2 Dowl. 400: *Wills* v. *Bowman*, Id. 413: *Johnson* v. *Rouse*, 1 Dowl. 641; 1 C. & M. 26, *S. C*: *Atkinson* v. *Cleave*, 5 Dowl. 252. But see *Hickman* v. *Dallimore*, 1 H. & W. 524; 4 Dowl. 278, *S. C.*

(*p*) *Hill* v. *Maule*, 1 C. & M. 617; 2 Dowl. 10, *S. C.*: and see *Street* v. *Lord Alvanley*, 1 C. & M. 27; 1 Dowl. 638, *S.C.* and Id. n. (*a*).

(*q*) *Pagden* v. *Kelly*, 10th Nov. 1832, K. B. M.S.: *Coett* v. *Willis*, 20th Nov. 1832, K. B. M.S.: *Atkins* v. *Lowther*, 24th Nov. 1832, Exch. M.S.: *Street* v. *Alvanley*, 1 C. & M. 27; 1 Dowl. 638, *S. C.*: *Balgay* v. *Gardener*, 2 Dowl. 52: *Turner* v. *Smith*, 1 M. & P. 557.

(*r*) See *Moon* v. *Thynne*, 3 Dowl. 153, (where the defendant was abroad): also *Grindley* v. *Thorn*, 5 Dowl. 544: *White* v. *Johnson*, 1 Gale, 108. See also *Evans* v. *Fry*, 3 Dowl. 581; 1 H. & W. 185, *S. C.*, (where the defendant was in Ireland): also *Haughton* v. *Howarth*, 4 Dowl. 749: *Price* v. *Brown*, 2 Dowl 1: *Waddington* v. *Palmer*, 2 Dowl. 7: *Simpson* v. *Lord Graves*, 2 Dowl. 10: *Smith* v. *Hill*, 2 Dowl. 225.

(*s*) *Edwards* v. *Edwards*, 2 Jurist, 306, Exch.

specifically to such endeavours (*t*). All this need not be done by the same person (*u*). A declaration by the defendant, that he will keep out of the way to avoid being served, does not waive the necessity of making the three calls, and taking the other steps above mentioned, &c. (*v*). The court will not allow a writ of summons served on an agent of the defendant, the principal not being to be found, to be sufficient in order to obtain a *distringas*, with a view of compelling an appearance (*x*).

Affidavit to obtain Distringas.

The affidavit in support of the application should state that all the above means have been tried to serve the defendant personally with the summons, and that the defendant cannot be compelled to appear without some more efficacious process (*y*). And a mere affidavit, that a party has called several times at the defendant's house for the purpose of serving him, but that he could not find him, and that the answers were, that he was out of town or the like, and that it is verily believed that he kept out of the way to avoid being served, would be insufficient: the affidavit must shew positively, or that there is a reasonable *cause* for the belief of the deponent, (stating the reasons for such belief), that the service is purposely evaded (*z*). If, however, it be clear, from the facts stated in the affidavit, that the defendant kept out of the way to avoid being served, the court will grant a *distringas*, although the person who made the calls has omitted to make the appointments, or to take precisely the course above mentioned (*a*). The affidavit for a distringas to compel appearance must state that the defendant is, or that deponent believes him to be, resident in England, and that inquiries have been made at his actual or last place of abode; and it is insufficient to allege that inquiries have been made at his last *supposed* place of abode (*b*), it must also state where his residence or supposed residence, if any, is situated (*c*). It must also set forth the tenor of the summons (*d*) *in hæc verba* (*e*), and that the defendant has not appeared to the action (*f*). *Search must be made accordingly at the master's office to see if the defendant have entered an appearance.* Where the time limited for entering an appearance had elapsed, it was held no objection that the affidavit of search was made four days previous to the motion (*g*),

For Outlawry, Calls and Appointments.

A *distringas* for proceeding to *outlawry* will be granted under circumstances which would not entitle the plaintiff

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(*t*) As to what is sufficient, see *Moody* v. *Morgan*, 7 Dowl. 144.

(*u*) *Smith* v. *Good*, 2 Dowl. 398.

(*v*) *Clayton* v. *Marsham*, 5 Dowl. 542.

(*x*) *Grindley* v. *Thorn*, 5 Dowl. 383: and see *Close* v. *Parker*, 1 W. W. & D. 71.

(*y*) See the forms, Chit. Forms, 18, in *Johnson* v. *Romer*, 1 C. & M. 26, 8 Tyr. 161, *S. C.*: *Bayley*, B., held that the former practice, as to what should be stated in moving for a distringas on a venire in the Exchequer, is applicable to the new process.

(*z*) *Turner* v. *Smith*, 11 Moore, 371, note; 1 M. & P. 557, *S. C.*: and see *Price* v. *Bower*, 2 Dowl. 1: *Waddington* v. *Palmer*, Id. 7: *Scarborough* v. *Evans*, Id. 9: *Simpson* v. *Lord Graves*, Id. 10: *Smith* v. *Hill*, Id. 225: *Hewitt* v. *Milton*, 1 C. & M. 720.

(*a*) *Johnson* v. *Disney*, 2 Dowl. 400: and see *Hickman* v. *Dallimore*, 1 H. & W. 524; 4 Dowl. 278, *S. C.*: *Gale* v. *Winkes*, 3 Bing. N. C. 294; 5 Dowl. 348, *S. C.*: *White* v. *Western*, 2 Dowl. 398: *Webb* v. *Jenkins*, 7 Dowl. 135: *Anon.* 3 Jurist, 677.

(*b*) *Esdaile* v. *Marshall*, 6 Dowl. 400: see *Norman* v. *Winter*, 4 Bing. N. C. 637.

(*c*) *Pitt* v. *Eldred*, 1 C. & J. 147: *Bowser* v. *Austin*, 2 Id. 45.

(*d*) *Hill* v. *Wilkinson*, 4 Taunt. 619.

(*e*) *Hannam* v. *Dietrischsen*, 5 Taunt. 853.

(*f*) See *Hocker* v. *Townsend*, 1 Hodges, 204.

(*g*) *Waugh* v. *Fry*, Exch. H. 1839; 3 Jurist, 388.

need not be so precise.

to a *distringas* to compel an appearance (*h*), and the court, in an application for a *distringas* for that purpose, will not be strict in requiring an affidavit of the calls or appointments if it appear that several ineffectual attempts have been made to serve the defendant (*h*). In one case *Williams*, J. refused a *distringas* for outlawry, unless on an affidavit stating the intended purpose of the writ (*i*).

Distringas to compel Appearance not allowed when Defendant is abroad.

To Outlawry not, where Defendant is not abroad.

If the defendant be abroad, or there be reason from the affidavits to believe that he is so, a *distringas* to compel an appearance will not be allowed, and if it were, it might be set aside (*k*). And, *e converso*, if the defendant be not abroad, a *distringas for the purpose of outlawry* will not be allowed (*l*). The order for the *distringas* will not be granted in the alternative to compel an appearance *or* to proceed to outlawry (*l*), nor can the plaintiff, after suing out a *distringas*, with a notice that the object of it is to compel an appearance, treat it as a *distringas* for outlawry (*m*). Where it is not clear on the face of the affidavit whether the defendant was abroad or not, the court put the plaintiff to his election as to the purpose for which he sought to obtain the *distringas* (*n*).

Order, how obtained.

Order for, how obtained.] To obtain the order, *in term time, deliver the affidavit above directed to counsel, with a brief "to move for a distringas to compel the defendant's appearance"* (*o*), *and let him move accordingly for the distringas. If in vacation, lay the affidavit before a judge, and if he approve of it, he will make an order accordingly, ex parte* (*p*). The rule, if granted, is absolute in the first instance.

Setting aside for Defect in Affidavit.

If the court or judge give leave to issue the *distringas* upon a defective affidavit, the court may, on that account, afterwards set it aside (*q*). But the court will not set aside the *distringas* merely on account of a defect in the copy of the summons served, which does not alter the sense, and cannot mislead (*r*).

How sued out, &c.

Distringas, how sued out, &c.] *Having obtained a rule or order allowing you to sue out this distringas, prepare a præcipe for the office* (*s*)*; also get a blank writ of distringas, (which may be had at the stationer's or elsewhere), and fill it up according to the directions infra; take them, together with the order for the distringas, to one of the masters of the court out of which the writ is to be issued, who will sign the writ* (*t*). *Take it to the seal office and get it sealed* (*t*).

Form of Distringas.

Form of Distringas.] The following is the form of the writ,

(*h*) *Jones* v. *Price*, 2 Dowl. 42: *Hewitt* v. *Milton*, 1 C. & M. 720; 3 Tyr. 822, *S C.*: *Harding* v. *Manners*, 2 H. & W. 80.

(*i*) *Newton* v. *Levy*, E. 1839, B. C.; 3 Jurist, 385.

(*k*) *Sampson* v. *Lord Graves*, 2 Dowl. 10: *Partridge* v. *Wallbank*, 2 M. & W. 893: and see *Moon* v. *Thynne*, 3 Dowl. 153: *Evans* v. *Fry*, Id. 581; 1 H. & W. 581: *White* v. *Johnson*, 1 Gale, 108: *Esdaile* v. *Marshall*, 6 Dowl. 400.

(*l*) *Fraser* v. *Case*, 9 Bing. 464; 2 M. & Scott, 720; 1 Dowl. 725.

(*m*) *Vere* v. *Gower*, 3 Bing. N. C. 503.

(*n*) *Fraser* v. *Case*, *supra.*

(*o*) 2 W. 4, c. 39, s. 3. See *Hocker* v. *Townsend*, 1 Hodges, 204. See a form, Chit. Forms, 18.

(*p*) See the forms, Chit. Forms, 19.

(*q*) *White* v. *Johnson*, 1 Gale, 103: *Partridge* v. *Wallbank*, 2 M. & W. 893: *sed vide Smith* v. *Macdonald*, 1 Dowl. 688: *Gale* v. *Wickes*, 3 Bing. N. C. 294.

(*r*) *Tyser* v. *Brian*, 2 Dowl. 640; 4 Tyr. 994, *S. C.*

(*s*) See a form, Chit. Forms, 19.

(*t*) R. M. 3 W. 4, r. 2.

as prescribed by the 2 *W.* 4, *c.* 39, *s.* 3:—"*Victoria, by the grace of God Queen of the United Kingdom of Great Britain, Defender of the Faith, to the sheriff of —— greeting. We command you, that you omit not by reason of any liberty in your bailiwick, but that you enter the same, and distrain upon the goods and chattels of* C. D. *for the sum of forty shillings, in order to compel his appearance in our Court of Queen's Bench* [or "*Common Pleas,*" or "*Exchequer of Pleas*"] *to answer* A. B. *in a plea of trespass on the case* (*u*) [or "*of debt,*" or as the case may be]; *and how you shall execute this our writ you may make known in this our said court, on the —— day of ——* [*some day* in term time, not being less than fifteen days after the teste] *now next ensuing. Witness* [name of chief justice, or, in the Exchequer, the name of the chief baron] *at Westminster, the —— day of ——, in the —— year of our reign* [the day of issuing the writ]."

And the following notice must be subscribed to the writ.

"*In the Court of Queen's Bench,* [or *Common Pleas*, or *Exchequer of Pleas*].

Between A. B. *Plaintiff, and* C. D. *Defendant.*

"*Mr.* C. D.,

"*Take notice, that I have this day distrained upon your goods and chattels in the sum of forty shillings, in consequence of your not having appeared in the said court to answer the said* A. B., *according to the exigency of a writ of summons, bearing teste on the —— day of ——; and that in default of your appearance to the present writ within eight days inclusive after the return hereof, the said* A. B. *will cause an appearance to be entered for you, and proceed thereon to judgment and execution,* [or, if the defendant be subject to outlawry, *will cause proceedings to be taken to outlaw you*]."

The 2 *W.* 4, *c.* 39, *imperatively* requires this form to be adopted (*x*); and any material variation therefrom would render it irregular, and in some cases void.

The observations already made, as to the parts and requisites of the writ of summons, will, for the most part, be here applicable, *mutatis mutandis.*

Direction of.

Direction of.] It is to be observed, that this writ of *distringas* must be directed to the sheriff of the county wherein the dwelling-house, or place of defendant's abode, is situate, or to such other sheriff or person as the court or judge may order (*y*). In some instances, the writ must be directed differently; these instances will be found stated in a subsequent part of this volume (*Book I. Part II. Chap.* 1, *Sect.* 7), in treating of the direction of the writ of *capias.* The observations there made, as to the effect of the *non omittas* clause, will also apply to the writ of *distringas.*

Names, &c., in.

Names, &c., in.] We have seen the consequences of a mistake in the names or number of the parties in a writ of summons, (*ante*, 104, 105, 106). If the defendant be not correctly named

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(*u*) It will be seen that this mode of describing the action, and which is prescribed by the form given by the statute, is inconsistent with that prescribed in the writ of summons, *ante*, 103.

(*x*) See *Smith* v. *Crump*, 1 Dowl. 519: *Davies* v. *Porter*, 2 Id. 538: *Richards* v. *Stuart*, 10 Bing. 319; 3 M. & Scott, 774, *S. C.*

(*y*) 2 W. 4, c. 39, s. 3.

in this writ, the sheriff or officer will not be justified in executing it (*a*).

The writ should correspond with the summons in the statement of the cause of action, &c.

Return and Teste of.

Return and Teste of.] Unlike the writ of summons, this writ of *distringas* "shall be made *returnable* on some day in *term*, not being less than *fifteen* days after the *teste* thereof, and shall bear *teste* on the day of issuing thereof, whether in term or vacation" (*b*). It "shall be tested in the name of the lord chief justice or lord chief baron of the court from which the same shall issue, or in case of a vacancy of such office, then in the name of a *senior puisne* judge of the said court" (*c*). The fifteen days are to be reckoned exclusive of the day of the *teste*. If returnable on a *dies non*, it would, it seems, be void (*d*). The sheriff is required by the writ to make his return thereto on the return day; and as to ruling him to make the return, and how far he is in contempt, and subject to an attachment for not making it, &c., see *post*, *Book I. Part II. Chap.* 1, *Sect.* 10. If, by mistake, a wrong king's name be inserted in the commencement of the writ, it would be fatal, and this, although the writ contained the name of the chief judge of the court (*e*). It seems immaterial whether the day and year of the *teste* be stated in words at length or in figures (*f*).

As to the time for the defendant's appearance thereon, *see ante*, 124.

Form of Notice.

Form of Notice.] As regards the before-mentioned *notice*, subscribed to this writ of *distringas*, it must be intitled in the court in which it was sued out, and in the proper names of all the plaintiffs and defendants, and must, in other respects, correspond with the prescribed form, *ante*, 129, or it would render the writ irregular.

Indorsement of Debt and Costs.

Indorsement of Debt and Costs.] If the action befor the recovery of a *debt*, it must be indorsed with a statement of the amount of the plaintiff's claim and costs, and that upon payment thereof, within four days, to the plaintiff or his attorney, further proceedings will be stayed (*g*). This indorsement is fully noticed *ante*, 111.

Irregularity in.

Irregularity in Form of Writ.] If there be any irregularity in the writ or notice, in any of these respects, the court in term, or a judge in vacation, would set it aside (*h*). The application must be made in a reasonable time after the execution of the *distringas*. Eighteen days have been held an unreasonable time in this respect, if the defendant could have come earlier (*i*): and in general, perhaps, the application must be made in eight days after the writ is executed.

(*a*) *Cole* v. *Hindson*, 6 T. R. 234: see *Finch* v. *Cocker*, 2 C., M. & R. 196.

(*b*) 2 W. 4, c. 39, s. 3.

(*c*) Id. s. 12.

(*d*) See *Kenworthy* v. *Peppiat*, 4 B. & Ald. 288.

(*e*) See *Drury* v. *Davenport*, 6 Dowl. 162; 3 Mee & W. 45; 1 Jurist, 896.

(*f*) See *Butler* v. *Cohen*, 4 M. & Sel. 335: *Eyre* v. *Welsh*, 6 Taunt. 333: *sed vide Grogan* v. *Lee*, 5 Taunt. 651.

(*g*) R. M., 3 W. 4, r. 5: *Gale* v. *Winkes*, 3 Bing. N. C. 294; 3 Scott, 667; 5 Dowl. 348, *S. C.*

(*h*) See R. M. 3 W. 4, r. 10.

(*i*) *Wright* v. *Warren*, 3 M. & Scott, 163; 2 Dowl. 724, *S. C.*: and see *Ellison* v. *Roberts*, 2 Dowl. 241: *Fynn* v. *Kemp*, Id. 620: and see the cases as to a writ of summons, *ante*, 118.

We have already seen when the court will allow the *amendment* of *mesne* process, *ante*, 118.

How executed, and Appearance on.

How executed, and appearance on.] *Having sued out this writ and notice as above mentioned, and made the indorsement thereon of the debt and costs, (when necessary), make a copy thereof to be served on the defendant, or to be left at the place where the* distringas *is to be executed. Then take this writ and notice to the sheriff's office, and get a warrant thereon, directed to the sheriff's officer whom you intend employing to execute the writ. Give the copy of the writ and notice and the warrant to the officer, who will thereupon execute the writ; or, you may give the writ and notice and copy to the officer you employ, and he will procure the warrant.* The nature of a sheriff's warrant, and who may execute it, will be found noticed in a subsequent part of this volume, *Book I. Part II. Chap.* 1, *Sect.* 8. In the county palatine of Lancaster or Durham, a *mandate must, previously to the delivery of the writ to the sheriff, be obtained from the chancellor of the duchy or his deputy, commanding the sheriff to execute the writ.*

If the *distringas* can be executed, *the officer will thereupon, under the warrant, distrain upon the defendant's goods and chattels to the amount of* 40*s.* (*or less if he has no more*) (*k*), *and he should serve a copy of the writ and notice on the defendant, if he can be met with, or, if not, he should leave it at the place where the* distringas *is executed* (*l*). The writ may, it seems, be executed before or on the return day (*m*). It must not be executed on a Sunday, or it will be illegal (*n*). It may be executed at any hour, even of the night (*o*). It may be executed at any place within the county, city, &c., to the sheriff of which the writ has been directed; otherwise it might be set aside, unless it were executed on the borders of the county, &c., and there be a dispute as to the boundaries (*p*). The officer cannot break open an outer door or window to make the distress; but, after he has obtained peaceable admission at the outer door, he may, if necessary, break open an inner door, even if it be the door of a lodger (*q*). It is a sufficient execution of the *distringas* to entitle the plaintiff to enter an appearance, that the sheriff should take all the property on the premises, although it amounts to less than 40*s.* (*r*). *On the ninth day inclusive after the return day of the* distringas, *search at the master's office, if the defendant have entered an appearance: if he have, you may proceed in the action as usual; and if he have not, then you may enter an appearance for him as directed ante,* 122, *and proceed in the action.* The plaintiff may enter an appearance in this case without the leave of the court (*s*), or any affidavit (*t*).

Appearance where Distringas can be, and is executed.

If the *distringas* cannot be executed, *then you must procure the sheriff to make his return thereto of* non est inventus *and* nulla

Where Distringas cannot be executed.

(*k*) *Jones* v. *Dyer*, 2 Dowl. 445.

(*l*) 2 W. 4, c. 39, s. 3.

(*m*) Moore, 701: *Ellis* v. *Jackson*, 1 Sid. 229: *Parrot* v. *Mumford*, 2 Esp. 585.

(*n*) 29 C. 2, c. 7, s. 6: and see *Taylor* v. *Phillips*, 3 East, 155.

(*o*) *Mackalley's Case*, 9 Co. 66: *Anon.* 2 Chit. 357.

(*p*) See *Webber* v. *Manning*, 1 Dowl. 24: *Lloyd* v. *Smith*, Id. 372.

(*q*) *Lee* v. *Gansell*, Cowp. 1.

(*r*) *Jones* v. *Dyer*, 2 Dowl. 445.

(*s*) *Johnson* v. *Smealey*, 1 Dowl. 526: *Tucker* v. *Brand*, 4 Dowl. 411.

(*t*) *Page* v. *Kemp*, 4 Dowl. 203; 2 C., M. & R. 494; 1 Gale, 186, *S. C.*

bona, *which he may be compelled to do by ruling or obtaining a judge's order on him to return the writ as mentioned post, Book I. Part II. Chap.* 1, *Sect.* 10 (*u*). *On the ninth day inclusive after the return day of the* distringas, *search at the master's office if the defendant have entered an appearance; and if he have, then you may proceed in the action as usual; if he have not, then, upon an affidavit* (*x*) *made of the sheriff's return of* non est inventus *and* nulla bona, *and that due and proper means were taken and used to serve and execute the* distringas, *the court, or a judge, if satisfied by such affidavit, that such means were so taken, and that from the facts stated therein there is reason to believe that the defendant keeps out of the way to avoid being served with process, will make an order* (*x*), *allowing the plaintiff to enter an appearance for the defendant, and to proceed thereon to judgment and execution.* The observations already made, *ante*, 126, as to the affidavit for obtaining the *distringas*, will in most respects apply to this affidavit. The affidavit should shew that every means to find the defendant, and give him notice, have been tried (*y*), and that no effects of the defendant can be found anywhere to distrain on (*z*). The affidavit should state the places at which, and the persons of whom, the inquiry for the defendant or his goods was made (*a*). The sheriff's return to the *distringas* of *non est inventus* and *nulla bona* is not alone sufficient, and the court cannot listen to hearsay evidence of the efforts made to execute the writ, even where the officer is dead (*b*). An affidavit stating in general terms that the plaintiff could not discover any residence or property of the defendant, and that due diligence has been used, is insufficient (*c*). So is one stating, that the defendant resides in furnished lodgings, unless it also states that he has no effects elsewhere that can be taken (*d*). So is one stating that, upon proceeding to the residence of the defendant, the officer was informed that all the defendant's goods there had been assigned away (*e*). Where the defendant was a lunatic, and on *nulla bona* and *non est inventus* returned, it appeared by the affidavits that his residence was known, but that access to him was refused by his keeper, so that he could not be served with the process, the court refused to allow an appearance to be entered, and suggested that proceedings should be taken against the keeper (*f*).

If the officer will not make an affidavit of the efforts made by him to execute the writ, perhaps the court would compel him to make it.

Having obtained this rule or order, allowing you to enter an appearance, &c., take it to one of the masters, together with a memorandum for the appearance, and you may enter an appearance for the defendant, as directed ante, 122, *and proceed in the action.*

(*u*) See Chit. Forms.

(*x*) See form, Chit. Forms, 22.

(*y*) *Saunderson* v. *Bowen*, 2 Dowl. 338; 2 C. & M. 515, *S. C.*: *Balgay* v. *Gardener*, 2 Dowl. 52: *Romecill* v. *Bowen*, 4 Tyr. 374: *Copeland* v. *Neville*, 3 A. & E. 668; 5 N. & M. 172; 1 H. & W. 374, *S. C.* An affidavit shewing three attempts at service frustrated by the defendant's house being barricaded against the officer, and that a copy was fixed to the door, has been held sufficient. (*Tring* v. *Gooding*, 2 Dowl. 262).

(*z*) *Cornish* v. *King*, 6 Leg. Obs. 110; 2 Dowl. 18; 3 Tyr. 575, *S. C.*

(*a*) *Copeland* v. *Neville*, 5 N. & M. 172; 3 A & E. 668; 1 H. & W. 374, *S. C.* At the defendant's present *or* late place of abode is bad. (*Scarborough* v. *Evans*, 2 Dowl. 9).

(*b*) *Daniels* v. *Varity*, 3 Dowl. 26.

(*c*) *Saunderson* v. *Bowen*, 2 Dowl. 338.

(*d*) *Cornish* v. *King*, 2 Dowl. 18.

(*e*) *Balgay* v. *Gardener*, 2 Dowl. 52.

(*f*) *Starkie* v. *Skilbeck*, 6 Dowl. 52.

If the appearance be made by the defendant, *let it be done as directed ante*, 121.

Distress, how disposed of.

Distress, how disposed of.] The statute of 2 *W*. 4, *c*. 39, is silent as to what is to be done with the distress under the *distringas*. It should seem, however, that it cannot be sold, and that, upon the appearance being entered, the defendant is entitled to have his goods back again (*g*).

(*g*) See *Smith* v. *Macdonald*, 1 Dowl. 688. By the 10 G. 3, c. 50, s. 3, the court may order the issues levied to be sold, and the money arising thereby to be applied to pay the plaintiff's costs; and the surplus, if any, to be retained, until the defendant has appeared, or other purpose of the writ be answered; with a proviso by sect. 4, that when the purpose of the writ is answered, then the issues shall be *returned;* or if sold, what shall remain of the money arising by such sale shall be repaid to the party distrained upon. (See *Martin* v. *Townshend*, 5 Bur. 2725: *Raban* v. *Plaistow*, Id. 2726: *sed quære?* see *Smith* v. *Macdonald*, 1 Dowl. 688. See the forms, Chit. Forms, 24).

CHAPTER III.

PROCEEDINGS FROM THE DECLARATION TO THE ENTERING OF THE CAUSE FOR TRIAL, INCLUSIVE.

Sect. 1.

The Declaration.

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Book I.
Part I.

1. When to declare.

1. *When to Declare.*

Declaring de bene esse obsolete.

Declaring before Appearance, or de bene esse.] SINCE the 1st of October, 1838, at which time the statute 1 & 2 *V. c.* 110, for abolishing imprisonment on *mesne* process came into operation, the former practice of declaring *de bene esse* before appearance may be considered as virtually obsolete. It cannot be said to be totally abolished, because there is one case in which it may *possibly* occur, viz. that of the arrest of an insolvent under the 85th section of 1 & 2 *V. c.* 110 (*a*). It is very unlikely, however, that it will ever occur, even in that case, for two reasons:—First, it is improbable that the insolvent should "not be in actual custody at the expiration of eight days after the execution

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(*a*) See *Turnor* v. *Darnell*, 7 Dowl. 346.

of the writ," and if he be in actual custody, there can be no declaration *de bene esse* (*b*). And secondly, it is improbable that the plaintiff will, in such a case, incur more expense than is absolutely necessary to subject the insolvent to the period of imprisonment allowed by the adjudication, viz. the expense of arrest or detainer. It is clear that the plaintiff in such a case is not bound to declare within two terms, as he formerly was against other prisoners, and it is very doubtful whether he need declare at all (*c*). And, even if he proceeded with his action, the result would be that the defendant, so soon as the time prescribed by the adjudication had expired, would have a full defence by plea or *auditâ querelâ*, according to the stage of the proceedings (*d*). It would, therefore, be merely incumbering the work to retain in this edition all that part of it which treated of declaring *de bene esse* (*e*).

Plaintiff cannot declare before Appearance.

It may be useful, however, to state concisely the practice on this subject, previously to the passing of the above-mentioned act, in order that the effect of that act may be understood more clearly. It should be premised that, previously to the statute of 2 *W.* 4, *c.* 39, (the Uniformity of Process Act), the plaintiff could not declare before the return of the writ in any instance, or under any circumstances. Also, that in all cases where the process was not against the *person*,—as, where the proceedings were by original summons or *distringas*, or the like,—the plaintiff could not have delivered or filed his declaration until the defendant had actually appeared. But in all other cases, where the process was against the person, (such as the *capias*, bill of Middlesex, or *latitat*, bailable or otherwise (*f*),) the plaintiff might have delivered or filed his declaration *de bene esse* on or after the return day of the writ (*g*); or, by original, on or after the *quarto die post* (*h*), provided six days inclusive had elapsed after the service of the process or the arrest of the defendant (*i*); and provided the declaration had been delivered or filed before defendant had perfected bail in bailable cases (*k*); or before the time for the defendant's appearance had expired in non-bailable cases (*l*); and provided also it was so filed or delivered before the defendant had actually appeared, by putting in and justifying bail in bailable cases (*m*), or by entering a common appearance in non-bailable cases (*n*). Since the passing of 2 *W.* 4, *c.* 39, it will be perceived that in *non-bailable* cases the writ of *summons*, or writ of summons and *distringas* thereon, is not a process against the *person;* and such

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(*b*) See R. M. T. 3 W. 4, r. 11.

(*c*) See *Buzzard* v. *Bousfield*, 3 M. & W. 368; 7 Dowl. 1, *S. C.*

(*d*) See per *Parke*, B., Ibid.

(*e*) For full information on the subject, see the 6th edition of this work, p. 280, *et seq.*

(*f*) Formerly, also, to have enabled the plaintiff to declare *de bene esse*, the process must have been returnable before the last general return day of the term. (*Key* v. *Browne*, 3 D. & R. 28; 1 B. & C. 653, *S. C.*: *Wilson* v. *George*, 5 B. & C. 455; 8 D. & R. 135, *S. C.*)

(*g*) See R. T. 22 G. 3; R. M. 10 G. 2: *Abbey* v. *Martin*, 1 H. Bl. 533: and see 1 Sellon, 226: *Robertson* v. *Douglas*, 1 T. R. 191.

(*h*) 1 Sellon, 227: and see *Golding* v. *Grace*, 2 W. Bl. 749.

(*i*) R. T. 1 W. 4, r. 10.

(*k*) *Wendover* v. *Cooper*, 10 B. & C. 614.

(*l*) *Baker* v. *Cooper*, 6 T. R. 548; 2 Anst. 491, *S. C.*: *Turner* v. *Portall*, 2 New Rep. 231: *Kenman* v. *Bean*, Id. 433: *Smith* v. *Painter*, 2 T. R. 719.

(*m*) *Wendover* v. *Cooper*, 10 B. & C. 614.

(*n*) See *Turner* v. *Portall*, 2 New Rep. 232.

being the case (*o*), the plaintiff cannot declare therein until an appearance has been actually entered, and then it must be *absolutely* (*p*). In *bailable* actions, however, previously to the passing of 1 & 2 *V. c.* 110, the practice of declaring *de bene esse*, still continued, and by rule of *M. T.* 3 *W.* 4, *r.* 11, it was ordered that, upon all writs of *capias*, where the defendant should *not be in actual custody*, the plaintiff, at the expiration of eight days after the execution of the writ, inclusive of the day of such execution, should be at liberty to declare *de bene esse*, in case special bail should not have been perfected; and if there were *several defendants*, and one or more of them should have been served only, and not arrested, and the defendant or defendants so served should not have entered a common appearance, the plaintiff should be at liberty to enter a common appearance for him or them, and declare against him or them in chief (*q*), and *de bene esse* against the defendant or defendants who should have been arrested, and should not have perfected special bail. Now, however, since the passing of 1 & 2 *V. c.* 110, all personal actions must (by *s.* 2), be commenced by writ of summons, (except in cases within the 85th section, see *ante*, p. 134), and as there is nothing in that act to alter the practice of entering an appearance as regulated by the second section of the Uniformity of Process Act, an appearance must be entered in all cases, and the plaintiff cannot declare in any personal action before the appearance has been actually entered (*r*).

Declaring after Appearance.

Declaring after Appearance.] After an appearance entered, the plaintiff may declare, either in term or vacation, except between the 10th of August and 24th of October. Even if the defendant enter an appearance to a writ of summons before the expiration of the eight days allowed for that purpose, the plaintiff may immediately declare against him (*s*). Previously to 1 & 2 *V. c.* 110, he should have taken care in bailable cases not to declare *absolutely* before bail was put in and perfected; if he did so before bail was put in, it would have been a waiver of bail where the defendant was not in custody; if before justification, it would have been a waiver of justification. Now, however, since the proceeding by arrest is altogether collateral to the proceedings in the action, it would seem that even when the defendant is arrested before declaration, the plaintiff will not affect his right to have bail put in and justified by declaring absolutely.

Declaring by the bye abolished.

Declaring by the bye abolished.] Formerly, the plaintiff and other persons might, in actions by bill or original, after the appearance of the defendant, have declared *by the bye*; but the present process being returnable in vacation as well as in term,

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(*o*) Other reasons might, perhaps, be assigned for this rule; but this is deemed sufficient.

(*p*) Unless the defendant has appeared, the plaintiff cannot declare until eight days after service of the writ, inclusive of the day of service, have expired, and then only after an appearance. (See *Fish* v. *Palmer*, 2 Dowl. 400).

(*q*) This term "chief" used in the rule is inappropriate, it ought to have been "absolutely."

(*r*) See the possible exceptions to this rule, noticed *ante*, p. 134, in the case of proceeding against insolvents under 1 & 2 V. c. 110, s. 85.

(*s*) *Morris* v. *Smith*, 2 C., M. & R. 314; 1 Gale, 187; 4 Dowl. 198, *S. C.*

the former practice as to declaring *by the bye* can no longer prevail (*t*).

In what time Plaintiff is bound to declare.

In what Time Plaintiff is bound to declare.] As to the time within which the plaintiff must now declare—inasmuch as the appearance may now be entered by the defendant in *vacation* as well as in *term time*, it seems that the plaintiff must declare before the end of the term next after the execution of the writ, otherwise a judgment of *nonpros* may be signed (*u*). But if no such *nonpros* be obtained, then he may declare at any time *within a year* next after the execution of the writ (*x*), unless otherwise ordered by the court or a judge; but if he do not declare within that period, he will be deemed out of court (*y*), (the rule of *H. T.* 2 *W.* 4, *r.* 35, which is still in force, ordering that "a plaintiff shall be deemed out of court *unless he declare within one year* after the process is returnable"). And where an action is removed from an inferior court by writ of *habeas corpus*, the cause is not out of court till a year after the return of the writ by which the action is removed (*z*). It would seem, that, though the plaintiff's proceedings are stayed by rule under the Interpleader Act for a great portion of the year after the process is executed, still that portion will be counted as part of the year, and that the plaintiff must declare within it (*a*); and so, where the proceedings are stayed by injunction (*b*).

Against Prisoner.

In proceedings against a prisoner in custody at the plaintiff's suit, previously to 1 & 2 *V. c.* 110, he must have been declared against before the end of the term next after the arrest or detainer, or render and notice thereof, otherwise he would have been entitled to be discharged on entering a common appearance (*c*): and a question may be raised, whether the former regulations as to declaring against prisoners arrested on *mesne* process (*d*) apply to cases in which the defendant is arrested by capias under 1 & 2 *V. c.* 110 previously to declaration. It is conceived that they do not apply, and that the proceeding by arrest will now be considered in every respect as merely collateral to the action. As, however, an appearance

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(*t*) In actions by *original*, the plaintiff could not declare *by the bye* until after the defendant had appeared; and then only within the term in which the process was returnable. In actions by *bill*, the plaintiff could not have declared *by the bye* until after the defendant had appeared; but he might have done so at any time afterwards, provided he did so before the end of the term next after that in which the process was returnable. (*Smith* v. *Muller*, 3 T. R. 627; R. M. 10 G. 2, Q. B.)

(*u*) See Tidd, Sup. 125; Tidd, New Prac. 224. The defendant cannot sign judgment of *nonpros* if plaintiff has appeared for him. (See *post*, Vol. II. Book IV. Part I. Ch. 18).

(*x*) See *Barnes* v. *Jackson*, 3 Dowl. 59; 1 Hodges' Rep. 59, *S. C.*: *Hodgson* v. *Mee*, 5 N & M. 302; 3 A. & E. 765, *S. C.* The year cannot be calculated from the date of the appearance; the execution of the writ is deemed the return day of it. (Ib.)

(*y*) See *Worley* v. *Lee*, T. R. 112. *Morton* v. *Gray*, 9 B. & C. 544. In Mr. Chapman's second Addenda to the New Rules, 115, the practice is laid down thus: "A plaintiff, to prevent being nonprossed, must declare within two terms after the return of the writ, (that is, now, after the execution of the writ). If the writ be executed in the vacation, it would seem, from a parity of reasoning in similar cases of practice, that he must declare before the end of the following term, or a *nonpros* may be signed; but he may have a rule to declare as heretofore."

(*z*) *Morrish* v. *Richards*, 5 N. & M. 268; 1 H. & W. 437, *S. C.*: and see *Pierce* v. *Street*, 3 B. & Ad. 397.

(*a*) *Unite v. Humphrey*, 3 Dowl. 532.

(*b*) *Horne* v. *Took*, 4 M. & Scott, 183; 2 Dowl. 776, *S. C.*

(*c*) R. T. 3 W. 4.

(*d*) 2 W. 4, c. 39; R. T. 3 W. 4; 4 & 5 W. & M. c. 21; R. E. 5 W. & M. R. 3, s. 6.

must now be entered in all cases, the defendant will in general be able to compel the plaintiff to declare, and to obtain judgment of *nonpros* without reference to the proceedings under the arrest.

Time to declare where there are several Defendants.

Time to declare where there are Several Defendants.] Where one of several defendants, against whom you intend to proceed, or must proceed jointly, has been served with process or arrested, and the other cannot be served, the plaintiff should apply to the court, or to a judge in vacation, for time to declare against the defendant who was served or arrested, until the appearance or outlawry of the other (*e*); for a declaration delivered to the one served or arrested, and afterwards to the other, when he appears, would be irregular (*f*). The affidavit upon which such an application is grounded should state that the plaintiff cannot find the other defendant, and that he is using all due diligence in proceeding to serve or outlaw him (*g*), or that he is absent abroad (*h*), otherwise the court or a judge may possibly order the defendant, if he was arrested, to be superseded. Where (before 1 & 2 *V.* *c.* 110) goods had been obtained, and the plaintiff commenced an action against the person who obtained the goods, and other persons represented as his partners, but who could not be found, the Court of Exchequer gave leave to discontinue the first action without paying costs, and to detain the defendant in custody until the plaintiff had issued a new writ against him alone, and declared against him (*i*). It may be as well here to notice, that, by the rule *M. T.* 3 *W.* 4, *r.* 1, the writ must contain the names of all the defendants in the action, and not the names of any other defendants in any other action; therefore, if a writ be sued out against two defendants, the plaintiff cannot file or deliver two declarations against them severally. But, notwithstanding this rule, the plaintiff may in an action commenced by writ of summons on a writ against two defendants, declare against one only, provided, indeed, the cause of action be separate, and provided also, the plaintiff drop his proceedings against the other entirely (*k*). And he might have done so in an action commenced by writ of capias, subject however to discharging the bail, unless the action was for a tort, and the arrest was under a judge's order. The notice of such a declaration must not be intitled as against both (*k*).

Rule for Time to declare.

Rule for Time to declare.] If the plaintiff be not ready to declare within the time limited, *obtain from one of the masters a side-bar rule for time to declare* (*l*), *until the first day of the following term; or, as it is now more usual, he may take out a rule for a month's time. Serve a copy upon the defendant's*

(*e*) *Morton* v. *Grey*, 9 B. & C. 544: *Williams* v. *Manwairing*, Barnes, 401.

(*f*) *Morton* v. *Grey*, 9 B. & C. 544: *Knight* v. *Parker*, 2 W. Bl. 759: and see *Sykes* v. *Bauwens*, 2 New Rep. 404: *Turner* v. *Portall*, Id. 231: *Kenman* v. *Bean*, Id. 433: *Stork* v. *Herbert*, 1 Wils. 242.

(*g*) *Tracey* v. *Garmston*, Barnes, 396.

(*h*) *Richardson* v. *Pollen*, 1 Hodges, 75.

(*i*) *Ames* v. *Ragg*, 2 Dowl. 35.

(*k*) *Evans* v. *Whitehead*, 2 M. & R. 367: *Bowles* v. *Bilton*, 2 C. & J. 474: *post*, 142.

(*l*) See the form of these rules, Chit. Forms, 25. By R. H. 2 W. 4, r. 38, "the plaintiff may have a rule for time to declare in the Court of Exchequer as well as in the other courts." Before this *attorney or agent* (*m*). *You may afterwards obtain, in the same manner, rules for further time to declare, which was formerly granted from the beginning to the end of the term, and from the end of one term to the beginning of the next, but are now usually limited to a month, or more if necessary* (*n*); when a month's time is given, it is always understood to be a lunar and not a calendar month (*o*).

Rule to declare.

The defendant, on the other hand, if he wish to compel the plaintiff to declare, should *obtain from one of the masters upon counsel's signature* a peremptory rule *to declare* (*p*), *within a certain time, which rule is absolute in the first instance; and if the plaintiff do not declare within the time so limited, the defendant may, after a four-day written demand of declaration, sign judgment of* nonpros. By *R. H.* 2 *W.* 4, *r.* 39, "a rule to declare peremptorily may be in any case absolute in the first instance" (*q*). This term "peremptorily" only prevents a plaintiff from taking out more rules for time to declare; and therefore if the defendant signs judgment of *nonpros* after the rule to declare has run out, but the plaintiff has declared in the interim, the judgment is irregular (*r*). If the plaintiff after a peremptory rule to declare wish for further time, he must apply to the court or a judge on affidavit stating sufficient grounds for such indulgence. Before signing judgment of *nonpros* in replevin, or other cause removed from an inferior court for want of a declaration, a *rule to declare* must be given (*s*).

Consequences of declaring too soon or too late.

Consequences of declaring too soon or too late.] If the plaintiff declares too soon, or if he neglects to declare within the time specified, the defendant may take advantage of the irregularity or laches. If the plaintiff declares absolutely before the time allowed him for that purpose, the irregularity is a ground for an application to the court or a judge to set aside the declaration and subsequent proceedings. Even where the plaintiff declares conditionally within the eight days allowed the defendant to appear, it is an irregularity; but, to take advantage of it, the application should be made in the first instance, and before the defendant has taken any step; for when a plaintiff declared conditionally before the time for defendant's appearance had expired, and the defendant took the declaration out of the office, it was held to be a waiver of the irregularity (*t*). In a later case, where the plaintiff declared *de bene esse* before the expiration of the eight days from the service of the writ, it was holden as a consequence, that he was not entitled to the costs of his declaration (*u*).

Judgment of Nonpros.

If the plaintiff do not declare in due time, or within such further time as he may obtain of the court or a judge, the

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rule the plaintiff could only obtain time to declare in the Exchequer by summons and order of a baron.

(*m*) *Towes* v. *Powell*, 1 H. Bl. 87

(*n*) See *Richardson* v. *Pollen*, 1 Hodges, 75.

(*o*) See *Soper* v. *Curtis*, 2 Dowl. 237: *Talbot* v. *Linfield*, 3 Bur. 1415; 1 Bl. 450, *S. C.*

(*p*) See Chit. Forms, 25.

(*q*) Before this rule of court, the rule to declare peremptorily was in C. P. only a *rule nisi*.

(*r*) *Grey* v. *Pennell*, 1 Dowl. 120.

(*s*) See *post*, Vol. II. Book III. Ch. 2; Book IV. Part I. Ch. 4; R. H. 2 W. 4, r. 37, 38.

(*t*) *Gilbert* v. *Kirkland*, 1 Dowl. 153: see *Fish* v. *Palmer*, 2 Id. 460. See *post*, 143.

(*u*) *Per Parke*, J., *Fish* v. *Palmer*, 2 Dowl. 460: Bagley's Prac. 192.

defendant may, at the expiration of four days next after a written demand of declaration, served upon the plaintiff, or his attorney or agent, as the case may be (*x*), sign judgment of *nonpros.* This is a final judgment. (*See fully as to this judgment, post, Vol. II. Book IV. Part I. Ch.* 18).

Where Injunction in Equity.

It may be here observed that a declaration delivered, although in disobedience to an injunction in equity, is regular (*y*).

2. *How to Declare.*

2. How to declare.

Engross the declaration upon plain paper. It is no objection that it is partly written and partly printed, and it is the common practice so to engross it (*z*). *Indorse on it the notice to plead, as directed post*, 152 (*a*). *In some cases, also, indorse on it a demand of plea; and as to which see post*, 158, 159. *If the declaration is to be filed, charge, on the back of it,* 4*d. per folio of* 72 *words; and file it with one of the masters, and give the defendant's attorney notice of your having done so. If the declaration is to be delivered, then deliver it to the defendant's attorney or agent.* In what cases the declaration must be delivered, and in what cases filed, *see post*, 140, 141. As to the delivery of a particular of demand, with the declaration, *see post*, 143.

In Name of one not an Attorney.

It may be as well to observe, that, though the declaration be delivered in the name of a person as the attorney, but who, in fact, is not an attorney, the defendant cannot treat the declaration as a nullity, and sign judgment. His course would be to apply to the court or a judge to set aside the proceedings, or stay them until a proper attorney has been appointed (*b*).

In what Cases the Declaration is to be delivered.

How delivered.

In what Cases the Declaration is to be delivered.] In all cases where an appearance is entered (*c*) by the defendant or his attorney, a copy of the declaration must be delivered to the defendant's attorney or agent, or to the defendant himself if he has appeared in person. If an appearance has been by an attorney, a delivery to the party himself would be irregular (*d*); but, if the abode of the defendant's attorney be unknown to the attorney or agent of the plaintiff, such copy may be left with the masters, and notice thereof given to the defendant (*e*). The delivery must take place before nine o'clock at night (*f*): if delivered after that hour, it would not, it seems, be a nullity, though irregular (*g*). If it be necessary to serve a declaration in a special manner, an application for that purpose must be made previous to its being served out of the ordinary course (*h*); and where, on account of the defendant's residence being unknown, the court gives leave to serve the declaration in a particular way, they will not make a prospec-

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(*x*) R. T. 1 W. 4, r. 8.

(*y*) *Horne* v. *Took*, 4 M. & Scott, 183; 2 Dowl 776, *S. C.*

(*z*) *Brand* v. *Rich*, 2 Moore, 654; 8 Taunt. 591, *S. C.*: *sed vide Champneys* v. *Hamlin*, 12 East, 294: *Hartop* v. *Juckes*, 1 M. & Sel. 709: *Doe* d. *Irwin* v. *Roe*, 1 D. & R. 562.

(*a*) See the forms, Chit. Forms, 38.

(*b*) *Bayley* v. *Thompson*, 2 Dowl. 655; 4 Tyr. 955; 2 C. & M. 673, *S. C.*: and see *ante*, 35.

(*c*) Or (before 1 & 2 V. c. 110), where special bail was put in in time: *R.* v. *Shff. of Middlesex*, 3 Dowl. 186.

(*d*) Lofft, 332.

(*e*) R. T. 2 G. 2: and see R. T. 12 W. 3: *Hindford, Earl of*, v. *Charteris*, 2 L. Raym. 1407; Tidd, 9th ed. 452.

(*f*) R. H. 2 W. 4, r. 50, *ante*, 52.

(*g*) *Horsley* v. *Purdon*, 2 Dowl. 228.

(*h*) *Troughton* v. *Craven*, 3 Dowl. 436.

tive rule that service of future rules, &c., may be effected in the same way (*i*).

Rules as to Payment for Copy delivered, obsolete.

The old rules of *T. T.*, 12 *W.* 3, and *T. T.*, 2 *G.* 2, requiring the defendant's attorney to pay for the copy of the declaration on delivery, are, in practice, quite obsolete, and are virtually repealed by the rules of *H. T.*, 35 *G.* 3, and *M. T.*, 36 *G.* 3, which, although "*issue*-money" only is mentioned therein, the court have determined extend to all pleadings (*k*).

In what Cases filed.

In what Cases to be filed, and Notice of filing, &c.] The declaration must be filed with the masters, where an appearance is entered by the plaintiff for the defendant (*l*).

Notice of filing.

Where the declaration is thus filed, *notice of its being so filed* must be delivered to, or left at the last or most usual place of abode of the defendant, if known (*m*), and to all the defendants, if more than one (*n*). A personal service of the notice is in no case necessary (*o*).

Service of Notice of.

It may be served at any time on the same day on which the declaration is filed or at any time after, before a *nonpros* is actually signed, and within the year after the return of the process (*p*). And service of it in the country, 150 miles off, on the day on which the declaration is filed, is regular, at least if the notice be served after the time of filing the declaration (*q*). It must not, however, be served on a Sunday (*r*); if it were, the service would be absolutely void, and not a mere irregularity (*s*). It must not be served after nine o'clock at night (*t*), otherwise it would be irregular (*u*). It seems that it may be served between the 10th August and 24th October, provided the declaration be filed before that time (*x*).

Sticking up Notice of in Office.

By rule of *H. T.*, 2 *W.* 4, *r.* 49, "Where the residence of a defendant is unknown, *notice of declaration may be stuck up in the office, but not without previous leave of the court*" (*y*). To induce the court or a judge at chambers to allow the notice to be so stuck up, you must shew, on affidavit, that the most satisfactory inquiries have been made, and on more than one occasion, after the defendant (*z*), and the particulars of such inquiries must be stated in the affidavit. The rule is absolute in the first instance (*a*), and a judge's order for the like

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(*i*) *Martin* v. *Colvill*, 2 Dowl. 694: but see *Broom* v. *Stille*, 1 H. & W. 672.

(*k*) Tidd, 9th ed. 452.

(*l*) R. T., 1 G. 2, Q. B.: R. M., 1 G. 2, C. P.

(*m*) R. T., 1 G. 2, Q. B.: R. E., 49 G. 3: R. M., 1 G. 2, C. P.

(*n*) *Coulson* v. *Turnbull*, Barnes, 246: *Kingdom* v. *Horn*, Id. 293.

(*o*) *Simmons* v. *Shannon*, 2 W. Bl. 725; 3 Wils. 147, *S. C.*: and see *Rolfe* v. *Brown*, 3 Dowl. 628; in which case the court refused to set aside the service where the probabilities were, that it had come to the defendant's hands, and the latter did not deny that it had come to his knowledge.

(*p*) R. H., 2 W. 4, r. 35: *Worley* v. *Lee*, 2 T. R. 112: *West* v. *Radford*, 3 Burr. 1452: *ante*, 137. The day of the execution of *mesne* process, issued under the 2 W. 4, c. 39, *ante*, 137, is the return day.

(*q*) *Rooke* v. *Sherwood*, 4 Dowl. 362.

(*r*) *Morgan* v. *Johnson*, 1 H. Bl. 628: *Roberts* v. *Monkhouse*, 8 East, 547.

(*s*) *Moffat* v. *Carter*, 2 New Rep. 75: *Morgan* v. *Johnson*, 1 H. Bl. 628; 3 East, 55, 81; Id. 547.

(*t*) R. H., 2 W. 4, r. 50, *ante*, 53.

(*u*) *Horsley* v. *Purdon*, 2 Dowl. 228.

(*x*) So decided by *Maule*, B., at chambers, on 25th Oct. 1839. And see 2 W. 4, c. 39, s. 11.

(*y*) See *Troughton* v. *Craven*, 3 Dowl. 436. See the form of affidavit, Chit. Forms, 37. See also the old cases of *Oldham* v. *Burrell*, 7 T. R. 26: *Holsten* v. *Culliford*, 1 B. & P. 214: *Weller* v. *Robinson*, 1 Taunt. 433: *Losemore* v. *Cohen*, 1 New Rep. 279.

(*z*) *Fry* v. *Rogers*, 2 Dowl. 412: *Heming* v. *Duke*, Id. 637. Inquiries must be made at the place of which the defendant is described in the writ, though not his usual place of abode. (*Burghart* v. *Lord Ranelagh*, Bail Court, Q. B., M. 1838; 2 Jurist, 1642).

(*a*) *Bridger* v. *Austen*, 1 Dowl. 272; 1 M. & Scott, 520, *S. C.*

purpose may be obtained *ex parte.* If the notice has been served at the defendant's residence, or any service effected which will satisfy the court that it has been brought to the defendant's knowledge, the application for an order that posting the notice in the office may be sufficient, has, in some cases, been considered unnecessary; but the safer way, if there be any doubt, is to apply to the court or a judge under the above rule of *R. H.*, 2 *W.* 4 (*b*).

Form of the Notice.

As regards the form of the notice, it must specify in what office the declaration has been filed, the nature of the action, at whose suit prosecuted, the time limited for pleading, and state, that unless the defendant plead within the time so limited, judgment will be entered against him by default (*c*). If there be a variance between the nature of the action as stated in the notice and that in the declaration, the notice will be bad (*d*). Upon a writ against two, where the declaration is against one only, notice of such declaration intitled as against both is bad (*e*). When the declaration is filed *de bene esse*, the notice should state that circumstance; yet, although omitted, the court have holden the notice to be sufficient (*f*). It was formerly usual to state the amount of the damages in the notice in the Queen's Bench (*g*), but this was otherwise in the Common Pleas (*h*); and now, by rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 41, "it shall not be deemed necessary to express the amount of damages in a notice of declaration." It seems that no date is necessary (*i*).

Declaration deemed filed from Service of Notice only.

Declaration deemed filed from Service of Notice only.] The declaration is deemed filed only from the service of the notice (*k*); therefore, a rule to plead, or the like, before service of notice of filing, unless entered on the same day (*l*), would be irregular (*m*). And where a declaration *de bene esse* was filed, and the defendant entered an appearance before notice was given of filing it, the declaration and all subsequent proceedings were set aside for irregularity (*n*).

Defendant must take out, and pay for Declaration filed.

Defendant must take out, and pay for Declaration filed.] If the declaration is filed, the defendant cannot take it out of the office without paying for it, nor will he be allowed to plead without taking it out (*o*). By ruling a defendant to plead, and demanding a plea, therefore, you compel him to

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(*b*) See *per Alderson*, B., *Troughton* v. *Craven*, 3 Dowl. 436.

(*c*) R. T., 1 G. 2, K. B.: R. M., 1 G. 2, C. P.: *Sams* v. *Culham*, 9 B. & C. 370: *Hetherington* v. *Hobson*, 6 Taunt. 331: *Bartholomew* v. *Goulding*, Barnes, 291: *Taylor* v. *Sherman*, Id. 299, 409; Prac. Reg. 131, 133, 134, 135. See the forms, Chit. Forms, 37, 38.

(*d*) *King* v. *Skiffington*, 1 C. & M. 363; 1 Dowl. 686, *S. C.*: *Graves* v. *Urse*, 2 Wils. 84: *Robins* v. *Richards*, 1 Dowl. 378: *Cooke* v. *Johnson*, 1 M. & Scott, 115; 1 Dowl. 247, *S. C.*

(*e*) *Evans* v. *Whitehead*, 2 M. & R. 367. See *post*, Vol. II. Book IV. Part I. Ch. 35, as to the titles of affidavits.

(*f*) *Cort* v. *Jacques*, 8 T. R. 77: *Watkins* v. *Woolley*, 8 Taunt. 644; 2 Moore, 719, *S. C.*

(*g*) Imp. K. B., 10th ed. 186.

(*h*) *Hetherington* v. *Hobson*, 6 Taunt. 331.

(*i*) *Anon.*, 2 Chit. Rep. 238.

(*k*) R. T., 1 G. 2: R. T., 2 G. 2, K. B.: R. E., 49 G. 3: R. M., 1 G. 2, C. P.: see *Hutchinson* v. *Brown*, 7 T. R. 298: *Weddle* v. *Brazier*, 1 C. & M. 69; 1 Dowl. 639, *S. C.*: and see *Robertson* v. *Douglas*, 1 T. R. 191.

(*l*) *Actman* v. *Conway*, 6 Dowl. 76.

(*m*) *Post*, 157: Prac. Reg. 131: *Grey* v. *Saunders*, Barnes, 248: see *Worley* v. *Lee*, 2 T. R. 112: *West* v. *Radford*, 3 Bur. 1452.

(*n*) *Weddle* v. *Brazier*, 1 C. & M. 69; 3 Tyr. 237; 1 Dowl. 699, *S. C.*: *Rooke* v. *Sherwood*, 4 Dowl. 363.

(*o*) See *White* v. *Dent*, 1 B. & P. 341.

pay for the declaration; for, if he do not take the declaration out of the office, and plead within the time limited for that purpose, judgment may be signed as for want of a plea (*p*).

Taking Declaration out of Office, a Waiver of Irregularities.

It should be observed, that, by taking the declaration out of the office, you waive all objections to the process (*q*), and, it seems, to any variance between the notice of declaration and the declaration itself (*r*), and also to the declaration having been filed conditionally instead of absolutely. The defendant has always allowed him the opportunity of seeing the exterior of the declaration (*s*). Also, any irregularity in the notice or filing or delivery of the declaration must be taken advantage of before plea, or perhaps before the time for pleading has expired (*t*); and at all events before judgment signed (*u*). It has been held, however, that it is not too late, on the 25th, to take advantage of an irregularity in declaring too soon, which has occurred on the 7th (*v*).

Particulars of Demand.

Particulars of Demand.] By the rule of *T. T.*, 1 *W.* 4, *r.* 6, *post*, *Vol. II. Book IV. Part I. Ch.* 15, the plaintiff must, with every declaration, (if delivered), or with the notice of declaration, (if filed), *containing any common indebitatus counts*, deliver full particulars of his demand under those counts, where such particulars can be comprised *within three folios;* and where the same *cannot be comprised within three folios*, he must deliver such *a statement of the nature of his claims*, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios. And to secure the delivery of particulars in all *such cases*, it is thereby further ordered, that if any declaration or notice shall be delivered without such particulars or such statement as aforesaid, and a judge shall afterwards order a delivery of particulars, the plaintiff shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver. And it is thereby also further ordered, that a copy of the particulars of the demand, and also particulars (if any) of the defendant's set-off, shall be annexed by the plaintiff's attorney to every record at the time it is entered with the judge's marshal. As to the form and other requisites of the particulars, see *post*, *Vol. II. Book IV. Part I. Ch.* 15.

3. *Form of Declaration.*

3. Form of Declaration.

As this and other subjects of pleading could not be treated of in other than a cursory manner in a work of this description, and as a cursory notice of them would be of little practical utility, it is thought better to consider under this head only such points connected with the form of the

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(*p*) See *Keeling* v. *Newton*, 1 Wils. 173.

(*q*) *Caswall* v. *Martin*, 2 Str. 1072.

(*r*) *Robins* v. *Richards*, 1 Dowl. 378.

(*s*) *Robins* v. *Richards*, 1 Dowl. 379: *Gilbert* v. *Kirkland*, 1 Dowl. 153.

(*t*) *Semble*, *Newnham* v. *Hanny*, 5 Dowl. 259: but see *Hough* v. *Bond*, 1 M. & W. 314.

(*u*) *Smith* v. *Clarke*, 2 Dowl. 218: and see *M'Quoick* v. *Davis*, 2 Chit. Rep. 164: *Minster* v. *Coles*, Id. 237: *Paire* v. *Goodman*, 2 Smith Rep. 391: *sed vide Graves* v. *Wise*, 2 Wils. 84: *Bartholomew* v. *Goulding*, Barnes, 291.

(*v*) *Fish* v. *Palmer*, 2 Dowl. 460.

declaration as frequently occur in practice. These may be divided into the following heads:—

Declaration should correspond with Writ.

The Declaration should correspond with the Writ.] The declaration should correspond with the writ:—1st. In the parties; 2nd. In the character in which they sue, and are sued; and 3rd. In the form of action.

In the Parties.

1st. In the Parties:—If the process be against two, and one only be arrested or served, the plaintiff must in general first outlaw or compel the appearance of the other, before he can declare against the party arrested or served (*x*). If he declare against one only, where two are named in the writ, the other, if he have appeared, may sign judgment of *nonpros* (*y*); and the same, if he serve notice of declaration, or even obtain a rule for time to declare against one only, without proceeding against the other (*y*). And before 1 & 2 *V. c.* 110, if he had holden two defendants to bail on a joint writ, and declared against one only, the bail would have been discharged, and if he declared against both severally, the court would have set aside the declarations for irregularity (*z*); and this will, it would seem, still be the case as to the discharge of the bail, for the bail of each defendant, in actions *ex contractu* against several, only undertake for a joint claim recoverable in the action against all the defendants, and not for a separate claim against their principal, which could not be recovered in the joint action (*a*). But where process in an action for a tort, as for an assault, was against two defendants, and both were holden to bail under a judge's order, and the plaintiff afterwards declared against one of them only, the court held that he might do so without discharging the bail (*b*), provided he dropped his proceedings against the other entirely (*c*). And, on actions commenced by writ of summons, the plaintiff may declare against one defendant only, although several be joined in the writ, provided the cause of action be separate, and provided he drop the proceedings against the others (*d*). If the writ be at the suit of one plaintiff only, and the declaration at the suit of two, or *vice versâ*, the court will, either in bailable or non-bailable cases, set aside the declaration and proceedings thereon for irregularity (*e*), and in bailable cases order an *exoneretur* to be entered on the bail-piece.

Names of Parties.

As to how the defendant should be named in the declaration when he has been wrongly named in the writ, see *ante*, 104.

In the Character in which they sue and are sued.

2ndly. In the character in which the parties sue and are sued:—There seems to be a distinction, on this point, between general process, and process sued out *en autre droit* or *qui tam*.

(*x*) *Edwards* v. *Carter*, 1 Str. 473. and see *Thompson* v. *Cotter*, 1 M. & Sel. 55: *Haigh* v. *Conway*, 15 East, 1. Where one of two defendants is outlawed, and the plaintiff declares against the other, the latter cannot object to the declaration for a defect in the outlawry. (*Solly* v. *Forbes*, 2 Moore, 90).

(*y*) *Roe* v. *Cock*, 2 T. R. 257.

(*z*) Provided the application were made before plea (*Bartrum* v. *Williams*, 6 Dowl. 397).

(*a*) *Thompson* v. *Cotter*, 1 M. & Sel. 55: *Moss* v. *Birch*, 5 T. R. 722: *Jonge* v. *Murray*, 1 Marsh, 274: and see the rule of M. T. 3 W. 4. r. 1.

(*b*) *Wilson* v. *Edwards*, 5 D. & R. 622; 3 B. & C. 734, S. C.

(*c*) *Ante*, 106: *Evans* v. *Whitehead*, 2 M. & R. 367.

(*d*) *Coldwell* v. *Blake*, 3 Dowl. 656: *Evans* v. *Whitehead*, 2 M. & R. 367: *Bowles* v. *Bilton*, 2 Crom. & J. 474: *Holland* v. *Johnson*, 4 T. R. 695; Comyn, 74: *Spencer* v. *Scott*, 1 B. & P. 19, 49.

(*e*) *Rogers* v. *Jenkins*, 1 B. & P. 383.

On process sued out generally in the plaintiff's name, he may declare for a cause of action *en autre droit*, as executor, &c., or *qui tam* (*f*). But if he be described in the process as suing *en autre droit* or *qui tam*, he cannot declare for a cause of action in his own right (*g*).

In the Form of Action.

3rdly. In the form of action:—If the form of action declared in be different from that stated in the writ, the declaration may be set aside for irregularity: as if the writ be in case, and the declaration in trespass (*h*); or if the writ be in trespass, and the declaration on promises (*i*). The defendant cannot demur for such a variance, unless there be some other error apparent on the face of the declaration (*j*). Where, however, the writ was in debt, and the declaration in assumpsit and debt, the court refused to set it aside as being irregular, but left the defendant to demur for the misjoinder (*k*). Where the fault is in the writ, as where the writ is "in a special action," and the declaration on promises, the motion should be to set aside the writ and not merely the declaration (*l*). It seems to be unnecessary to state the form of action in the commencement of the declaration (*m*).

Title of Declaration.

Title of declaration.] The declaration must be intitled *in the court* in which the action is prosecuted (*n*). Formerly it must have been intitled of the *term* in which the writ was returnable (*o*): but now, by a general rule of all the courts of *M. T.*, 3 *W.* 4, *r.* 15, the declaration in an action commenced by the process prescribed by the Uniformity of Process Act, 2 *W.* 4, *c.* 39, "shall in future be intitled in the proper court, and of the day of the month and year on which it is filed or delivered." And the subsequent rule of *H. T.*, 4 *W.* 4, *r.* 1, orders that "every *pleading*, as well as the *declaration*, shall be *intitled* of the day of the month and year when the same was pleaded, and shall bear no other time or date, and every *declaration* and other *pleading* shall also be *entered* on the *record* made up for trial, and on the judgment roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date; *unless* otherwise *specially ordered* by the court or a judge." If the declaration were not intitled of any day or year (*p*), or were intitled of a day different from that on which it was actually filed or delivered, it would be deemed irregular (*q*), and the defendant might, either by summons and

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(*f*) *Watson* v. *Pilling*, 6 Moore, 66: *Lloyd* v. *Williams*, 2 Bl. 722; 1 B. & P. 383, n. (*b*): *Anon.* 1 Dowl. 97: *Knowles* v. *Johnson*, 2 Dowl. 653: *Ashworth* v. *Ryal*, 1 B. & Ad. 19.

(g) See *Douglas* v. *Irlam*, 8 T. R. 416: *Anon.* 1 Dowl. 97: *Ashworth* v. *Ryal*, 1 B. & Ad 19.

(*h*) *Thompson* v. *Dicas*, 2 Dowl. 23.

(*i*) *Edwards* v. *Dignam*, 2 Dowl. 240: see *Scrivener* v. *Watling*, 1 H. & W. 8: *Lyng* v. *Sutton*, 4 M. & Scott, 417: *Ward* v. *Tummon*, 4 N. & M. 876.

(*j*) *Marshall* v. *Thomas*, 9 Bing. 678; 3 M. & Scott, 98; 2 Dowl. 208, *S. C.*

(*k*) *Rotton* v. *Jeffrey*, 2 Dowl. 637.

(*l*) *Moore* v. *Archer*, 4 Dowl. 214.

(*m*) *Strangman* v. *Buckle*, 1 Har. & W. 519.

(*n*) R. M., 3 W. 4, r. 15. See *Ripling* v. *Watts*, 4 Dowl. 290; 1 H. & W. 525, *S. C.*

(*o*) See *Smith* v. *Miller*, 3 T. R. 624.

(*p*) In a case before *Parke*, B., at chambers, 1st August, 1839, *Lewis* v. *Duthie*, where the declaration was intitled thus—"The twenty seventh day of July, one thousand, eight hundred, & thirty nine;" not saying "in the year of our Lord," the learned baron considered it irregular.

(*q*) Not a nullity: *Hodson* v. *Pennell*, 4 M. & W. 373.

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order, compel the plaintiff to put it right (*r*), or else get it set aside (*s*) on an application made to the court or a judge for that purpose within the time allowed for pleading (*t*). The above two rules do not, it seems, extend to ejectments (*u*), and at all events not to real actions or revenue causes (*x*), the courts not having a common jurisdiction over the latter two. But they extend to pleadings in *scire facias* on a judgment (*y*).

Venue, how to be stated in.

Venue in.] By a general rule of all the courts of *H. T.*, 4 *W.* 4, "The *name* of a *county* shall in all cases be stated in the *margin* of a declaration, and shall be taken to be the *venue* intended by the plaintiff, and no *venue* shall be stated in the body of the declaration, or in any subsequent pleading. Provided, that in cases where *local description* is now required, such local description shall be given." Though venue be stated in opposition to this rule, the opposite party cannot demur: the only course is, to apply to a judge to strike it out (*z*). Where no *venue* is stated either in the body of the declaration, or in the margin, the proper course seems to be to demur (*a*). In local actions, laying the *venue* in a wrong county is a ground of nonsuit, or if the error appear on the face of the record, of demurrer; but after verdict or judgment by default, the error will be cured by the Statute of Jeofails (*b*).

Commencement of.

Commencement of.] The form of the commencement of a declaration in an action commenced by the process prescribed by the Uniformity of Process Act, 2 *W.* 4, *c.* 39, is prescribed by the general rule of all the courts of *M. T.*, 3 *W.* 4, *r.* 15 (*c*). This rule does not apply to ejectments (*d*), or to actions removed from inferior courts (*e*): and the plaintiff should, in those cases, commence the declaration in the old form. The date of the writ need not be stated in the commencement of the declaration, for the form given by the above rule does not require it, but it must be inserted in the issue according to the form prescribed by the rule of *H. T.*, 4 *W.* 4 (*f*). If the declaration mis-describe the writ by which the action was commenced, it would be irregular, and might be set aside accordingly.

Statement of Cause of Action in.

Rule of T. T., 1 W. 4, dis-

Statement of the Cause of Action in.] To avoid unnecessary expense to parties, by reason of the *length* of declarations in actions on bills of exchange, promissory notes, and causes of action recoverable under the common counts, the courts have, by rule of *T. T.*, 1 *W.* 4, (*as to plead-*

(*r*) *Semble*, *Wilkes* v. *Halifax*, *Earl of*, 2 Wils. 256: *Thompson* v. *Marshall*, 1 Id. 304.

(*s*) *Hodson* v. *Pennel*, *supra*: *Topping* v. *Fuge*, 1 Marsh. 341; 5 Taunt. 330, *S. C.*: *Rowles* v. *Lawrence*, 11 Moore, 338.

(*t*) *Newnham* v. *Hanny*, 5 Dowl. 259: *Hough* v. *Bond*, 1 M. & W. 314.

(*u*) *Doe Haines* v. *Roe*, 2 M. & Scott, 619: *Doe Fry* v. *Roe*, 3 Id. 370; *Doe Ashman* v. *Roe*, 1 Bing. N. C. 253; 1 Scott, 166, *S. C.*: *Doe Evans* v. *Roe*, 2 A. & E. 11.

(*x*) *Miller* v. *Miller*, 1 Hodges, 31; 1 Scott, 387; 3 Dowl. 408, *S. C.*

(*y*) *Collins* v. *Beaumont*, 5 Dowl. 700.

(*z*) *Farmer* v. *Champneys*., 1 C., M. & R. 369; 4 Tyr. 859; 2 Dowl. 680, *S. C.*: *Fisher* v. *Snow*, 3 Dowl. 27: *Townsend* v. *Gurney*, Id. 168; 1 C., M. & R. 590; 5 Tyr. 214, *S. C.*

(*a*) *Remington* v. *Taylor*, 1 Lutw. 235.

(*b*) 1 Saund. 241, n.

(*c*) See the forms, Chit. Forms, 26.

(*d*) *Doe Haines* v. *Roe*, 2 M & Scott, 619: *Doe Fry* v. *Roe*, 3 Id. 370: *Doe Gillett* v. *Roe*, 1 C., M. & R. 19; 2 Dowl. 690, *S. C.*

(*e*) *Dod* v. *Grant*, 6 N. & M. 70.

(*f*) *Dupré* v. *Langridge*, 2 Dowl. 584.

couraging Prolixity in.

ing), prescribed forms (*g*) of declarations in such actions, and ordered, that "if any declaration in *assumpsit*, thereafter filed or delivered, being for any of the demands mentioned in the schedule of forms and directions annexed to that order, or demands of a like nature, shall exceed in length such of the said forms, set forth or directed in the said schedule, as may be applicable to the case; or if any declaration in *debt* to be so filed or delivered, for similar causes of action, and for which the action of *assumpsit* would lie, shall exceed such length, no costs of the excess shall be allowed to the plaintiff if he succeed in the cause; and such costs of the excess as have been incurred by the defendant shall be taxed and allowed to the defendant, and be deducted from the costs allowed to the plaintiff. And it is further ordered, that on the taxation of costs as between attorney and client, no costs shall be allowed to the attorney in respect of any such excess of length: and in case any costs shall be payable by the plaintiff to the defendant on account of such excess, the amount thereof shall be deducted from the amount of the attorney's bill." In actions to which the above rule applies, if the debt amount to *twenty* pounds and upwards, and the declaration is under *twenty-four folios*, the officer who taxes the costs is authorized, by instructions given by the courts to their taxing officers, in *Hilary* Term, 1832, to allow for declaration, including instructions, copy and delivery, 1*l*. 18*s*.; and for close copy in *country* causes, according to length (*h*): provided that the above instructions shall not extend to cases in which several actions shall be brought on the same bill or note against several parties thereto.

R. H. T., 2 W. 4, r. 74, for same purpose.

And, as another protection to the defendant against the unnecessary length of the declaration, the rule of *H. T.*, 2 *W*. 4, *r*. 74, orders, that "no costs shall be allowed on taxation to a plaintiff upon any counts or issues upon which he has not succeeded, and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs" (*i*).

Rules of H. T., 4 W. 4, prohibiting several Counts for same Cause of Action.

In addition to these rules the judges have, by the rules of *H. T.*, 4 *W*. 4, made several important regulations as to declarations which should be here noticed (*k*); and the 5th of these rules, so far as it respects declarations, is as follows: "And whereas, by the mode of pleading hereinafter prescribed, the several disputed facts material to the merits of the case will, before the trial, be brought to the notice of the respective parties more distinctly than heretofore: and by the said act of 3 & 4 *W*. 4, *c*. 42, *s*. 23, the powers of amendment at the trial, in cases of variance in particulars not material to the merits of the case, are greatly enlarged —

"*Several counts shall not be allowed* unless a *distinct subject-matter of complaint* is intended to be established in respect of each (*l*), nor shall *several pleas*, or *avowries*, or *cognizances* be

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(*g*) See the forms, Chit. Forms, 27, &c.

(*h*) Chapm. Bills of Costs, 1832, p. 1, 12.

(*i*) See also the rule as to not reciting the writ in actions by original; (R. H. 2 W. 4, r. 4); and for the construction of the above rule, see *post*, Vol. II. Book IV. Part I. Ch. 30.

(*k*) These rules of pleading are confined to such actions as all the courts have jurisdiction over, and, therefore, do not extend to real actions, (*Miller* v. *Miller*, 3 Dowl. 408; 1 Hodges, 31, *S. C.*), or to revenue causes. (Ib.) They extend, it seems to ejectments (See *Doe Llandeselio* v. *Roe*, 4 Dowl. 222: *post*, 149).

(*l*) See a case before the new rules: *Carmack* v. *Gundry*, 3 B. & Ad. 272.

allowed, unless a *distinct ground of answer* or *defence* is intended to be established in respect of each.

Several Counts, when allowed, or not.

"Therefore, *counts founded on one* and the same *principal matter of complaint*, but *varied* in *statement, description*, or *circumstances* only, are not to be allowed.

"*Ex. gr.* counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed, for they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract.

"So, counts for not giving, or delivering, or accepting a bill of exchange in payment, according to the contract of sale, for goods sold and delivered, and for the price of the same goods to be paid in money, are not to be allowed.

"So, counts for not accepting and paying for goods sold, and for the price of the same goods as goods bargained and sold, are not to be allowed.

"But counts upon a bill of exchange or promissory note, and for the consideration of the bill or note in goods, money, or otherwise, are to be considered as founded on distinct subject-matters of complaint, for the debt and the security are different contracts; and such counts are to be allowed.

"Two counts upon the same policy of insurance are not to be allowed. But a count upon a policy of insurance, and a count for money had and received, to recover back the premium upon a contract implied by law, are to be allowed.

"Two counts on the same charter-party are not to be allowed. But a count for freight upon a charter-party, and for freight *pro rata itineris* upon a contract implied by law, are to be allowed.

"Counts upon a demise, and for use and occupation of the same land, for the same time, are not to be allowed.

"In actions of tort for misfeazance, several counts for the same injury, varying the description of it, are not to be allowed.

"In the like actions for nonfeazance, several counts, founded on varied statements of the same duty, are not to be allowed.

"Several counts in trespass, for acts committed at the same time and place, are not to be allowed.

"Where several debts are alleged in *indebitatus assumpsit* to be due in respect of several matters, *ex. gr.* for wages, work and labour as a hired servant, work and labour generally, goods sold and delivered, goods bargained and sold, money lent, money paid, money had and received, and the like, the statement of each debt is to be considered as amounting to a several count within the meaning of the rule which forbids the use of several counts, though one promise to pay only is alleged in consideration of all the debts.

"Provided that a count for money due on an account stated may be joined with any other count for a money demand, though it may not be intended to establish a distinct subject-matter of complaint in respect of each of such counts.

"The rule which forbids the use of several counts is not to be considered as precluding the plaintiff from alleging more breaches than one of the same contract in the same count."

[The rule then contains provisions as to pleas and avowries, which see, *post*, 183, &c., and proceeds thus]:—

Several Counts, when allowed, or not.

"The *examples* in this and other places specified are given as *some instances only* of the application of the rules to which they relate; but the *principles* contained in the rules *are not to be considered as restricted* by the examples specified."

Under this rule it has been decided, that two counts describing the same contract cannot be allowed, though the defendant be described in one of them as jointly responsible, and in the other as severally so (*m*). In an action respecting tithes, the plaintiff introduced two counts into the declaration, one for the treble value of tithes not set out, the other for the same tithes bargained and sold: and the court conceiving this to be a violation of the rule, ordered the last count to be struck out, with costs, but bound the defendant to agree not to set up a composition at the trial, or that if he did, the declaration might be amended (*n*). So, where a declaration contained one count claiming a fee or reward in the name of metage on coals imported into the Port of *Truro*, alleged to be due to the plaintiff as lessee under the corporation of *Truro* of an ancient office of meter to which the fee was stated to be incident, and another count claiming the same sum as a port duty; the court held that these counts were only different statements of the same subject-matter of complaint, within the meaning of the above rule, and that one of them must be struck out (*o*). And where a declaration in ejectment on the demise of the churchwardens and overseers of a parish to recover parish property contained two sets of counts, one specifying the names of the individuals, and the other not, the court ordered one of them to be struck out (*p*). But where the first count of a declaration was framed on the statute 11 *G.* 2, *c.* 19, *s.* 18, for the recovery of double rent, and the second count was for use and occupation, the court refused a rule to strike out one of the two counts (*q*). And although there has been but one transaction between the parties, yet there may have been several causes of action arising out of it, which may be made the subject of several counts:—Thus, in an action on the *case* against the sheriff, one count may be inserted in the declaration for not taking the defendant when he had an opportunity, and another for suffering him to escape: for there might have been a time when the sheriff might have made the arrest, and had not done so, or he might have arrested the party, and afterwards permitted him to escape (*r*). And in an action against a carrier by water, two counts may be inserted, one alleging a contract to convey certain goods from a place beyond the seas to a certain port, and the other alleging a further contract to con-

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(*m*) *Cholmondeley* v. *Payne*, 3 Bing. N. C. 708; 5 Dowl. 638, *S. C.*

(*n*) *Lawrence* v. *Stephens*, 3 Dowl. 777; 1 Gale, 164, *S. C.* *Sed quære*: and see *Thornton* v. *Whitehead*, 1 M. & W. 14; 1 Tyr. & G. 313; 1 Gale, 359; 4 Dowl. 747, *S. C.* It is questionable, whether the court could properly bind the defendant to enter into the agreement mentioned in the text.

(*o*) *Jenkins* v. *Treloar*, 1 M. & W. 16; 1 Tyr. & G. 316; 1 Gale, 360; 4 Dowl. 690, *S. C.*

(*p*) *Doe Llandeselio* v. *Roe*, 4 Dowl. 222.

(*q*) *Thoroton* (or *Thornton*) v. *Whitehead*, 1 Tyr. & G. 313; 1 M. & W. 14; 4 Dowl. 747; 1 Gale, 359, *S. C.*

(*r*) *Guest* v. *Everest*, 9 Leg. Obs. 75; Tidd, New Pract. 218; and see Tidd, Pract. 9th ed. 236.

vey the goods from the wharf where landed, to the plaintiff's warehouse (*s*). The common counts given by the rule of *T. T.*, 1 *W.* 4, *ante*, 146, are considered as separate counts within the meaning of the above 5th rule of *H. T.*, 4 *W.* 4, for the purposes of *pleading*, as well as of *costs* (*t*).

Striking out Counts inserted in Violation of Rule.

By *H. T.*, 4 *W.* 4, *r.* 6, "Where more than one count, plea, avowry, or cognizance shall have been used, *in apparent violation of the preceding rule*, (*r.* 5, *ante*, 147), the opposite party shall be at liberty to apply to a judge, suggesting that two or more of the counts, pleas, avowries, or cognizances are founded on the same subject-matter of complaint, or ground of answer or defence, for an order that all the counts, pleas, avowries, or cognizances, introduced in violation of the rule be struck out at the *cost* of the party pleading; whereupon the judge shall order accordingly, unless he shall be satisfied, upon cause shewn, that some *distinct subject-matter of complaint* is *bonâ fide* intended to be established in respect of each of such counts, or some distinct ground of answer or defence in respect of each of such pleas, avowries, or cognizances; in which case he shall *indorse upon the summons*, or *state in his order*, as the case may be, that he is so satisfied; and shall also specify the counts, pleas, avowries, or cognizances mentioned in such application which shall be allowed." In general, an application under this rule to strike out counts, should be made in the first instance to a judge at chambers; and if a doubt arise, the parties may apply to the court (*u*). Where the case involved a question of law, and the construction of an act of parliament, it was considered that the application might at once be made to the court (*x*). No objection on the ground of superfluity of counts can be taken on demurrer: it must be made the subject of a motion (*y*). The application to strike out the objectionable count or counts, if made to the court, must be founded on an affidavit that they are for the same identical cause of complaint, or else the rule must be drawn up on reading the declaration (*z*). This rule as to the costs is imperative (*a*).

Costs where distinct Subject-matter of Complaint not proved.

By *H. T.*, 4 *W.* 4, *r.* 7, "Upon the *trial*, where there is more than one count, plea, avowry, or cognizance upon the record, and the party pleading *fails to establish a distinct subject-matter of complaint* in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance, a verdict and judgment shall pass against him upon each count, plea, avowry, or cognizance, which he shall have so failed to establish, and he shall be liable to the other party for all the *costs* occasioned by such count, plea, avowry, or cognizance, including those of the evidence as well as those of the pleadings; and further, in all cases in which an *application* to a *judge* has been made under the preceding rule, and any count, plea, avowry, or cog-

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(*s*) *James* v. *Bourne*, 6 Dowl. 603; *Coltman*, J., diss.

(*t*) *Jourdain* v. *Johnson*, 2 C., M. & R. 564; 5 Tyr. 524, *S. C.*: and see *Marshall* v. *Whiteside*, 1 M. & W. 191; 1 T. & G. 491; 4 Dowl. 770, *S. C.* The contrary has been held in the Court of Exchequer in Ireland, though these cases were cited, on the ground that as the form contains only one promise, it amounts, properly speaking, to a single count only. (*Barnes* v. *Keily*, E. T. 1838, *ex rel. Collins*, Q. C.: and see *Steph. Pl.* 4 ed. 269, (*a*).

(*u*) *Ward* v. *Graystock*, 4 Dowl. 717.

(*x*) *Doe Llandeselio* v. *Roe*, 4 Dowl. 222.

(*y*) *Gardner* v. *Bowman*, 4 Tyr. 412.

(*z*) *Roy* v. *Bristow*, 2 M. & W. 241; 5 Dowl. 452: 1 M. & H. 39, *S. C.*

(*a*) *Lawrence* v. *Stephens*, 3 Dowl. 777.

nizance allowed as aforesaid, upon the ground that some distinct subject-matter of complaint was *bonâ fide* intended to be established at the trial in respect of each count so allowed, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance so allowed, if the *court* or *judge* before whom the trial is had shall be of opinion that *no such distinct subject-matter of complaint* was *bonâ fide* intended to be established in respect of each count so allowed, or no such distinct ground of answer or defence in respect of each plea, avowry, or cognizance so allowed, and shall so *certify* before final judgment, such party so pleading shall not recover *any costs upon the issue* or *issues upon which he succeeds*, arising out of any count, plea, avowry, or cognizance with respect to which the judge shall so certify."

Statement of Interest in Action on Policy.

By *R. H.*, 4 *W.* 4, (as to pleadings in particular actions), *r.* 1, *s.* 4, "in actions on *policies* of *assurance*, the interest of the insured may be averred thus: 'That A., B., C., and D., or some or one of them, were or was interested,' &c.; and it may also be averred, 'that the insurance was made for the use and benefit, and on the account of the person or persons so interested.'"

Statement of Abuttals in Trespass, q.c.f.

By *R. H.*, 4 *W.* 4, (as to pleadings in particular actions), *r.* 5, *s.* 1, "in actions of trespass *quare clausum fregit* the *close* or *place* in which &c. must be *designated* in the declaration by name or abuttals, or other description, in failure whereof the defendant may demur specially." This rule is not complied with by describing the close or place in which &c. as abutting *towards* (instead of *upon*) another close, the word "towards" being too indefinite, but such a defect will be cured by pleading over (*b*).

Statement of prescriptive Right under 2 & 3 W. 4, c. 71, s. 5.

By stat. 2 & 3 *W.* 4, *c.* 71, *s.* 5, for shortening the time of *prescription* in certain cases, it is enacted, that "in all actions upon the *case*, and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient; and if the same shall be denied, all and every the matters in that act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation."

Entry of Pledges to be omitted.

Entry of Pledges at conclusion to be omitted.] By a general rule of all the courts of *M. T.*, 3 *W.* 4, *r.* 15, "the entry of pledges to prosecute at the conclusion of the declaration shall in future be discontinued." The insertion of them, in contravention of this rule, would, it seems, only be a ground for applying to a judge at chambers to strike them out.

Quo minus.

The statement of a *quo minus* in a declaration in the Exchequer is mere surplusage, and not a ground of special demurrer; and the proper course is, to apply for a judge at chambers to strike it out (*c*).

(*b*) *Lemprière* v. *Humphreys*, 3 Ad. & El. 181, 4 N. & M. 638. *Per Patteson*, J. the "words 'abutting towards' are perfect nonsense: the place mentioned might be thirty miles from the *locus in quo*."

(*c*) *Alderson* v. *Johnson*, 5 Dowl. 294; 2 M. & W. 70, *S. C.*

Sect. 2.

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1. *Notice to Plead, and Time for Pleading.*

1. Notice to plead, and Time for pleading.

Before the defendant can be compelled to plead, or the plaintiff sign judgment for want of a plea, three things are necessary: 1. a notice to plead; 2. a rule to plead; and, 3. in some cases, a demand of a plea. These shall now be considered in their order:—

Notice to plead.

Notice to plead.] This is necessary in all cases, before the plaintiff can sign judgment for want of a plea (*b*). It is usually indorsed on the declaration when delivered (*c*); but may be given on a separate paper, and served subsequently to

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(*a*) As to pleas in *abatement*, see *post*, Vol. II. Book II. Part I.; *Particulars of Plaintiff's Demand*, *ante*, 143, and *post*, Vol. II. Book IV. Part I. Ch. 15; *Oyer*, *post*, Vol. II. Book IV. Part I. Ch. 15; *Changing Venue*, *post*, Vol. II. Book IV, Part I. Ch. 6; *Paying Money into Court*, *post*, Vol. II. Book IV. Part I. Ch. 9.

(*b*) *Fenton* v. *Anstice*, 5 Dowl. 113: and see *Heath* v. *Rose*, 2 New Rep. 223; Tidd, 9th ed. 473. According to *Clementson* v. *Williamson*, 1 Bing. N. C. 356, a notice to plead is not requisite in an action against a prisoner, if he has been served with a rule to plead.

(*c*) See R. T., 5 & 6 G. 2; R. M. 10 G. 2, r. 2.

the delivery of the declaration (*d*); and where the declaration is filed, as the notice to plead is contained on the notice of filing the declaration, it is not necessary to indorse it on the declaration. (*Ante*, 142). Where the declaration was indorsed "to plead in ——," the Court of Common Pleas held that it should be understood to mean within the number of days allowed by the rules of the court (*e*). And perhaps a notice to plead in four days, the defendant being allowed eight days to plead, would be a good notice for the eight days.

The only matter remaining to be considered under this head is the time limited for pleading, and which must be specified in the notice to plead.

Time for pleading.

Time for Pleading.] The notice must be to plead within *four* days, if the *venue* be laid in London or Middlesex, *and* the defendant reside within twenty miles of London; or within *eight* days, if the *venue* be laid in any other county, *or* the defendant reside above twenty miles from London (*f*). In actions against attornies, the defendant has only *four* days to plead after delivery of a copy of the declaration, wherever the *venue* is laid, and whether he resides within twenty miles of London or not (*g*).

Where Declaration filed.

In cases where the declaration has been filed, these four or eight days are reckoned from the service of the notice of declaration, containing also a notice to plead, and not from the time of filing the declaration (*h*).

Where last day Sunday, &c.

These four or eight days are reckoned *exclusive of the day of giving the notice*, and *inclusive of the last day*, unless the last day be a Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case they will be reckoned exclusively of that day also (*i*); but if Sunday happen to fall on an intermediate day, it will be reckoned (*k*).

At Easter.

Also by *R. E.*, 2 *W*. 4, (*ante*, 93), the days between Thursday next before and Wednesday next after Easter-day are not to be reckoned or included.

At Christmas.

As to Christmas-day, and the three following days, the 3 & 4 *W*. 4, *c*. 42, *s*. 42, which enacts, that those days shall be kept as holidays, has qualified the eighth rule of *H. T.*, 2 *W*. 4; therefore, where a declaration was filed on the 24th December, with notice to plead in four days, judgment signed for want of a plea on the 29th was set aside for irregularity (*l*).

Between 10 Aug. and 24 Oct.

By the stat. 2 *W*. 4, *c*. 39, *s*. 11, no plea shall be delivered *between the* 10*th of August and the* 24*th of October*. And by *R. M.*, 3 *W*. 4, *r*. 12, *ante*, 94, in case the time for pleading to the declaration shall not have expired *before* the 10th of August, the defendant has the same number of days for that purpose after the 24th of October as if the declaration had

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(*d*) *Anon.* 2 Wils. 137: see *West* v *Radford*, 3 Bur. 1452.

(*e*) *Hifferman* v. *Langelle*, 2 B & P. 363.

(*f*) R. T., 5 & 6 G. 2: R. T., 22 G. 3, Q. B.: R. T., 8 G. 3, C. P.: R: M., 1 W. 4, r. 2, s. 11: and see *Holland* v. *Cooke*, 1 M. & Sel. 566; Tidd, New Prac. 228. In a case where the defendant, who usually resided in Scotland, was arrested in London, the court held that four days' notice was sufficient. (*Douglas* v. *Ray*, 4 T. R. 553, n.) See the cases, *post*, 285, as to notice of trial.

(*g*) *Mann* v. *Fletcher*, 5 T. R. 369: *Lowder* v. *Lander*, 5 Dowl. 684: *Brenton* v. *Lawrence*, 5 Id. 506.

(*h*) *Hutchinson* v. *Brown*, 7 T. R. 298: *Weddle* v. *Brazier*, 1 C. & M. 69; and *ante*, 142.

(*i*) R. H., 2 W. 4, r. 8, *ante*, 93.

(*k*) *Shoebridge* v. *Irwin*, 6 Dowl. 126.

(*l*) *Wheeler* v. *Green*, 7 Dowl. 194.

Time between 10th Aug. and 24th Oct.

been delivered or filed on the 24th of October; but in such case it will not be necessary for the plaintiff to give a fresh rule to plead. If the time for pleading does not expire before the 10th of August, although it may be *enlarged* time, the defendant has still the same time for pleading as if the declaration had been filed or delivered on the 24th of October (*m*). Even where the defendant, on the 5th of September, obtained a month's time to plead, *taking short notice of trial for the first sittings in term*, it was held, that the enlarged time did not begin to run until after the 24th of October, though it thereby became impossible to try the cause at the first sittings in term (*n*). This restriction as to the time of pleading and replying, &c., is, however, frequently removed where the time for pleading expires before the 10th of August, by the plaintiff procuring the judge, who makes the order for further time to plead, to grant it only upon the defendant's pleading, and the plaintiff's replying without being subject to such restriction.

As to the time for pleading, where the original or enlarged time expires before the 10th of August, and the plaintiff lets the 10th of August pass without signing judgment, the practice appears not to be settled. In one case, where the defendant on the 5th of August delivered his plea, and on the same day served a rule to reply, and the plaintiff, not having replied, the defendant, on the 27th of August, signed judgment of *nonpros*, the court are reported to have been of opinion that, as the plaintiff was prevented by the operation of the statute, 2 *W*. 4, *c*. 39, *s*. 11, from delivering his replication, it followed that the defendant could not sign judgment for want of it, having allowed the 10th of August to go by: and therefore that the judgment was irregular (*o*). If this last case be correct, it would seem to follow, that, if the time for pleading expires before the 10th of August, and the plaintiff lets the 10th of August go by without signing judgment, he cannot sign it until on or after the 24th of October. This result, however, does not seem to be authorized by either the statute or the rule above mentioned. The statute is directed merely to prevent the delivery or filing of pleadings, and not to prevent signing judgment; while the rule in terms applies only to cases where the time has *not* expired before the 10th of August. The case, therefore, of time expiring *before* (or perhaps even *on*) the 10th of August, steers clear both of the statute and the rule; and, consequently, it would seem that judgment may in such a case be signed between the 10th of August and 24th of October.

Where Notice gives longer Time than is necessary.

If the plaintiff, by his notice to plead or otherwise, give the defendant a greater number of days for pleading than by the practice of the court is required, the defendant is entitled to avail himself of the greater number (*p*).

Where it gives less Time.

On the other hand, where the notice gives too short a time, it would probably be held a good notice for the time allowed by the practice of the court. (*Ante*, 153).

(*m*) *Wilson* v. *Bradstocke*, 2 Dowl. 416: *Trinder* v. *Smedley*, 3 Dowl. 87: *Le Fevre* v. *Molyneux*, 6 Dowl. 153.

(*n*) *Le Fevre* v. *Molyneux*, 6 Dowl. 153.

(*o*) *Anon.* 13 Leg. Obs. 120; Tidd, New Prac. 433, *sed quære?*

(*p*) *Solomonson* v. *Parker*, 2 Dowl. 405.

Imparlance.

Imparlance.] Formerly, unless the plaintiff declared within certain prescribed times, the defendant was entitled to an *imparlance*, or, in other words, the defendant was allowed another term to plead in. But since the 2 *W.* 4, *c.* 39, in actions commenced by the process prescribed by that act, these *imparlances* are abolished (*r*).

Term's Notice.

Term's Notice.] To prevent surprise on the defendant, if four terms have elapsed since the delivery or filing of the declaration, the defendant must have an entire term's notice to plead before judgment can be signed for want of a plea, unless the cause have been stayed by injunction or privilege (*s*), or at the defendant's request (*t*). The notice must be given before the first day of the term (*u*); and judgment may be signed at any time in the following vacation (*x*).

After Demand of Oyer.

After Demand of Oyer.] Where *oyer* has been demanded, the defendant shall have as much time or as many pleading days after it is granted, as he had when he demanded it (*y*); as, if he had four days originally to plead, and after two days had elapsed he craved *oyer*, he shall have two days after the delivery of *oyer* to plead.

After Delivery of Particulars.

After Delivery of Particulars of Demand.] When an order for the delivery of particulars has been drawn up and served, it operates as a stay of proceedings from the time of service until particulars have been delivered (*z*); and such an order will prevent the plaintiff from signing judgment, although granted in an action in which an order for particulars cannot in general be made, as in trespass (*a*); but the order does not operate as any stay of proceedings, unless it has been drawn up and served (*b*), even though the plaintiff's attorney should have indorsed his consent on the summons, and afterwards proceeded in direct breach of good faith (*c*). A *summons* for particulars does not of itself operate as any stay of proceeding. But, by a rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 1, *s.* 48, "a defendant shall be allowed the same time for pleading after the delivery of particulars under a judge's order which he had at the return of the summons; nevertheless judgment shall not be signed till the afternoon of the day after the delivery of the particulars, unless otherwise ordered by the judge." By operation of this rule, when the summons for particulars is taken out, together with, or after the defendant has obtained an

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(*r*) *Wigley* v. *Tomlins*, 3 Dowl. 7: *Nurse* v. *Geeting*, Id. 157; 1 C., M. & R. 567, *S. C.*, overruling *Trean* v. *Chaplin*, 2 Dowl. 523: and see Tidd, Sup. 127; Tidd, New Prac. 227. See the old rules, *post*, Vol. II. Book III. Part I. Ch. 2. They may, it seems, still exist in actions not so commenced. And see *post*, Vol. II. Book III. Part I. Ch. 3, as to the imparlance in proceedings by *scire facias*; and *post*, Vol. II. Book III. Part I. Ch. 2, as to the imparlance in the action of replevin; and *post*, Vol. II. Book IV. Part I. Ch. 4, as to the imparlance in actions removed from inferior courts.

(*s*) R. T., 5 & 6 G. 2, Q. B.; R. E., 13 G. 2, r. 2, C. P.: *Hayley* v. *Riley*, 1 Doug. 72: *Bosworth* v. *Phillips*, 2 W. Bl. 784.

(*t*) *Bland* v. *Darley*, 3 T. R. 530: *Watkins* v. *Haydon*. 2 Bl. R. 762.

(*u*) *Bogg* v. *Rose*, 2 Str. 1164: *Price* v. *Hughes*, 1 Dowl. 448.

(*x*) *Milborne* v. *Nixon*, 2 T. R. 40. See the form of the notice, Chit. Forms, 39.

(*y*) *Webber* v. *Austin*, 8 T. R. 356.

(*z*) *St. Hanlaire* v. *Byam*, 7 D. & R. 458; 4 B. & C. 970, *S. C.*: *Glover* v. *Watmore*, 5 B. & C. 769; 8 D. & R. 607, *S. C.*: Tidd's Prac. 468, 597: Bagley's Prac. 202.

(*a*) *Derry* v. *Lloyd*, 1 Chit. R. 724.

(*b*) *Wilson* v. *Hunt*, 1 Chit. R. 647.

(*c*) *Joddrell* v. ——, 4 Taunt. 253.

order for time to plead, the time for pleading runs until the summons is returnable ; but, if the order for particulars is then granted, the order to plead is suspended, or, in other words, the time for pleading is prolonged from thence until the particulars are actually delivered. If the particulars are delivered immediately when the order is obtained, or on the same day, there is in effect no stay of proceeding, but the time for pleading must be considered as running on, and will expire at the end of the time limited by the practice of the courts. When it is intended that the time to plead should not begin to run until after the delivery of particulars, it should be clearly expressed in the order for time (*d*). If the summons for particulars is returnable during the currency of an order for time to plead, and the judge refuses the order for particulars, (which is not uncommon when it appears that the demand is merely made for the purpose of delay), the plaintiff may sign judgment when the time for pleading expires, the summons for particulars being wholly inoperative. To justify this proceeding, however, the plaintiff's attorney must have attended the summons ; for when a summons for better particulars was obtained four days before the time for pleading had expired, but the plaintiff's attorney did not attend till the third summons, when the order was refused, and immediately after signed judgment, the time for pleading having expired, the judgment was set aside on the ground that the delay was occasioned by the plaintiff's not attending the summons (*e*). Under the operation of the latter provision of the preceding rule, it is clear that though the time for pleading is out, and the demand of a plea made twenty-four hours before, judgment cannot be signed till the afternoon of the day after the delivery of particulars, unless otherwise ordered (*f*). Where a declaration in *assumpsit* indorsed to plead in four days was delivered with particulars annexed, and the plaintiff two days afterwards, finding that the particulars were wrongly intitled, delivered fresh particulars properly intitled, and for want of a plea within the four days signed judgment, the Court of Exchequer held the judgment was regular, the accepting of the amended particular being a waiver of the objection to the first (*g*).

After changing Venue.

After Changing the Venue.] The defendant must in this case plead to the altered declaration, as he should have done to the other, without delay (*h*).

After Order for Security for Costs.

After an Order for Security for Costs.] In the Common Pleas, where the plaintiff is ordered to find security for costs, he cannot sign judgment for want of a plea until the opening of the office on the morning after the day on which he gives the security (*i*) : but in the Court of Queen's Bench and in the Exchequer, the practice in these and the like cases is in general different, the defendant being allowed only the same time to plead after the security for costs given, &c., that remained to

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(*d*) *Adams* v. *Drummond*, 1 Dowl. 99, n. (*a*), and cases there cited.

(*e*) *Glover* v. *Watmore*, 5 B. & C. 769.

(*f*) See *Tate* v. *Bodfield*, 3 Dowl. 218: *Ramsey* v. *Lord Reay*, 2 N. R. 361: *Decker* v. *Thompson*, 3 B. & P. 319.

(*g*) *Jones* v. *Fowler*, 4 Dowl. 232; 1 Gale, 256, *S. C.*

(*h*) R. M. 1654, s. 5.

(*i*) *Decker* v. *Thompson*, 3 B. & P. 319.

him at the time the summons was attendable, or the rule *nisi* served. (*Ante*, 155, 156).

After Amendment.

After Amendment.] If the defendant has already pleaded, and the plaintiff amend his declaration, the defendant shall have two days (exclusive of the day of amendment and after payment of costs) to alter his first plea, or plead another, unless otherwise ordered by the court, or by the judge granting leave for the amendment (*j*). The plea already pleaded will be considered as standing pleaded to the amended declaration, unless the defendant amend it or plead another within the two days (*k*). By rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 42, "where an amendment of the declaration is allowed, no new rule to plead shall be deemed necessary, whether such amendment be made of the same term as the declaration, or of a different term" (*l*). Nor is a demand of plea requisite, if the amendment were after plea pleaded (*m*).

2. *Rule to Plead.*

2. Rule to plead.

The next thing requisite is the rule to plead. This must be entered in all cases, whether the defendant have appeared or not, unless he be bound by a rule of court, or a judge's order, to plead within a limited time (*n*); or unless the defendant dispense with it, by taking out a summons (*o*), or by obtaining an order for time to plead, or the like. The delivery of a defective plea will not dispense with this rule to plead, so as to enable the plaintiff to sign judgment without it (*p*). There is no occasion for a rule to plead to an *amended* declaration, (*supra*), or for a fresh rule to plead to enable the plaintiff to sign judgment in a term subsequent to that in which, or in the vacation of which, a rule has been already given (*q*).

Make out a memorandum of the rule on plain paper (*r*). *Take it to one of the masters, and he will enter it in a book kept for that purpose. This is a four-day rule.* A rule to plead in a wrong name is a nullity (*s*).

At what Time entered.

A rule to plead may be entered at any time after the delivery or filing, and notice of the declaration, whether in term or vacation. It cannot be entered *before* the declaration is de-

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(*j*) R. T., 5 & 6 G. 2: R. M., 10 G. 2, r. 2, Q. B.: R. E., 1 W. 4, C. P.: see *Woodroffe* v. *Watson*, 6 Taunt. 400. Before the 2 W. 4, c. 39, instead of receiving costs, it was said he might. at his option, have an imparlance. (*Leehill* v. *Reynell*, 2 Str. 950: but see R. M. 1654, sect. 13; Prac. Reg. 18).

(*k*) See *Fagg* v. *Borsley*, 2 Dowl. 107; 1 C. & M. 770; 3 Tyr. 905, *S. C.*: *Huckvale* v. *Kendal*, 3 B. & Ald. 137.

(*l*) See *per Bayley*, J., in *Fagg* v. *Borsley*, 2 Dowl. 108. Formerly, in the Common Pleas, a defendant was entitled to a new rule to plead in all cases on an amendment of the declaration; (*Blunt* v. *Morris*, 2 Bl. Rep. 785); but this was altered by rule of E. T., 1 W. 4. In the Queen's Bench, if the amendment was of the same term, the defendant had two days to plead *de novo*; but if the amendment was in a subsequent term, a new four-day rule was necessary. (Tidd, 469, 475, 708).

(*m*) *Huckvale* v. *Kendal*, 3 B. & Ald. 37.

(*n*) R. T., 5 & 6 G. 2, Q. B: R. M., 1654, s. 15, C. P.: see *Nias* v. *Spratley*, 4 B. & C. 386; 6 D. & R. 390, *S C.*: *Towes* v. *Powell*, 1 H. Bl. 87: *Cardozo* v. *Hardy*, 2 Moore, 220: and see *Pearson* v. *Reynolds*, 4 East, 571; 1 Smith, 288, *S. C.*: *Donne* v. *Marsh*, 7 Taunt. 587; 1 Moore, 320, *S. C.*: *Bolton* v. *Manning*, 5 Dowl. 769.

(*o*) *Nugee* v. *M'Donnell*, 3 Dowl. 579: *Bolton* v. *Manning*, 5 Id. 769: *semble*, overruling *Decker* v. *Shedden*, 3 B. & P. 180.

(*p*) *Warne* v. *Beresford*, 4 Dowl. 361; 1 T. & G. 230, *S. C.*: and see *Hough* v. *Bond*, 1 M. & W. 314; 1 T. & G. 617, *S. C.*: *semble*, overruling *Brandon* v. *Payne*, 1 T. R. 689: *Lockhart* v. *Mackreth*, 5 T. R. 663: *Perry* v. *Fisher*, 6 East, 549.

(*q*) *Usborne* v. *Pennell*, 1 Bing. N. C. 320.

(*r*) See the form, Chit. Forms, 38; and of the rule, Id.

(*s*) *Warne* v. *Beresford*, 4 Dowl. 361; 1 T. & G. 230, *S. C.*

livered or filed, and if it be, it will be irregular (*t*); yet, if the defendant in such a case plead, he will thereby waive the irregularity (*t*). But it may be entered at any time *after* the declaration is delivered or filed, provided notice of declaration be given, either before entering the rule to plead (*u*) or on the same day (*v*); and where expedition is desirable, care should be taken to enter it four days exclusive before the expiration of the time limited for pleading. Before the 2 *W.* 4, *c.* 39, it must have been entered in term time (*x*); but this is no longer requisite in actions commenced by the process prescribed by that act. Nor need it be given of the term of which judgment is signed (*y*). It may be entered after demand of plea (*z*).

At what Time Rule to plead expires.

This rule expires in four days, exclusive of the day on which it is entered (*a*); and Sunday is reckoned, unless it happen to be the last day of the four (*b*): and the same of any other *dies non juridicus*, as Good Friday, or a day appointed for a public fast or thanksgiving (*c*), on which the court do not sit.

Dies non.

10th Aug. to 24th Oct.

Easter.

Christmas.

If this rule expire before the time limited for pleading has elapsed, still the plaintiff cannot sign judgment for want of a plea until the day after the time to plead has expired. But if it expire at the same time with the time for pleading, or after it, the plaintiff may sign judgment the day after the rule to plead expires (*d*). If the rule, however, expire on a Sunday, or *dies non juridicus*, the defendant has all the following day to plead (*e*). And in case the time for pleading has not expired before the 10th August, the defendant, we have seen, (*ante*, 153), has, unless otherwise ordered, the same number of days for pleading after the 24th October, as if the declaration had been delivered or filed on the 24th October, and in such case no new rule to plead is necessary. Also it seems, that, by *R. E.*, 2 *W.* 4, *ante*, 93, the days between Thursday next before, and the Wednesday next after Easter-day, are not to be reckoned or included in the time for pleading. As to Christmas-day and the three following days, the 3 & 4 *W.* 4, *c.* 42, *s.* 42, which enacts, that they shall be kept as holidays, qualifies the *R. H.*, 2 *W.* 4, *r.* 8, and it seems that they will not be reckoned in the four days (*f*).

3. *Demand of Plea.*

3. Demand of Plea.

When necessary.

In all cases where the defendant has appeared, (or, in actions commenced by *capias* under 2 *W.* 4, *c.* 39, put in bail), the plaintiff must demand a plea, before he can sign judgment (*g*). It is not necessary to make it where the plaintiff has entered an appearance for the defendant (*h*), or where the defendant

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(*t*) *Bennett* v. *Smith*, 5 Dowl. 353; 3 Bing. N C. 305, *S. C.*: *Perry* v. *Fisher*, 6 East, 549.

(*u*) See *Shadwell* v. *Angell*, 1 Bur. 55.

(*v*) *Aikman* v. *Conway*, 6 Dowl. 76. In that case, *Alderson*, B., said, that when two or more acts were done on the same day, the court will presume that act to have been done first which ought to have been so done.

(*x*) *Milbourne* v. *Nixon*, 2 T. R. 40; Tidd, 421.

(*y*) *Pryer* v. *Smith*, 2 Dowl. 114; 1 C. & M. 855, *S. C.*: *Mould* v. *Murphy*, Id. 54; 1 C. & M. 495; 3 Tyr. 538, *S. C.*: see *Usborne* v. *Pennel* 1 Bing. N. C. 320.

(*z*) *Maxwell* v. *Skerrett*, 5 East, 547.

(*a*) R. T., 1 G. 2, Q. B.: R. M. 1654, s. 15, C. P.: R. H., 2 W. 4, r. 8, *ante*, 93.

(*b*) Ib.: *Asmole* v. *Goodwin*, 2 Salk. 624: *Anon.* 1 Str. 86: *Wathen* v. *Beaumont*, 11 East, 272.

(*c*) R. T., 1 G. 2; R. H., 2 W. 4, r. 8: *ante*, 93: *Harrison* v. *Smith*, 9 B. & C. 242: *semble*, overruling *Mesure* v. *Britten*, 2 H. Bl. 616.

(*d*) See R. H., 2 G. 2, r. 3.

(*e*) *Anon.* 1 Str. 86: *Harrison* v. *Smith*, 9 B. & C. 245: *ante*, 93, 153.

(*f*) *Wheeler* v. *Green*, 7 Dowl. 194.

(*g*) *Nott* v. *Oldfield*, 1 Wils. 134: *Eames* v. *Jew*, Barnes, 276: *White* v. *Dent*, 1 B. & P. 341: and see *Harvey* v. *Goodford*, 8 Taunt. 33; 1 Moore, 464, *S. C.*

(*h*) R. T , 1 G 2, Q. B.; R. M., 1 G. 2, C. P.: and see *Free* v. *Mason*, 5 B. & C. 763: *Davis* v. *Cooper*, 2 Dowl. 135, Exch.: *Palk* v. *Rendle*, 8 T. R. 465: *North* v.

is bound by a judge's order to plead within a limited time (*i*), or where the declaration has been amended after plea pleaded (*j*). And before the rule of *T. T.*, 3 *W.* 4, it was not necessary to make it where the defendant was in the custody of the sheriff (*k*), in the same suit (*l*); but by that rule the demand must be made in this as in other cases.

At what Time to be made.

The demand cannot be made before the defendant has appeared (*m*). If the plaintiff, before 1 & 2 *V. c.* 110, demanded a plea, before special bail was put in, (in case the defendant was not a prisoner), it would have been a waiver of bail, unless in cases where time to justify had been given conditionally; or if bail were put in, a demand of plea before justification would have been a waiver of justification; but it would seem, that since 1 & 2 *V. c.* 110, a demand of plea would not have such an effect, the arrest and putting in bail under that statute being altogether collateral to the proceedings in the action. If the plaintiff demand a plea before the defendant has appeared, and the defendant (instead of treating the demand as a nullity, which, it seems, he may do (*n*)) accordingly plead before appearance, the plaintiff cannot treat the plea as a nullity, and sign judgment (*o*); although it would be otherwise if the defendant had so pleaded before a demand of plea given (*p*). It "may be made at the time when the declaration is delivered, and may be indorsed thereon" (*q*). It may be made before a rule to plead given (*r*).

How to be made.

The demand must be in writing (*s*); and delivered by the plaintiff's attorney to the attorney or agent of the defendant (*t*). Sticking the demand up in the Queen's Bench Office will not do, unless by leave of the court or a judge; and this, although the defendant keep out of the way (*u*).

Judgment for Want of Plea after Demand.

By rule of *H. T.*, 2 *W.* 4, *r.* 66, "judgment for want of a plea after demand may, in all cases, be signed at the opening of the office in the afternoon of the day after that on which the demand was made, but *not before*" (*x*). And this, although the time for pleading and the rule to plead have expired (*y*).

Lambert, 2 B. & P. 218, Barnes, 177. *Shadwell* v. *Angel*, 1 Bur. 55. Though the defendant, after the appearance entered by plaintiff, also enter an appearance, still the rule will apply. (*Davis* v. *Cooper*, 2 Dowl. 135).

(*i*) *Pearson* v. *Reynolds*, 4 East, 571: *Baker* v. *Hall*, 1 Taunt. 538.

(*j*) *Huckvale* v. *Kendal*, 3 B. & Ald. 137.

(*k*) *Rose* v. *Christfield*, 1 T. R. 591: *Wilkinson* v. *Brown*, 6 Id. 524.

(*l*) *Remmington* v. *Johnson*, 2 B. & C. 803. But it must have been made when he was in the custody of the *marshal* or *warden*, and notice thereof had been given to the plaintiff.

(*m*) *Martin* v. *Mahony*, 5 D. & R. 609: *Cook* v. *Raven*, 1 T. R. 635: see 1 Sellon, 304. But it seems, that if defendant's attorney has not appeared according to his undertaking, a plea may be demanded before appearance. (Imp. C. P. 281).

(*n*) *Cook* v. *Martin*, 1 T. R 635.

(*o*) *Martin* v. *Mahony*, 5 D. & R. 609.

(*p*) See *Cook* v. *Raven*, 1 T. R. 635: *Venn* v. *Calvert*, 4 Id. 578: *Martin* v. *Mahony*, 5 D. & R. 609.

(*q*) R. H., 2 W. 4, r. 43: see the former practice, Tidd, New Prac. 233; Jervis's Rules, 70: *Maxwell* v. *Skerrett*, 5 East, 547: *Hewit* v. *Palmer*, 4 Taunt. 51. *Rundell* v. *Champneys*, 1 D. & R. 186.

(*r*) *Maxwell* v. *Skerrett*, 5 East, 547. It was never necessary that this demand should be made as of the term of which judgment for want of plea was signed, (*Sweet* v. *John*, 1 Chit. Rep. 735, n., MS. E. 1825), as was at one time the case with the rule to plead. (*Ante*, 158).

(*s*) R. M., 1 G. 2, C. P.: *Nott* v. *Oldfield*, 1 Wils. 134.

(*t*) See the forms, Chit. Forms, 38, 39.

(*u*) *Anon.* 1 Dowl. 68, 23.

(*x*) This rule applies only where the time for pleading has expired. Before this rule, in the *Queen's Bench*, the defendant had twenty-four hours to plead after the demand, exclusive of Sunday, whether the time for pleading were or were not expired when such demand was made: in the *Common Pleas*, he had only until the opening of the office in the afternoon of the following day. (Tidd, 9th ed. 477).

(*y*) *Dyche* v. *Burgoyne*, 1 T. R. 454: *Bowles* v. *Edwards*, 4 Id. 118.

But he may sign it then, or at any time after, provided the time for pleading and rule to plead be out (*z*), and the defendant has not pleaded. (*Post*, 165). And where a plea is demanded at the time of the delivery or filing of the declaration, or before the last day limited for pleading, the plaintiff may sign judgment for want of a plea, in the morning of the day after the time for pleading expires (*a*). Sunday, or a *dies non juridicus* (*b*), is not included in this time; therefore, if the demand be made on Saturday, judgment cannot be signed until the opening of the office in the afternoon of the Monday following (*c*).

Waiver of Demand.

The demand of the plea will be waived by the defendant's pleading without it. But if the plaintiff treats a plea as a nullity, and signs judgment as for want of a plea, he so treats it for all purposes, and cannot afterwards say it was merely irregular, so as to be a waiver of the demand of a plea (*d*).

4. *Further Time to Plead.*

4. Further Time to plead.

If, from circumstances, a further time to plead become necessary, the defendant may obtain it upon summons, if the judge, in his discretion, think it reasonable that it should be granted.

How obtained.

To obtain further time to plead, *apply to the judge's clerk for a judge's summons for that purpose* (*e*): *serve it on the plaintiff's attorney or agent, who will probably attend the first summons, (for by waiting for a second he would be merely delaying himself); and will in general consent to an order, unless he have sufficient grounds for objecting to it* (*f*). *Serve a copy of the order as you did the summons; for, unless it be served, the plaintiff is not bound to notice it, but may sign judgment for want of a plea* (*g*): *and this, though the order was obtained by consent* (*h*). Care should be taken that the first summons be *attendable* before the time at which the plaintiff is at liberty to sign judgment, supposing no summons to have been taken out; otherwise it will not stay the signing of judgment (*i*). But if the plaintiff omit signing judgment in such case before such summons is attendable, he cannot sign it afterwards, it being a rule, that if the summons be returnable before judgment is signed, it prevents the plaintiff from afterwards signing it (*k*). The summons is a stay of proceedings, if it is returnable at the time the judgment-office opens on the day after the time for pleading expires (*l*).

Summons for, when a Stay of Proceedings.

The time to be given is entirely in the discretion of the

(*z*) *Dyche* v. *Burgoyne*, 1 T. R. 454: *vide post*, 165.

(*a*) *Blundell* v. *Hanson*, 2 M. & W. 243; 5 Dowl. 457; 1 M. & H. 13, *S. C.*

(*b*) *Ante*, 93, 94: and see *Harrison* v. *Smith*, 9 B. & C. 243.

(*c*) *Solomons* v. *Freeman*, 4 T. R. 557.

(*d*) *Hough* v. *Bond*, 1 M. & W. 314; 1 Tyr. & G. 617, *S. C.*: *semble*, overruling *Lockart* v. *Mackreth*, 5 T. R. 661: *Perry* v. *Fisher*, 6 East, 549: *Bond* v. *Smart*, 1 Chit. Rep. 735.

(*e*) See the form, Chit. Forms, 39.

(*f*) See the practice as to summonses and orders, Vol. II. Book IV. Part I. Ch. 34; and see the form of the order, Chit. Forms, 39.

(*g*) *Sedgwick* v. *Allerton*, 7 East, 542; 3 Smith, 559, *S. C.*: *Jans* v. *Hutton*, 1 W. Bl. 290: *Wilson* v. *Hunt*, 1 Chit. 647.

(*h*) *Edensor* v. *Hoffman*, 2 C. & J. 140; 1 Dowl. 304, *S. C.*: see *ante*, 155.

(*i*) *Ottiwell* v. *D'Aeth*, Barnes, 254; Say. 165; Ca. Pr. C. B. 137, 142: and see Barnes, 225; Ca. Pr. C. B. 144: *Barnett* v. *Newton*, 1 Chit. Rep. 689; *Calye* v. *Lord Lyttleton*, 2 Bl. Rep. 954.

(*k*) *Morris* v. *Hunt*, 2 B. & Ald. 355; 1 Chit. Rep. 93, *S. C.*

(*l*) *Wells* v. *Secret*, 2 Dowl. 447; *Spenceley* v. *Shouls*, 5 Dowl. 562; which was the case of a further time to plead granted.

What Time allowed.

judge. In ordinary cases, a month is the extreme limit; but, under special circumstances, an order may be obtained for a much longer period; thus, in trover for goods, where there was some reason to suppose that the plaintiff had sold the goods, time has been given to enable the defendant to file a bill of discovery (*m*). And where a plaintiff indicted for a felony sued for money surmised to be the produce of the felony, the court gave the defendant time to plead until a month after the trial of the indictment (*n*). Where the witnesses were about to leave this country, the court granted a year's time to plead (*o*). But the court refused to grant an indefinite time to plead, on the ground that the defendant could not safely plead till a rule pending in another court, and involving the same matter of defence, was determined; though they granted time to plead on or before a day fixed (*p*).

The Time, how reckoned.

As to the mode of reckoning the further time to plead, if it be a month, it is to be considered a lunar month, consisting of four weeks (*q*). It is reckoned exclusive of the day of the order, but inclusive of the day on which it expires (*r*). If the order be obtained on a day prior to the time in which the defendant originally, or by a prior order, had to plead in, and is not for "*further*" time to plead, the time limited by the last order begins to run from the day of that order, and not from the expiration of the original time allowed for pleading, nor, in the case of a prior order for time, from the expiration of that order (*s*). And if the defendant do not plead on or before the day on which the time expires, the plaintiff may sign judgment on the morning of the following day, without giving any new rule to plead, or demanding a plea. (*See ante*, 157 *to* 159). If the time given does not expire *before* the 10th August, the defendant is entitled to the remainder of the time *after* the 24th October for the purpose of pleading (*t*). And where the defendant, on the 5th September, obtained a month's further time to plead, taking short notice of trial for the first sittings in term, it was held nevertheless that the enlarged time did not commence till after the 24th of October (*u*). It is not unfrequent, however, for a judge at plaintiff's request to impose on the defendant, in the order for time to plead, the terms of pleading, and allowing all the pleadings to go on between those days.

Second or subsequent Application for further Time.

After having thus obtained time to plead, the defendant may again obtain further time, if the judge deem it reasonable that it should be granted.

Upon what Terms, and their Consequences.] The order is

(*m*) *Whitter* v. *Cazalet*, 2 T. R. 683.

(*n*) *Deakin* v. *Praed*, 4 Taunt. 825: and see *Sibson* v. *Nivin*, Barnes, 224.

(*o*) *Hunt* v. *Barclay*, 3 Dowl. 646; 1 Hodges, 103, *S. C.*

(*p*) *Clarke* v. *Alnutt*, 1 Gale, 358; 4 Dowl. 684; 1 Tyr. & G. 71, *S. C.*

(*q*) *Tullett* v. *Linfield*, 3 Burr. 1455; 1 W. Bl. 540, *S. C.*: *Soper* v. *Curtis*, 2 Dowl. 237.

(*r*) R. H., 2 W. 4, r. 8; *ante*, 93; and see Tidd, 9th ed. 470: *Aspinall* v. *Smith*, 8 Taunt. 592; 2 Moore, 695, *S. C.*: *Pepperell* v. *Burrell*, 2 Dowl. 674.

(*s*) *Lane* v. *Parsons*, 3 Bing. N. C. 264; 5 Dowl. 359, *S. C.*: *Simpson* v. *Cooper*, 2 Scott, 840; 1 Hodges, 448, *S. C.* In *Aspinall* v. *Smith*, 8 Taunt. 592, the defendant had four days to plead after the delivery of particulars, and there the case would be different.

(*t*) *Trinder* v. *Smedley*, 3 Dowl. 87: *Wilson* v. *Bradstocke*, 2 Id. 416: *Le Fevre* v. *Molyneux*, 6 Dowl. 153.

(*u*) *Le Fevre* v. *Molyneux*, 6 Dowl. 153.

Upon what Terms, and their Consequences.

usually drawn up upon the terms of *pleading issuably, rejoining gratis, and taking short notice of trial or inquiry* (*if necessary* (*x*), and sometimes upon the terms of taking such a notice of trial as the plaintiff can give). When an order is drawn up on what are technically called "*the usual terms*," it means pleading issuably, rejoining gratis, and taking short notice of trial (*y*). But it is entirely discretionary with the judge to exact these terms or not; and they are consequently exacted only in cases where the judge, in his discretion, thinks it reasonable that the plaintiff should not experience any inconvenience or injury, likely otherwise to arise to him from the indulgence thus granted to the defendant. Also, if the defendant be an executor or administrator, the judge may order that he shall not plead any judgment which may be obtained against him since the time for pleading expired (*z*); otherwise a plea of such judgment, being an issuable plea, might be pleaded by him (*a*). It is also not unusual for the judge, on granting further time to plead, just before the 10th of August, to preclude the defendant from taking advantage of the statute and rule, (*ante*, 94), restraining pleadings being delivered between the 10th of August and the 24th of October, &c. The defendant, if he is desirous of changing the venue, should take care that the order is not made upon "the usual terms," unless it expresses that it is made without prejudice to his right to change the venue; otherwise he will be precluded from such right. (*See post*, *Vol. II. Book IV. Ch.* 6). And in order to compel the defendant to rejoin in twenty-four hours to any replication concluding with a verification, that term should be expressed on the order, for it would not come within the meaning of the term "rejoining gratis." So, in order to compel the defendant to join in demurrer in twenty-four hours, in case plaintiff should demur, or to enable the plaintiff to add a joinder in demurrer and make up the issue, these terms should be expressed in the order; and so should the term of taking short notice of inquiry. (*Post*, 164). So, if it is intended to shut out the defendant from his right to demand oyer, he must be expressly excluded from so doing by the order itself (*b*).

"Pleading issuably." What Pleas are "issuable."

Meaning of pleading "issuably."] By pleading "issuably" is meant, not a general issue only (*c*), but any other plea upon which the plaintiff may take issue, and go to trial upon the merits, either upon an issue in fact or an issue in law (*d*). The general rule is, that where a party has obtained time to plead on the terms of pleading issuably, and by his pleading fails to bring the merits of the case, or some question of fact, or some question of law arising on the facts, in issue, he does not comply with the conditions of the order (*e*). A plea in abatement (*f*), or a plea of "alien enemy" (*g*), or a plea of

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(*x*) 1 Sellon, 307.

(*y*) Tidd's Pract. 471; 1 Sellon, 307.

(*z*) *Anon.* 8 Mod. 308.

(*a*) *Hughes* v. *Pellett*, Barnes, 330.

(*b*) *Goodricke* v. *Turley*, 4 Dowl. 431.

(*c*) *Dearden* v. *Holden*, 1 Burr. 605.

(*d*) *Foster* v. *Snow*, 2 Burr. 782: *Wagstaffe* v. *Long*, Barnes, 263: *Simeon* v. *Thomson*, 8 T. R. 71: *Thelluson* v. *Smith*, 5 Id. 152: *Sealey* v. *Harris*, 7 Dowl. 195.

(*e*) See *per Abbott*, C. J., in *Sawtell* v *Gillard*, 5 D. & R. 620.

(*f*) *Kilwick* v. *Maidman*, 1 Burr. 59; Barnes, 263; and see *Dougal* v. *Bowman*, 2 W. Bl. 724; 3 Wils. 145, *S. C.*

(*g*) *Simeon* v. *Thomson*, 8 T. R. 71: *Shombeck* v. *De la Cour*, 10 East, 326.

What Pleas are "issuable."

bankruptcy of one of several plaintiffs after action brought (*h*), or a plea to an action of trespass, *quare clausum fregit*, of insolvency of plaintiff, and that the cause of action is vested in the provisional assignee (*i*), or a plea of *plene administravit*, and of the defendant's own bankruptcy, in an action against an administrator (*k*), or, as it seems, a plea of coverture (*l*), is not an issuable plea, within the meaning of the terms "pleading issuably;" nor is a plea of judgment recovered, if false, considered such (*m*), nor perhaps any other plea palpably false (*n*). And in an action on an attorney's bill, where a regular judgment had been signed, and the defendant had been let in to plead on an affidavit of merits, the court would not permit him to plead no signed bill, or that the plaintiff had not taken out his certificate (*o*). But a plea of tender (*p*), of the Statute of Limitations (*q*), of infancy (*r*), of the bankruptcy of the defendant (*s*), of the bankruptcy of a sole plaintiff before action brought (*t*), of the spirituous liquors act (*u*), and of the statute, 23 *H.* 3, *c.* 10, that a bail-bond was given for ease and favour (*x*), are issuable. So is a plea of no *ca. sa.* against principal, in an action against bail (*y*). So, in an action against a surety for such sums as the plaintiff should recover against J. S., is a plea of a writ of error pending on the judgment against J. S. (*z*). So, in an action for wrongfully refusing to allow the plaintiff to appraise goods distrained is a plea that the plaintiff was tenant to the defendant, and that the goods were taken as a distress for arrears for rent (*a*). A general demurrer, if fairly and *bonâ fide* intended, is an issuable plea within the meaning of such an order (*b*): but in general a special demurrer (*c*), or a sham or frivolous demurrer, is not (*d*). But where a special demurrer in such a case was treated as a nullity, and judgment signed as for want of a plea, the court, upon application, and upon its appearing that there were substantial grounds of demurrer, set aside the judgment, the defendant undertaking to strike out the special causes (*e*).

Condition of pleading issuably applies only to Plea.

The condition of pleading issuably applies only to the state of the record existing at the stage of the proceedings in which it is imposed, and does not affect subsequent proceedings, and

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(*h*) *Staples* v. *Hollingsworth*, 4 Bing. N. C. 144; 6 Dowl. 196, *S. C.*

(*i*) *Wettenhall* v. *Graham*, 4 Bing. N. C. 715; 6 Dowl. 746, *S. C.*: but see *Willis* v. *Hallett*, *infra*.

(*k*) *Searle* v. *Bradshaw*, 2 C. & M. 148; 2 Dowl. 289.

(*l*) *Conwell* v. *Thomas*, 2 W. Bla. 724; *sed quære*.

(*m*) *Heron* v. *Heron*, 1 W. Bl. 376: *Lowfield* v. *Jackson*, 2 Wils. 117: *Cave* v. *Aaron*, 3 Id. 33.

(*n*) See *Brown* v. *Austin*, 4 Dowl. 161: *Blewitt* v. *Marsden*, 10 East, 237.

(*o*) *Holmes* v. *Grant*, 1 Gale, 59: *Beck* v. *Mordaunt*, 4 Dowl. 112; 2 Bing. N. C. 140, *S. C.*

(*p*) *Noone* v. *Smith*, 1 H. Bl. 369: *Kilwick* v. *Maidman*, 1 Burr. 59.

(*q*) *Rucker* v. *Hannay*, 3 T. R. 124; 4 East, 604, n., *S. C.*: *Maddocks* v. *Holmes*, 1 B. & P. 228: see *Stadholme* v. *Hodgson*, 2 T. R. 390, *contra*.

(*r*) *Delafield* v. *Tanner*, 5 Taunt. 856; 1 Marsh, 391, *S. C.*

(*s*) *Evans* v. *Gill*, 1 B. & P. 52.

(*t*) *Willis* v. *Hallett*, 5 Bing. N. C. 465: but see *Wettenhall* v. *Graham*, *supra*.

(*u*) 24 G. 2, c. 40, s. 12: *Gaitskill* v. *Greathead*, 1 D. & R. 359.

(*x*) *Dearden* v. *Holden*, 1 Burr. 605.

(*y*) *Hartley* v. *Hodson*, 1 Moore, 430.

(*z*) *Curling* v. *Innes*, 2 H. Bl. 372.

(*a*) *Sealey* v. *Harris*, 7 Dowl. 195.

(*b*) *Wright* v. *Russell*, 2 W. Bl. 923; 3 Wils. 530, *S. C.*: *Dewey* v. *Sopp*, 2 Str. 1185: *Langford* v. *Waghorne*, 7 Price, 673.

(*c*) *Berry* v. *Anderson*, 7 T. R. 530: *Blick* v. *Dymoke*, 1 Bing. 379; and see *Bell* v. *Da Costa*, 2 B. & P. 446: *sed vide Newnham* v. *Dowding*, 1 Chit. Rep. 711: *Holmes* v. *Hodgson*, 8 Moore, 379: and see *Gisborne* v. *Wyatt*, 3 Dowl. 505; 1 Gale, 35, *S. C.*, which was a demurrer to a replication for duplicity.

(*d*) *Gray* v. *Ashton*, 3 Burr. 1788; Say. 88.

(*e*) *Berry* v. *Anderson*, 7 T. R. 530: *Nanney* v. *Kenrick*, 1 Dowl. 609.

therefore does not preclude the defendant from demurring generally or specially to the replication (*f*); or to an amended declaration (with liberty to plead *de novo* (*g*).

Where Defendant is "under terms," a non-issuable Plea is a Nullity.

Where a defendant, when under terms to plead issuably, pleads a plea which is not issuable, the plaintiff may treat it as a nullity, and sign judgment after the time for pleading has expired. (*Post*, 165). Or even where he pleads several pleas, if any one of them be not issuable, that one will vitiate the others, and the plaintiff may sign judgment (*h*); and the same where the defendant puts in a sham demurrer or the like as to some of the counts in the declaration, and pleads issuably to the rest (*i*). But where the plea is merely informal, the plaintiff will not be allowed to sign judgment, but may demur (*k*); and in all cases where it is doubtful whether the plea be issuable or not, the better way is to move the court, or a apply to a judge, to set it aside.

"Rejoining gratis."

Meaning of "rejoining gratis."] By "*rejoining gratis*" is meant not only dispensing with the common four-day rule to rejoin (*l*), but also with all the consequences of that rule; so that the defendant is bound to *rejoin* within twenty-four hours after delivery of the replication and a demand of rejoinder (*m*). But he is not bound to join in *demurrer* within that time (*n*). And the term "rejoining gratis" applies only to joining issue to the country, or in other words where the defendant is required only to add the *similiter* (*o*). As to the consequences of defendant's neglecting to add the *similiter*, it seems that as the plaintiff may add it for him (*p*), judgment cannot be signed against him for not adding it (*q*). And the effect of these decisions seems to be, that the condition of "rejoining gratis" amounts to nothing, and might be left out of any order.

"Short Notice of Trial."

Meaning of "Short Notice of Trial."] By "*short notice of trial*," is meant, in country causes, a notice four days at least before the commission-day, the one day exclusive, the other inclusive (*r*); in town causes two days' notice seems sufficient (*s*), although it is usual to give as much more as the time will admit of (*t*). A plaintiff having permission to give short notice for any particular sittings, must try at those sittings or give full notice (*u*). Therefore, if the terms be to take short

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(*f*) *Barker* v. *Gleadow*, 5 Dowl. 134: *Betts* v. *Applegarth*, 4 Bing. 267; 12 Moore, 501, *S. C*: *Gisborne* v. *Wyatt*, 3 Dowl. 505; 1 Gale, 35, *S. C.*: *Woodman* v. *Goble*, 6 Dowl. 371, overruling *Sawtell* v. *Gillard*, 5 D. & R. 620: *White* v. *Givens*, 6 M. & Sel. 415.

(*g*) *Children* v. *Mannering*, T. T. 1838, B. C.; 2 Jurist, 858.

(*h*) *Waterfall* v. *Glode*, 3 T. R. 305: *Cuming* v. *Sharland*, 1 East, 411: *Serle* v. *Bradshaw*, 2 C. & M. 148.

(*i*) Ib.: *Sutton* v. *Wadilove*, Barnes, 314.

(*k*) *Thelluson* v. *Smith*, 5 T. R. 152: *Vere* v. *Goldsborough*, 1 Bing. N. C. 353.

(*l*) *Maurice* v. *Engier*, Barnes, 271; and see *Wyse* v *Fisher*, 3 B. & P. 443.

(*m*) *Clarke* v. *Adams*, 2 C. & J. 683: 2 Tyr. 755, *S. C.*: *Jones* v. *Key*, 2 Dowl. 265.

(*n*) See *Jones* v. *Key*, 2 Dowl. 265; 2 C. & M. 340, *S. C.*

(*o*) Ib. So ruled also by *Gurney*, B., at chambers, 27th July, 1836.

(*p*) *Post.*

(*q*) *Wyse* v. *Fisher*, 3 B. & P. 443. and see *Seaton* v. *Skey*, 3 Dowl. 537; 1 H. & W. 210, *S. C.*

(*r*) R. E., 30 G. 3, Q. B.: and see R. H., 2 W. 4, r. 8: *ante*, 93.

(*s*) Prac. Reg. 390: *Butler* v. *Johnson*, 1 Barnes, 300.

(*t*) Tidd, 9th ed. 472: see *Price* v. *Simpson*, 1 Taunt. 343.

(*u*) *Dignam* v. *Mostyn*, 6 Dowl. 547. This rule applies to trials before the sheriff. (Ibid.)

notice of trial for the sittings *in* term, the defendant is not thereby bound to take short notice of trial for the sittings *after* term (v), nor does he waive the irregularity by retaining an irregular short notice of trial (w). And the defendant's being under terms to take short notice of trial, does not entitle the plaintiff to give less than the usual notice of countermand (x); nor does it bind the defendant to take short notice of inquiry (y).

5. *Judgment for Want of a Plea.*

5. Judgment for Want of a Plea.

When it may be signed.

After the time specified in the notice to plead, and the four days after the rule to plead is entered, and the time allowed for pleading after the plea has been demanded, (where a demand is necessary), have severally expired (z), if the defendant have not delivered a plea, or have delivered one which is a nullity, the plaintiff may sign judgment. And by *R. H.*, 1 *V.* C. P., it is ordered that, "from and after the last day of this term, all judgments may be signed on the morning after the day on which the time for pleading has expired"(a). We have seen, that by the rule of all the courts of *H. T.* 2 *W.* 4, *r.* 66, (*ante*, 159), the plaintiff cannot sign judgment for want of a plea until the opening of the office in the afternoon of the day after that on which the *demand of plea* was made, although the time for pleading and rule to plead have severally expired: but as the usual practice now is to demand a plea on the back of the declaration, or on a day before the last day limited for pleading, this rule is seldom applicable, and in such cases the plaintiff may sign judgment as for want of a plea in the morning after the day on which the time limited for pleading is expired (b). It seems to have been considered in one case that the plaintiff cannot sign judgment for want of a plea on any day between the 10th of August and 24th of October, though the time for pleading expired before the 10th of August; but this, as has been already noticed, seems very questionable (c). Though the defendant pleads irregularly, on an improper plea, the plaintiff cannot sign a judgment before the time for pleading is out (d). So, if a plea is delivered after the time at which the plaintiff is entitled to sign judgment, but before judgment is signed, it would be irregular afterwards to sign judgment (*e*). Where, however, after the time for pleading had expired, the defendant's attorney tendered a plea at plaintiff's attorney's office, just after plaintiff's attorney's clerk had set out to sign judgment, and defendant's attorney pursued, and arriving immediately after judgment had been signed, again tendered the plea, the judgment was held to be regular, having been signed in ignorance of the tender of the plea (*f*). The judgment may, it seems, be signed on a holiday (*g*).

(v) Tidd, 757: and see *Abbott* v. *Abbott*, 7 Taunt. 452; 1 Moore, 160, *S. C.*: *Blaaw* v. *Chaters*, 6 Id. 458; 2 Marsh. 151, *S. C.*

(w) *Dignam* v. *Mostyn*, 6 Dowl. 547.

(x) *Doncaster* v. *Cardwell*, 2 M. & W. 390; 5 Dowl. 582, *S. C.*: *King* v. *Jones*, 1 C. & M. 71; 1 Dowl. 640, *S. C.*: *Sutton* v. *Barnet*, 1 C. & M. 71.

(y) *Stevens* v. *Pell*, 2 Dowl. 355; 2 C. & M. 421, 4 Tyr. 267, *S. C.*

(z) See *ante*, 153, 157, 158.

(a) *Duncan* v. *Carlton*, 4 D. & R. 391; 2 B. & C. 798, *S. C.* In *Kemp* v. *Tyson*, 3 Dowl. 265, in Exchequer, a declaration was delivered on the 4th of August, with notice to plead in four days: it was held, that judgment could not be properly signed till the afternoon of the 9th, for want of a plea. It was contended by the defendant's counsel, that, the office not being open in the afternoon, the defendant had till next day. It is not stated in the report when the demand of plea was made, and the decision may be considered as overruled by that of *Blundell* v. *Hanson*, 2 M. & W. 243: 5 Dowl. 457, *S. C.*

(b) *Blundell* v. *Hanson*, 5 Dowl. 457; 2 M. & W. 243, 1 M. & H. 13, *S. C.*

(c) *Ante*, 154.

(d) *Warne* v. *Beresford*, 4 Dowl. 361; 1 Tyr. & G. 230, *S. C.*: *Hough* v. *Bond*, 1 M. & W. 314; 1 Tyr. & G. 617, *S. C.*: *Nollekin* v. *Severn*, 1 Dowl. 320; 2 C. & J. 333, *S. C.*: *Pepperell* v. *Burrell*, 2 Dowl. 674; 1 C. M. & R. 372, *S. C.*, (which was a case where time to plead had been granted): *Macher* v. *Billing*, 3 Dowl. 246, and see notes there; 1 C. M. & R. 577, *S. C.*; and *Dakins* v. *Wagner*, 3 Dowl. 535.

We have already noticed the time defendant has to plead in after *oyer*, or the delivery of particulars of demand, or changing the venue, or obtaining an order for security for costs or amendment. (*Ante*, 155 *to* 157).

Where the defendant has obtained a *further time* to plead, if he do not plead within the time limited by the judge's order, the plaintiff may sign judgment on the day after, without entering a rule to plead, or demanding a plea. (*Ante*, 157 *to* 159).

If the defendant plead in abatement, or to the jurisdiction after the time limited for that purpose (*h*), or, being under terms to plead issuably, plead a plea which is not issuable, (*ante*, 162), the plaintiff may consider the plea as a nullity, and, after the time for pleading is expired, and the usual notice to plead, rule to plead, and demand of plea have been given, sign judgment.

Where the Plea is a Nullity.

So, if *nil debet* be pleaded to an action of *assumpsit* (*i*), or *non assumpsit* (*j*) to an action of debt; or never did promise (*k*) to an action of debt; or a plea in abatement of the statute of additions, such plea not being available by the practice of the court (*l*), the plaintiff may consider the plea a nullity, and sign judgment. But if the plea be "*not guilty*" to an action of *assumpsit* (*m*), or, "*not guilty*" to an action of debt on a penal statute (*n*), or the defendant did not "undertake," omitting the words "or promise," &c., in an action of *assumpsit* where the declaration alleges a promise (*o*), or *nil debet* to debt on judgment (*p*), it is not a nullity; and notwithstanding the recent rules of *H. T.*, 4 *W.* 4, prohibit the defendant pleading *non assumpsit* to a declaration on a bill or note, or *nil debet* to a declaration in debt, the plaintiff could not sign judgment on such pleas so pleaded, in contravention of the rule (*q*); the plaintiff's course would be, either to get a

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(*e*) *Ampthill* v. *Semple*, 1 Dowl. 316; 2 C. & J. 358, *S. C.*: *Gray* v. *Pennell*, 1 Dowl. 120: *Leigh* v. *Bender*, 4 Dowl. 201: *Minns* v. *Baxter*, 1 T. R. 17: *sed vide Thompson* v. *Ryall*, 4 T. R. 195.

(*f*) *Stafford* v. *Nichols*, 4 Bing. N. C., 693.

(*g*) *Bennett* v. *Potter*, 2 C. & J. 622: but see *Harrison* v. *Smith*, 9 B. & C. 243.

(*h*) See *post*, Vol. II. Book II. Ch. 1.

(*i*) *Stafford* v. *Little*, Barnes, 257. It was on a promissory note: but, it seems, the plea *nil debet* in *assumpsit* would be a nullity in any case; and see Tidd, 9th ed. 563.

(*j*) *Perry* v. *Fisher*, 6 East, 549: *Brennan* v. *Egan*, 4 Taunt. 164: see *Aaron* v. *Chaundy*, 2 B. & C. 562; 4 D. & R. 41, *S. C.*

(*k*) *King* v. *Myers*, 5 Dowl. 686.

(*l*) *Gray* v. *Sidneff*, 3 B. & P. 395: and see *Deshons* v. *Head*, 7 East, 383; 3 Smith, 363, *S. C.*: *Murray* v. *Hubbart*, 1 B. & P. 645: *White* v. *Howard*, 3 Taunt. 339.

(*m*) *Coggs* v. *Bernard*, 1 Salk. 26: *Marsham* v. *Gibbs*, 2 Str. 1022: *Hayne* v. ——, 1 Chit. Rep. 715: *Davison* v. *Morton*, Id. 715: *Iremy* v. *Farrant*, 1 Dowl. 453.

(*n*) *Coppin* v. *Carter*, 1 T. R. 462. It would seem that such plea would be good: see Id.; and see Com. Dig. Pleader, 2, s. 11 *Faulkner* v. *Chevell*, 5 Ad. & El. 213: *Jones* v. *Williams*, 4 M & W 375.

(*o*) *Smith* v. *Jones*, 3 D. & R. 621.

(*p*) *Anon.* 2 Chit. 239.

(*q*) *Littledale*, J., has so decided in two or three cases at chambers, after taking time to consider the point.

Where the Plea is a Nullity.

judge to strike it out, or demur to it. The omission of "*qui tam*," &c., to the plaintiff's name, in the title of the plea, in a penal action, will not warrant the plaintiff in signing judgment (*r*); nor will a mistake in the date of the plea (*s*); nor will a mistatement of the defendant's christian name in the commencement of his plea (*t*). To an action against the defendant as indorser of a bill, he pleaded that "he did not make or draw the bill:" it was held that the plaintiff could not treat the plea as a nullity, and sign judgment (*u*). To a declaration of two counts, one on a bill of exchange, the other on an account stated, defendant, without a rule to plead several matters, pleaded "that he did not accept the bill, and for a further plea that he did not account;" it was held that the informality of omitting to confine each plea to the count to which it applied, did not authorize plaintiff to sign judgment (*v*). A plea in debt for 1800*l*., (before the late rules of *H. T.*, 4 *W.* 4, prohibiting the plea of *nil debet*), that defendant "does not owe the said sum of 10*l.* above demanded," &c. was considered, at all events, so far sufficient, that plaintiff could not sign judgment, as the amount stated in the plea might be rejected as surplusage (*x*). And in general the plaintiff cannot treat a plea as a nullity, which will be rendered a good plea by rejecting surplusage (*y*). A sham plea, though demurrable, or a trick upon the face of it, and false (*z*), cannot be considered a nullity, so as to warrant the plaintiff in signing judgment (*a*), unless the defendant be under terms of pleading *issuably;* nor would the court or a judge, until recently, have given the plaintiff leave to sign such judgment (*b*); but now the judges have come to a resolution to disallow such pleas, and where the plea is, upon the face of it, palpably a tricky one, framed only for the purpose of delaying the plaintiff, the court or a judge will order it to be struck out, and, in some cases, may give him leave to sign judgment.

Sham Plea.

Where the Plea answers only Part.

If a plea begin as an answer to part only, and is in truth an answer only to that part (*c*), the plaintiff should sign judgment for that part of the cause of action which the plea in its commencement does not profess to answer: otherwise, if, instead of doing so, he demur or plead over, the whole action will be discontinued. And where a plea professes to answer the whole of a count or counts, and is no answer to any part

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(*r*) *Dale* v. *Beer*, 7 East, 333; 3 Smith, 243, *S. C.*

(*s*) *Hodson* v. *Pennell*, 4 M. & W. 373; 7 Dowl. 208, *S. C.*: *nom. Hodson* v. *Pamel.*

(*t*) *Anon.* 7 D. & R. 511.

(*u*) *Allen* v. *Walker*, 5 Dowl. 460; 2 M. & W. 317, *S. C.*

(*v*) *Vere* v. *Goldsborough*, 1 Bing. N. C. 353: but see *Putney* v. *Swann*, and *Jourdain* v. *Johnson*, *post*, 184, n. (*b*).

(*x*) *Attwood* v. *Bonwich*, 1 D. & R. 473: and see *Edginton* v. *Town*, 1 Moo. & P. 276: *Risdale* v. *Kelly*, 1 Dowl. 285; 1 C. & J. 410; 1 Tyr. 387, *S. C.*: *sed vide Macdonnell* v. *Macdonnell*, 3 B. & P. 174.

(*y*) *Risdale* v. *Kelly*, 1 Dowl. 285; 1 C. & J. 410; 1 Tyr. 387, *S. C.*

(*z*) The court cannot strike out a plea on affidavit of its falsehood. (*Per Tindal*, C. J., *Edwards* v. *Greenwood*, 5 Bing. N.C. 476).

(*a*) *Webb* v. *Holt*, 2 Str. 1234.

(*b*) See *Cowper* v. *Jones*, 4 Dowl. 591; 1 H. & W. 642, *S. C.*: *Laforest* v. *Langan*, 4 Dowl. 642; 1 Hodges, 410, *S. C.*: *Smith* v. *Blackwell*, 1 Moo. & P. 338; 4 Bing 512: *Merington* v. *Becket*, 2 B. & C. 81. *Thomas* v. *Vandermoolen*, 2 B. & Ald. 197: *Bones* v. *Punter*, Id. 777; 1 Chit. Rep. 564, *S. C.*: *R.* v. *Cooke*, 2 B. & C. 618.

(*c*) 1 Saund. 28, (*n.* 1, 2, 3); 1 Chit. Pl. 5th ed. 554: *Clarkson* v. *Lawson*, 6 Bing. 595, 266; 4 Moo. & P. 356, *S. C.*: *Gray* v. *Pindar*, 2 B. & P. 395: *Rowles* v. *Lusty*, 4 Bing. 428; 1 Moo. & P. 102, *S. C.*

of them, the plaintiff is entitled to sign judgment, for the whole plea is naught (*e*). If, on the contrary, the plea begin as an answer to the whole, but in truth be only an answer to part, or *vice versâ* (*f*), the plaintiff cannot sign judgment for the part not answered, but should demur (*g*).

Where the Plea has been delivered irregularly.

So, if there be any irregularity in the delivery of the plea—as if the defendant file a plea instead of delivering it to the plaintiff's attorney (*h*), or deliver a plea which ought to be signed by counsel, but is not so (*i*), the plaintiff may sign judgment. So, by rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 34, "if a party plead several pleas, avowries, or cognizances, without a rule for that purpose, the opposite party shall be at liberty to sign judgment."

Too soon.

If the defendant pleads before he has taken the declaration out of the office, (if filed), the plaintiff may sign judgment, and this, it seems, without a demand of plea (*k*).

If the defendant, in bailable actions, before 1 & 2 *V. c.* 110, pleaded before bail put in and perfected, the plaintiff might have treated the plea as a nullity, and signed judgment, even although the bail were afterwards to justify (*l*): except in the case of a plea in abatement, which might of course be pleaded before justification, otherwise the plaintiff might have had it in his power to prevent the defendant from pleading such a plea, by not excepting to the bail before the time limited for pleading in abatement should have expired (*m*). But since that statute, the time for declaring and pleading must, it seems, be regulated in all cases by the time of appearance, and not that of perfecting bail; and therefore, now, if the defendant in any case plead before he have entered an appearance, or an appearance entered for him, the plaintiff may treat the plea as a nullity, and, after the time for pleading has expired, sign judgment (*n*), unless he have waived his right of doing so by having previously demanded a plea, (*ante*, 158), or the like.

After former Plea.

Where the defendant first pleaded in abatement, and afterwards, without applying to the court for leave to withdraw it, pleaded a judgment recovered, the court held that the plaintiff was at liberty to sign judgment as for want of a plea (*o*).

In Name of one not an Attorney.

A plea pleaded in the name of a person who is not an attor-

(*e*) *Crump* v. *Adney*, 1 C. & M. 362: and see *Bush* v. *Parker*, 1 Bing. N. C. 72; 4 M. & Scott, 588, *S. C.*

(*f*) *Gray* v. *Pindar*, 2 B. & P. 427: *Thomas* v. *Heathorn*, 2 B. & C. 477: *Clarkson* v. *Lawson*, 6 Bing. 587: *Mountney* v. *Watson*, 2 B. & Ad. 673: see *Harvey* v. *Grabham*, 5 Ad. & Ell. 61, and *post*, 184.

(*g*) *Wood* v. *Farr*, 5 Bing. N. C. 247; 7 Dowl 263, *S. C.*; 1 Saund. 28, (*n.* 1, 2, 3), 296, (*n.* 1): *Everard* v. *Patterson*, 6 Taunt. 646; 2 Marsh. 304, *S. C.*: *Thomas* v. *Heathorn*, 2 B. & C. 477; 3 D. & R. 647, *S. C.*: *Clarkson* v. *Lawson*, 6 Bing. 266; 4 Moo. & P. 356, *S. C.*: and see *Worley* v. *Harrison*, 3 A. & E. 669; 5 N. & M. 173; 1 H. & W. 426, *S. C.*: *M'Curday* v. *Driscoll*, 1 C. & M. 618: *Stammers* v. *Yearsley*, 10 Bing. 35: 3 M. & Scott, 410, *S. C.*

(*h*) *Lockhart* v. *Mackreth*, 5 T. R. 661: *Jennings* v. *Webb*, 1 Id. 278: *Rowsell* v. *Cox*, 2 B. & Ald. 392; 1 Chit. Rep. 211, *S. C.*

(*i*) R. E., 18 Car. 2: and see *Macher* v. *Billing*, 3 Dowl. 246; 1 C., M. & R. 577, *S. C.*: *Leigh* v. *Monteiro*, 6 T. R. 496: *Samuels* v. *Dunne*, 3 Taunt. 386: *Hockley* v. *Sutton*, 2 Dowl. 700: *Grant* v. ——, 2 Chit. 319.

(*k*) *Bond* v. *Smart*, 1 Chit. Rep. 735: Tidd, 9th ed. 566, 476; *ante*, 142.

(*l*) *Venn* v. *Calvert*, 4 T. R. 578.

(*m*) *Dimsdale* v. *Nielson*, 2 East, 406: *Saunders* v. *Owen*, 2 D. & R. 252: *Capen* v. *Bond*, 2 Y. & J. 531: *Hopkinson* v. *Henry*, 13 East, 170.

(*n*) See *Nollekin* v. *Seserne*, 2 Tyr. 304: and see *Douglas* v. *Green*, 2 Chit. 7.

(*o*) *Palmer* v. *Dixson*, 5 D. & R. 623: and see R. H. 2 W. 4, r. 46, *post*, 180.

ney, or it seems in the name of an attorney without authority, is not such a nullity as will entitle the plaintiff to sign judgment (*o*). Nor, it seems, is a plea pleaded in the name of the country attorney, where the appearance was in the name of the town agent (*p*). If the plaintiff accept the plea, he waives any objection to it on the ground of its having been pleaded by a new attorney without an order to change (*q*).

Where Plea of Judgment recovered does not state the Number of the Roll.

By *R. H.*, 4 *W.* 4, *r.* 8, "where a defendant shall plead a *plea* of *judgment recovered* in another court, he shall in the *margin* of such plea state the *date* of such *judgment*, and, if such judgment shall be in a court of record, the *number* of the *roll* on which such proceedings are entered, if any; *and in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea*; and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer or person having the custody of the records or proceedings of the court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea, by leave of the court or a judge." This rule does not apply to a plea of judgment recovered against an executor (*r*). If the plea do not contain this marginal note when it ought to do so, plaintiff may treat it as a nullity, and sign judgment (*s*).

Where Demurrer has no marginal Note.

Also, by the same rule, *r.* 2, "in the *margin* of every *demurrer*, before it is signed by counsel, *some matter of law intended to be argued shall be stated*; and if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside as irregular by the court or a judge, and leave may be given to sign judgment as for want of a plea: provided that the party demurring may, at the time of the argument, insist upon any further matters of law, of which notice shall have been given to the court in the usual way." (*See further as to this rule, post, Vol. II. Book II. Part II.*)

Other Cases where it may be signed.

The plaintiff may sign judgment if the defendant plead a tender, without paying the money into court (*t*); but the judgment in such case should not be signed for more than the sum which ought to have been paid in (*u*). So, the plaintiff may sign judgment if the defendant plead a dilatory plea, without an affidavit to verify it (*x*); or, after craving *oyer*, do not set forth all the condition of the bond, or set forth a false *oyer*, in his plea (*y*); or if defendant waive his plea or demurrer without leave of the court or a judge (*z*).

When Judgment may be signed with

When Judgment may be signed without a new Rule to plead.] Formerly, the judgment must have been signed of

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(*o*) *Hill* v. *Mills*, 2 Dowl. 696: *Bayley* v. *Thompson*, 2 Dowl. 655; 4 Tyr. 955; 2 C. & M. 673, *S. C.*

(*p*) *Buckler* v. *Rawlins*, 3 B. & P. 111.

(*q*) *Margerem* v. *Makilwaine*, 2 N. R. 509: see *Farley* v. *Hebbes*, 3 Dowl. 533, *ante*, 55.

(*r*) *Power* v. *Izod*, 1 Bing. N. C. 304; 3 Dowl. 140; 1 Scott, 119, *S. C.*

(*s*) *Begbie* v. *Grenville*, 3 Dowl. 502, *per Parke*, B.

(*t*) *Pether* v. *Shelton*, 1 Str. 638.

(*u*) *Chapman* v. *Hicks*, 2 Dowl. 641; 2 C. & M. 633, *S. C.*

(*x*) See *Hughes* v. *Alvarez*, 2 L. Raym. 1409; *Sherman* v. *Alvarez*, 1 Str. 639. But if there be an affidavit, though sworn before defendant's own attorney, plaintiff cannot sign judgment. (*Horsfall* v. *Mattheuman*, 3 M. & Sel. 154).

(*y*) *Wallace* v. *Cumberland, Duchess of*, 4 T. R. 370, 371, n.: and see *Cole* v. *Hulme*, 3 M. & R. 86, a.

(*z*) *Post*, 180.

out a new Rule to plead.

the same term the rule to plead was entered; otherwise, if the cause stood over to another term, without further proceedings, a new rule to plead must have been entered before the plaintiff could sign judgment, for judgments ought in general to have been entered of the same term in which rules were given (*a*); but now, in actions commenced by the process prescribed by the Uniformity of Process Act, (2 *W.* 4, *c.* 39), such new rule to plead is no longer in that case necessary (*b*). Formerly, if a rule to plead had not been entered the same term the declaration was amended, a new rule to plead must have been given before judgment could be signed (*c*), but this is now otherwise. (*Ante*, 157). And such new rule is not necessary where a judge's order has been obtained for time to plead. (*Ante*, 157). And where, after a rule to plead is entered, the proceedings are stayed by injunction, the plaintiff may sign judgment immediately after the injunction is dissolved, without giving a new rule to plead (*d*).

How signed.

How Signed.] As to the mode of signing the judgment, *see Vol. II. Book II. Part IV. Ch.* 3. It may, it seems, be signed on a holiday (*e*).

Setting aside Judgment.

Setting aside Judgment.] As to this, *see post, Vol. II. Book II. Part IV. Ch.* 3.

6. *The Plea* (*f*), *how delivered, &c.*

6. The Plea, how delivered, &c.

A common appearance being entered, either by the defendant or his attorney or agent, or by the plaintiff for him, the defendant's attorney or agent may deliver his plea. Before he pleads, however, he must take the declaration (if filed) out of the office; otherwise the plaintiff may treat his plea as a nullity, and sign judgment. (Vide ante, 142, 143).

Engross the plea on plain paper, (*obtain counsel's signature, if necessary, at the foot of the draft or engrossment, see post,* 171), *and deliver it to the plaintiff's attorney or agent* (*g*) *before nine at night* (*h*). It seems, however, that though delivered after that time the plaintiff cannot treat it as a nullity, and sign judgment, at least, without returning the plea (*i*). But as the plea must be dated of the day on which it is pleaded the plaintiff may get it set aside as irregular (*j*).

By a general rule of all the courts of *H. T.*, 4 *W.* 4, *r.* 1, "no demurrer, nor any *pleading subsequent* to declaration, shall in any case be *filed* with any officer of the court, but the same shall always be *delivered* between the parties" (*k*).

If you intend giving a notice to dispute the act of bankruptcy, &c., in actions by assignees, see how to do it, *post*,

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(*a*) Gilb. B. R. 318; Tidd, 9th ed.; Sellon, 301.

(*b*) *Pryer* v. *Smith*, 2 Dowl. 114; 1 C. & M. 855, *S. C.*: *Mould* v. *Murphy*, Id. 54; 1 C. & M. 495, *S. C.*: *Usborne* v. *Pennell*, 1 Bing. N. C. 320; 1 Scott, 277, *S. C.*

(*c*) *Barry* v. *Rodney*, 2 Chit. Rep. 332.

(*d*) *Theedam* v. *Jackson*, Barnes, 238.

(*e*) *Bennett* v. *Potter*, 2 C. & J. 622: *sed vide Harrison* v. *Smith*, 9 B. & C. 243.

(*f*) As to pleas in abatement, see *post*, Vol. II. Book I. Part I.

(*g*) See the forms, Chit. Forms, 40.

(*h*) R. H., 2 W. 4, r. 50.

(*i*) *Horsley* v. *Purdon*, 2 Dowl. 228: *sed quære*.

(*j*) See *Hodson* v. *Pennell*, 4 M. & W. 373; 7 Dowl. 208, *S. C.*: *nom. Hodson* v. *Pennell*.

(*k*) See the former practice, Tidd, New Prac. 411. Even before this rule, in the Q. B. all pleas and demurrers upon writs of error, *scire facias*, and *auditâ querelâ*, must have been *delivered*. (R. T., 12 W. 3). This new rule does not apply to ejectments. (*Doe Williams* v. *Williams*, 2 A. & E 381; 4 N. & M. 259, *S. C.*) As to which see a late rule, H. T., 1 V. *post*, Vol. II. tit. "Ejectment."

Vol. II. Book III. Part II. Ch. 9. If you intend to give particulars of objection to a patent, see how, *post, Vol. II.* title "Particulars."

7. *Counsel's Signature.*

7. Counsel's Signature. When necessary.

By a rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 107, "It shall not be necessary that any pleadings *which conclude to the country* be signed by counsel" (*l*). There are also certain other general pleas, which need not when pleaded in the Court of Queen's Bench or Exchequer (*m*) be signed by counsel: such as *liberum tenementum; comperuit ad diem* to debt on bail-bond (*n*); *nul tiel record* to debt on judgment or recognizance; *son assault demesne* (*o*); *solvit ad diem* (*p*); *plene administravit* (*q*); *ne unques executor or administrator; per minas; riens per descent* (*r*). Also in the Common Pleas, the pleas of *comperuit ad diem* to debt on bail-bond, *nul tiel record* (*s*), and *solvit ad diem* (*t*), need not be signed (*u*). But all other special pleas which conclude with a *verification*, must be signed by counsel (*v*). Since the above rule of *H. T.*, 2 *W.* 4, *r.* 107, *double* pleas need not now on that account merely be signed (*x*).

How made.

The signature in either of the courts may now be by a serjeant or barrister (*y*). It must be the signature of the counsel or serjeant himself, and not that of his clerk, or any other party (*z*). It may be on the draft or the engrossment (*z*). It has been decided by *Patteson*, J., at chambers, that if the signature be placed on the exterior of the pleading, and not at the foot, it will suffice (*a*), but, according to a prior case, it ought to be at the foot (*b*).

Judgment for want of.

If a plea or pleas which ought to be signed, be delivered without the signature, the plaintiff may, after the time for pleading is out (*c*), treat the plea as a nullity, and sign judgment (*d*). And it has been held he might do so where the general issue was pleaded to part of a declaration, and the Statute of Limitations to the remainder, without signature (*e*). But if there be two defendants, and one pleads the general issue, and the other pleads specially, and both are on the same paper, though the special plea is not signed, the plaintiff cannot reject the general issue and take judgment against both (*f*).

(*l*) Before this rule, it was not necessary in Q. B., that pleas in covenant concluding to the country, special *non est factum*, and not guilty to a new assignment, should be signed by counsel; (R. T. 12 W. 3, *a*); nor needed a general plea of bankruptcy in Q. B., (*Leigh* v. *Monteiro*, 6 T. R. 496: *Henderson* v. *Sansom*, 2 B. & Ald. 392; 1 Chit. Rep. 211, *S.C.*), though it must have been in C. P. (3 B. & P. 171).

(*m*) The Court of Exch. follows the practice of the Q. B. (*Reed* v. *Spurr*, 5 Dowl. 330; 2 M. & W. 76, *S. C.*)

(*n*) *Rowsell* v. *Cox*, 2 B. & Ald. 392; 1 Chit. Rep. 211, *S. C.*

(*o*) R. T., 12 W. 3, *a.*

(*p*) *Lockhart* v. *Mackreth*, 5 T. R. 661.

(*q*) *Reed* v. *Spurr*, 2 M. & W. 76; 5 Dowl. 330, *S. C.*

(*r*) Imp. B. R. 287: Lee's Prac. Dict. tit. *Pleas.*

(*s*) *Hubert* v. *Lord Weymouth*, 2 W. Bl. 816: *Simpson* v. *Neal*, 2 Wils. 74.

(*t*) Per *Wood*, 5 T. R. 663; Imp. C. P. 6th ed. 239.

(*u*) See Tidd, 9th ed. 672.

(*v*) See R. E., 18 Car. 2, Q. B.: *Denormanville* v. *Meyer*, 1 Chit. Rep. 211; 1 C. & P. 95 (*a*). In *Clay* v. *Cheatle*, Q. B. 13 May, 1835, it was held that the plea of infancy must be signed; and see 1 C. & P. 95, n.

(*x*) Whilst the filing of pleas was necessary, it was otherwise. (See 2 East, 225; Imp. C. P. 6th ed. 241).

(*y*) So decided by *Parke*, B. at chambers, in two cases in July, 1839.

(*z*) *Power* v. *Fry*, 3 Dowl. 140; 1 Scott, 119; 1 Bing. N. C. 304, *S. C.*, *nom. Power* v. *Izod.*

(*a*) *Colyer* v. *Billett*, Nov. 1836.

(*b*) *Grant* v. ———, 2 Chit. 139.

(*c*) *Macher* v. *Billing*, 1 C., M. & R. 577; 3 Dowl. 246, *S. C.*: *Pepperell* v. *Burrell*, Id. 674; 1 C., M. & R. 372, *S. C.*

(*d*) Ib: *ante.* 168.

(*e*) *Macher* v. *Billing*, 3 Dowl. 246; 1 C., M. & R. 577, *S. C.*: and see Cas. Pr. C. P. 41: *sed vide Spencer* v. *Cartlick*, 3 Dowl. 247, n.

(*f*) 1 Sel. Prac. 295: 2 Lil. Reg. 299.

8. *Pleading several Pleas.*

8. Pleading several Pleas. When allowed. At Common Law.

At common law a defendant could not plead several distinct pleas to the same declaration, or a part thereof (*g*), which often led to much inartificial and repugnant pleading, as it naturally induced the defendant to endeavour to crowd as many facts and arguments into his plea as he possibly could (*h*). But even at common law he might have pleaded several pleas, provided all taken together afforded but one answer to the whole declaration; and such pleas may now be pleaded without a rule (*i*).

By 4 & 5 Ann. c. 16. ss. 4, 5, several Matters may be pleaded by Leave of the Court.

At length it was provided by the statute 4 & 5 *Ann. c.* 16, *ss.* 4, 5 (*k*), that "the *defendant* or tenant in any action or suit, or any *plaintiff in replevin* in any court of *record*, may, with the leave of the same, plead as many several matters thereto as he shall think necessary for his defence: provided, nevertheless, that if any such matter shall, upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the court, or if a verdict shall be found upon any issue in the said cause for the plaintiff or demandant, costs shall be also given in like manner; unless the judge who tried the said issue shall certify that the said defendant or tenant, or plaintiff in *replevin, had a probable cause to plead such matter*, which, upon the said issue, shall be found against him; provided, also, that nothing in this act shall extend to any writ, declaration, or suit of appeal of felony, &c., or to any writ, bill, action, or information upon *any penal statute*."

By R. H., 4 W. 4, r. 6, several Pleas not allowed unless distinct Defences.

And by one of the recent rules of pleading, (*R. H.*, 4 *W.* 4, *r.* 6), which is a statutory one, reciting that, by the new mode of pleading, the disputed facts material to the merits of the case would, before the trial, be brought to the notice of the respective parties more distinctly than heretofore, and that by 3 & 4 *W.* 4, *c.* 42, *s.* 23, the powers of amendment at the trial are greatly enlarged, it is ordered, that "several pleas, or avowries, or cognizances shall not be allowed, *unless a distinct ground of answer or defence is intended to be established in respect of each.*" And, therefore, that "*pleas*, *avowries*, and *cognizances*, founded on *one* and the *same principal matter*, but *varied* in *statement*, *description*, or *circumstances* only, (and pleas in bar in *replevin* are within the rule), are not to be allowed. *Ex. gr.*, pleas of *solvit ad diem* and of *solvit post diem* are both pleas of payment, varied in the circumstances of time only, and are not to be allowed. But pleas of *payment*, and of *accord and satisfaction*, or of *release*, are distinct, and are to be allowed. Pleas of an *agreement to accept the security of A. B. in discharge of the plaintiff's demand*, and of an *agreement to accept the security of C. D. for the like purpose*, are also distinct, and to be allowed. But pleas of an *agreement to accept the security of a third person*, in discharge of the plaintiff's demand, and of the same agreement, describing it to be an agreement to forbear for a time, in consideration of the same security, are

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(*g*) Co. Litt. 303. *a.*; and see 1 Chit. Pl. 6th ed. 560.

(*h*) 2 Eunomus, 141: see Boote's Suit at Law, 104: Coop Eq. Pl. 227.

(*i*) *Archer* v. *Garrard*, 6 Dowl. 132; 3 M. & W. 63, *S. C.*

(*k*) The construction of and practice upon this statute are stated in Com. Dig. Pleader, E. 2; and Tidd, 9th ed. 654, 657.

not distinct, for they are only variations in the statement of one and the same agreement, whether more or less extensive, in consideration of the same security, and not to be allowed. In trespass *quare clausum fregit*, pleas of *soil and freehold* of the defendant in the *locus in quo*, and of the defendant's *right to an easement* there, pleas of *right of way*, of *common of pasture*, of *common of turbary*, and of *common of estovers*, are distinct, and are to be allowed. But pleas of right of common at all times of the year, and of such right at particular times, or in a qualified manner, are not to be allowed. So, pleas of a *right of way* over the *locus in quo*, varying the *termini* or the purposes, are not to be allowed. Avowries for *distress* for rent, and for *distress for damage feasant*, are to be allowed. But avowries for distress for rent, varying the amount of rent reserved, or the times at which the rent is payable, are not to be allowed. The examples in this and other places specified are given as *some instances only* of the application of the rules to which they relate: but the principles contained in the rules are not to be considered as restricted by the examples specified."

Pleas in violation of above Rule may be struck out, with Costs.

And by rule of *H. T.*, 4 *W.* 4, *r.* 6, it is further ordered, in order to enforce the above rule, and as a consequence of the violation of it, that "where more than one count, plea, avowry, or cognizance, shall have been used in apparent violation of the preceding rule, the opposite party shall be at liberty to apply to a judge, suggesting that two or more of the counts, pleas, avowries, or cognizances, are founded on the same subject-matter of complaint, or ground of answer or defence, for an order that all the counts, pleas, avowries, or cognizances, introduced in violation of the rule, be struck out at the cost of the party pleading; whereupon the judge shall order accordingly, unless he shall be satisfied, upon cause shewn, that *some distinct subject-matter* of complaint is *bonâ fide* intended to be established in respect of each of such counts, or some distinct ground of answer or defence in respect of each of such pleas, avowries, or cognizances, in which case he shall indorse upon the summons, or state in his order, as the case may be, that he is so satisfied; and shall also specify the counts, pleas, avowries, or cognizances, mentioned in such application, which shall be allowed."

Costs where there are several Pleas and no distinct Defence established in respect of each.

Also, by rule of *H. T.*, 4 *W.* 4, *r.* 7, it is further ordered, that "where there is more than one count, plea, avowry, or cognizance upon the record, and the party pleading fails to establish a distinct subject-matter of complaint in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance, a verdict and judgment shall pass against him upon each count, plea, avowry, or cognizance, which he shall have so failed to establish, and he shall be liable to the other party for all the costs occasioned by such count, plea, avowry, or cognizance, including those of the evidence as well as those of the pleadings; and further, in all cases in which an application to a judge has been made under the preceding rule, and any count, plea, avowry, or cognizance allowed as aforesaid, upon the ground that some distinct subject-matter of complaint was *bonâ fide* intended to be established at the trial in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance so allowed, if the court or judge, before whom the trial is had, shall be of opinion that no such distinct subject-matter of complaint was *bonâ fide* intended to be established in respect of each count so allowed, or no such distinct ground of answer or defence in respect of each plea, avowry, or cognizance so allowed, and so shall certify before final judgment, such party so pleading shall not recover any costs upon the issue or issues upon which *he succeeds*, arising out of any count, plea, avowry, or cognizance, with respect to which the judge shall so certify."

Several Pleas not allowed at Suit of the Queen.

It will be observed, that the statute of 4 *Ann. c.* 16, does not bind the Queen (*l*), nor would the above new rules; and at her suit the defendant cannot plead several pleas without leave of the attorney-general (*m*). Therefore, the defendant cannot plead several pleas to an information of intrusion (*l*), or in *quare impedit*, where the Queen is a party (*n*), or in *scire facias* for a debt due to the Queen (*o*); nor could he plead several till the 32 *G.* 3, *c.* 58, in an information in nature of a *quo warranto* (*p*), nor in prohibition till the 1 *W.* 4, *c.* 21 (*q*).

Several Pleas in inferior Courts.

It is also to be observed, that the statute of 4 *Ann. c.* 16, does not extend to an action in an inferior court not of record (*r*). But under the above statutory rules, which are directed to be observed *in all courts of common law* (*s*), it may be considered that a defendant may, by leave of the court, be allowed to plead several matters in an inferior court, though not a court of *record:* and, at all events, it has become the practice of such courts to allow them to be pleaded.

In Action on penal Statute.

It will also be seen that the statute of 4 *Ann. c.* 16, does not extend to any action or information upon a *penal* statute (*t*); and the new rules do not seem to allow several matters to be pleaded in such an action or information.

What Pleas allowed together before R. H., 4 W. 4.

The court would not, *before* the above new statutory rules, allow the defendant to plead several matters where the pleas were most grossly and manifestly inconsistent, so it was evident that the object of pleading them was to vexatiously occasion inconvenience and expense to the plaintiff. Thus the defendant was not allowed to plead *non assumpsit* (*u*) or *non est factum* (*x*) to the whole declaration, and a *tender* as to part; for one of these pleas went to deny that the plaintiff ever had any cause of action, and the other absolutely admitted it to the extent of the sum tendered and paid into court. And even in cases where the pleas were not so grossly inconsistent, the court refused to allow them in many instances to be pleaded together, if at all inconsistent. Thus, in an action on a deed made beyond seas, the defendant, relying in some of his pleas

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(*l*) *Att.-Gen.* v. *Allgood*, Parker, 1; Id. 10.

(*m*) *Reg.* v. *Bewdley*, 1 P. Wms. 220: *R.* v. *Caldwell*, Forrest, 57: *R.* v. *Archbishop of York*, Willes, 533.

(*n*) *R.* v. *Archbishop of York*, Willes, 533.

(*o*) R. v. *Caldwell*, Forrest, 57: *Att.-Gen.* v. *Allgood*, Parker, 1.

(*p*) *Reg.* v. *Bewdley*, 1 P. Wms. 220: *Att. Gen* v. *Allgood*, Parker, 1; and see Tidd, New Pract. 404.

(*q*) See *Hall* v. *Maule*, 1 H. & W. 583; 5 N. & M. 455, *S. C.*

(*r*) See *Chitty* v. *Dendy*, 1 H. & W. 169; 4 N. & M. 842; 3 A. & E. 319, *S. C.*

(*s*) *Post*, 183.

(*t*) *Morgan* v. *Lukup*, 2 Str. 1044; R. T. Hardw. 262: *Heyrick* v. *Forster*, 4 T. R. 701: *R.* v. *Richardson*, 9 East, 469; Tidd, 9th ed. 655, and cases there collected.

(*u*) *Maclellan* v. *Howard*, 4 T. R. 194: *Dougal* v. *Bowman*, 2 Bl. Rep. 723.

(*x*) *Fox* v. *Chandler*, 2 Bl. Rep. 905: *Jenkins* v. *Edwards*, 5 T. R. 97: *Orgill* v. *Kemshead*, 4 Taunt. 459.

Before R. H. 4 W. 4.

on matters of defence which necessarily imported the execution of the deed, the court would not permit him to plead *non est factum* (*y*). And the defendant was not allowed to plead *non assumpsit* and the Stock Jobbing Act (*z*), or *non assumpsit* and alien enemy (*a*). The Court of Common Pleas also refused to allow the assignees of a bankrupt to plead in covenant on a lease *non est factum*, and that the premises did not come to them by assignment (*b*). And in the exercise of their discretion, that court in *scire facias* on a judgment would not permit the defendant to plead—1st, payment; 2ndly, judgment by fraud; and 3rdly, that the judgment was upon a warrant of attorney obtained by fraud (*c*). And to a declaration on a life-policy the court would not allow the defendant to plead—1st, the general issue; 2ndly, a fraudulent misrepresentation as to the state of the health of the party whose life was insured; and lastly, that the policy was not under seal (*d*). So, in an action by a reversioner against assignees of a bankrupt for several breaches of covenant in a lease, the court would not permit the defendant to plead *non est factum*, and also that the premises did not come to them by assignment (*e*). And in another case, the court said, that where a title was deduced through a number of successive links, they would only allow the defendant to traverse the material allegations, and not to take issue on every distinct allegation of fact, immaterial to the decision of the cause on its merits (*e*). And where the plaintiff's title to an advowson was traced in *quare impedit* through a period of two centuries, and the defendant's claim arose on the alleged invalidity of a deed of 1672, the court would not allow him to traverse all the allegations in the declaration, or to plead more pleas than were necessary to contest the deed of 1672 (*f*). So, in an action of covenant against an executor on an indenture of lease, the court refused to allow the defendant to plead, in addition to the pleas of *plene administravit* and *plene administravit* before he had notice of the indenture, pleas of *plene administravit* before he had notice of the breach of covenant, and payment to the residuary legatees before notice of the indenture (*g*). Nor was the defendant allowed to plead several matters which required different trials, as in dower, *ne unques accouple en loyal matrimonie* and a mortgage, and *ne unques seisie que dower* (*h*); for the first matter is triable by the bishop, and the other by a jury; and if the former be found against the defendant, the judge cannot certify that he had a probable cause for pleading it. The courts, however, do not appear to have been governed by any settled principle in using their discretion as to what pleas would or would not be allowed together, so long as they were not so grossly and manifestly inconsistent that it was evident the defendant's object in pleading them was vexatiously

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(*y*) *Laughton* v. *Ritchie*, 3 Taunt. 385.

(*z*) *Shaw* v. *Everett*, 1 B. & P. 222: *Rossett* v. *King*, 1 Moo. & P. 145.

(*a*) 1 B. & P. 222, n. (*a*): *Tyatt* v. *Young*, 2 Id. 72: *Fruckenbolt* v. *Payne*, 12 East, 206: *Shombeck* v. *De la Cour*, 10 East, 326.

(*b*) *Whale* v. *Lenny*, 5 Bing. 12; 2 Moo. & P. 19, *S. C.*

(*c*) *Shaw* v. *Lord Alvanley*, 9 Moore, 694; 2 Bing. 325, *S. C.*

(*d*) *Weld* v. *Forster*, 12 Moore, 61.

(*e*) *Whale* v. *Lenny*, 5 Bing. 12; 2 Moo. & P. 19, *S. C.*

(*f*) *Gully* v. *Bishop of Exeter*, 2 Moo. & P. 105; 4 Bing. 525; 5 Id. 42, *S. C.*

(*g*) *Davis* v. *Blackwell*, 2 M. & Scott, 7; 9 Bing. 5, *S. C.*

(*h*) *Anon.* Com. Rep. 148: *Anderson* v. *Anderson*, 2 Bl. Rep. 1157: *Hillier* v. *Fletcher*, Id. 1207; Tidd Pract. 9th ed. 655.

to occasion inconvenience and expense to the plaintiff, and not to bring the real merits of the cause to a decision (*i*).

Since R. H., 4 W. 4.

As to what pleas the court or a judge will now allow to be pleaded together since the above new statutory rules, it would seem that the main object of those rules was to prevent the same defence being pleaded in different forms: and that that should be the main consideration when deciding upon what pleas should be pleaded together; and that the question of the pleas being inconsistent with each other ought not to be brought into consideration, unless, indeed, the inconsistency be so gross and apparent, that it is evident the defendant's object in pleading them is to vex the plaintiff, and put him to expense, and not *bonâ fide* to bring the case to a decision on the merits. In a recent case, *Tindal*, C. J., observed, that "the late rules for the regulation of pleading nowhere state that pleas that are *inconsistent* with each other shall not be allowed; on the contrary, amongst the examples of pleas that may be pleaded together, we find pleas of payment, and of accord and satisfaction, or of release, are distinct, and are to be allowed: these, and many others that might be referred to, are instances of pleas that cannot *all* be true, and in that sense are inconsistent: it was not intended that the defendant should be shut out from any *bonâ fide* ground of defence; though, where pleas that are manifestly inconsistent with each other appear to be vexatiously pleaded, and for the purpose of occasioning inconvenience and expense to the plaintiff, the court will not allow them (*k*). And Mr. Justice *Bosanquet*, in the same case, observed, that "the word *inconsistent* was studiously avoided in framing the new rules, because it was felt that two or more pleas might be inconsistent, and yet contain substantially different defences, the object had in view being to prevent the same defence being pleaded in different forms." In that case, which was an action for goods sold and delivered, and for money paid, the court allowed the defendant to plead *non assumpsit*, and as to part of the money paid that it was so for illegal bargains. In trespass for false imprisonment on a charge of felony, the court allowed the defendant to withdraw a former plea, and to plead, 1st, That plaintiff had forged the acceptance of a bill of exchange, &c., and that defendant, therefore, caused him to be taken before a magistrate: 2nd, That he had issued an acceptance knowing it to be forged &c.: 3rd, That defendant had reasonable cause to believe that plaintiff had forged the acceptance, &c.: 4th, That plaintiff had obtained money on the bill by false pretences, &c., the plaintiff refusing to allow the circumstance to be given in evidence under one plea, and it not necessarily appearing that it was only one transaction (*l*); and *Tindal*, C. J., said, that "where the same facts and circumstances are differently stated in different pleas, the rule applies; but where the same facts lead to different conclusions in law, it is material to the defendant, and it is of advantage to the plaintiff, that the different

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(*i*) See various instances in which the courts allowed inconsistent pleas to be pleaded together, Tidd, New Pract 402.

(*k*) *Tribuer* v. *Duerr*, 1 Scott, 103; 1 Bing. N. C. 266; 3 Dowl. 133, *S. C.*: and see *Hart* v. *Bett*, 1 Hodges, 6: *Wilkinson* v. *Small*, 3 Dowl. 564.

(*l*) *Currie* v. *Almond*, 5 Bing. N. C. 224; 7 Dowl. 250, *S. C.*: *nom. Currie* v. *Arnott*.

Since R. H., 4 W. 4.

views of the facts which are relied on should be put upon the record (*m*). In trover, the defendant has been allowed to plead a right of lien by agreement, a right of lien by usage, and the same usage in two other pleas, but with reference to a delivery of goods by two different parties (*n*). In an action of *debt* on simple contract the defendant was allowed to plead—first, as to a particular sum, his bankruptcy; secondly, as to another sum, payment; thirdly, as to a third sum, accord and satisfaction; and fourthly, as to the whole demand, except a particular sum, the plea of *nunquam indebitatus* (*o*). In an action by the assignees of a bankrupt, the court allowed the bankruptcy to be put in issue, together with a plea of mutual credit and payment of money into court (*p*). In *trover* by the assignee of a bankrupt, the defendant may be allowed to plead—first, not guilty, to put the plaintiff upon proof of the conversion; secondly, that the plaintiff is not assignee of the bankrupt; and thirdly, that the plaintiff was not lawfully possessed of the goods as of his property as such assignee (*q*). In *covenant* on a lease against the assignees of a bankrupt, the court allowed them to plead—first, that the lessee's interest did not pass to them; and secondly, that they renounced the term in time to be discharged from the performance of the covenants (*r*). In *replevin*, an avowry justifying the taking of cattle, damage *feasant* in the *locus in quo* as the soil of A., and the like avowry as the soil of B., have been allowed (*s*). In *case* for obstruction of a right of way, the defendant has been allowed to plead—first, not guilty; second, leave and license; third, a denial of plaintiff's possession of the *locus in quo*; fourth, a denial of the plaintiff's right of way (*t*). In *assumpsit* against an attorney for negligence in providing insufficient security upon an advance of money, the court allowed the defendant to plead, in addition to *non assumpsit* and several other pleas, that the loss was not the result of the alleged negligence (*u*).

What Pleas not allowed together since R. H., 4 W. 4.

But where the defendant moved for leave to plead several matters, viz. first, *non assumpsit*; secondly, payment as to part; thirdly, as to part, that the goods were warranted like the sample; fourthly, as to part, that the goods were warranted to be of good merchantable quality; and fifthly, that they were warranted to be one ton weight of black-lead, the first and fourth pleas were disallowed (*x*). And in an action for not accepting railway shares the court refused to allow the defendant to plead that the contract was for goods, and that there was no note in writing, together with a plea that it was a contract for an interest in land, and no note in writing; observing, that the defendant could only be allowed to plead one plea of the Statute of Frauds, and that there could be no difficulty in framing a plea that would meet both points (*y*).

(*m*) 7 Dowl. 251.

(*n*) *Leuckhart* v. *Cooper*, 3 Dowl. 415; 1 Bing. N. C. 509; 1 Hodges, 16; 1 Scott, 481, *S. C.*

(*o*) *Hart* v. *Bell*, 1 Hodges, 6.

(*p*) *Atkinson* v. *Duckham*, 4 Dowl. 327.

(*q*) *Scott* v. *Thomas*, 6 C. & P. 611.

(*r*) *Thompson* v. *Bradbury*, 1 Bing. N.C. 326; 1 Scott, 279; 3 Dowl. 147, *S. C.*

(*s*) *Evans* v. *Davies*, 3 Nev. & P. 464.

(*t*) *Forrest* v. *Hale*, C. P. H. 1838; 2 Jurist, 302.

(*u*) *Wright* v. *Newton*, 3 Scott, 595.

(*x*) *Steele* v. *Sterry*, 1 Scott, 101; 3 Dowl. 133, *S. C.*

(*y*) *Sykes* v. *Reeves*, 6 Dowl. 385. This defence is admissible under the general issue, *post*, 194.

What Pleas not allowed together since R. H., 4 W. 4.

So in trespass, *quare clausum fregit*, two pleas justifying the trespasses under a custom, with and without a condition, will not be allowed (*a*). And the court will not allow special matter to be pleaded where it may be given in evidence under the general issue; as a special contract in *assumpsit*, to a declaration in the common form for goods bargained and sold (*b*). Therefore, where to an action on a cheque the defendant pleaded but one plea, which admitted the making of the cheque, the court refused to allow him to plead that the cheque required a stamp (*c*). So where a defendant may, by statute, give matter of justification in evidence under the general issue, the defendant will not be permitted to plead the general issue, and also a plea of justification (*d*). In cases of doubt, however, as to whether or not the matter may be given in evidence under the general issue, it is the practice to allow it to be pleaded specially. In an action on an attorney's bill, where the defendant, after having suffered judgment to go by default, which was set aside on an *affidavit* of merits and payment of costs, pleaded that no signed bill had been delivered, and afterwards added two pleas, viz. of *non assumpsit*, and that the plaintiff had not taken out his certificate, and the plaintiff, on application to a judge at chambers, obtained an order confining the defendant to the plea of the general issue, the court held that this order was proper, it appearing that the defendant had had the bill taxed (*e*). Some of the judges have refused to allow a plea of payment of the whole or part of the debt, with a plea of *non assumpsit* or *nunquam indebitatus* to the whole; but this is now rarely refused, except in clear cases against the necessity for it.

Leave to plead several Matters, how obtained.

Leave to plead several Matters, how obtained.] By a general rule of all the courts of *T. T.*, 1 *W.* 4, *r.* 13, it is ordered, "that no rule to shew cause, or motion, shall be required, in order to obtain a rule to plead several matters, or to make several avowries or cognizances; but that *such rules shall be drawn up upon a judge's order, to be made upon a summons* (*f*), *accompanied by a short abstract or statement of the intended pleas, avowries, or cognizances.* Provided, that no summons or order shall be necessary in the following cases, that is to say, where the plea of *non assumpsit* or *nil debet* or *non detinet*, with or without *a plea of tender as to part, a plea of the Statute of Limitations, set-off, bankruptcy of the defendant, discharge under an insolvent act, plene administravit, plene administravit præter, infancy*, and *coverture*, or any two or more of such pleas, shall be pleaded together; but in all such cases, a rule shall be drawn up by the proper officer, upon the production of the engrossment of the pleas, or a draft or copy thereof" (*g*). It will be seen that this rule dispenses with

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(*a*) MSS. 1839.

(*b*) *Gardner* v. *Alexander*, 3 Dowl. 146; 1 Scott, 281, *S. C.*: *Cotton* v. *Brown*, 4 N. & M. 831; 3 A & E. 312, *S. C.* As to what amounts to the general issue, see *post*, 188.

(*c*) *Jenkins* v. *Creech*, 5 Dowl. 293.

(*d*) *Fisher* v. *Thames Junction Canal Company*, 5 Dowl. 772: *Neale* v *M'Kenzie*, 1 C., M. & R. 61; 4 Tyr. 670; 2 Dowl. 702, *S. C.* But in *Twigg* v. *Potts*, 1 C., M. & R. 89: *Hooker* v. *Nye*, Id. 258; 4 Tyr. 777, *S. C.*, a special plea of justification was allowed in addition to the general issue.

(*e*) *Biggs* v. *Maxwell*, 3 Dowl. 497.

(*f*) See form, Chit. Forms, 40.

(*g*) See Chit. Forms, 39: see the former practice, Tidd, New Pract. 409.

the necessity for any motion to the *court* to plead several matters; at the same time the defendant may, if he think fit, move the court to plead them; and in some cases it may be expedient so to do. It may be observed, that a summons to plead several matters is a stay of proceedings, if it is returnable at the time the judgment-office opens on the day after the time for pleading expires, otherwise not (*h*).

Engross your double pleas on plain paper, and if any of the pleas require counsel's signature, get the whole signed by counsel. If the defendant wish to plead a double plea, not within the description of those specified in the proviso contained in the above rule of *T. T.*, 1 *W.* 4, *take out a summons* (*i*) *before a judge, for leave to plead the several pleas, and accompany it with a short abstract or statement of the intended pleas, and deliver a copy to the plaintiff's attorney before nine at night.* (*Ante*, 170). *On the judge's order* (*i*) *being made, take it with the abstract or statement of the intended pleas to one of the masters, who will draw up the rule accordingly. As soon as you have obtained the rule, annex a copy of it to the pleas, and deliver them to the plaintiff's attorney or agent before nine at night, as in other cases. If the rule should not happen to be ready, when you are obliged to deliver your pleas, you may serve a notice on the plaintiff's attorney or agent, stating that instructions have been given for the rule, and that a copy of it shall be delivered as soon as it shall be drawn up* (*k*). If the intended pleas be of the description of those named in the proviso of the above rule of *T. T.*, 1 *W.* 4, *then no summons or order will be requisite, and the master will draw up the rule upon your producing the engrossment of the pleas, or a draft or copy thereof. After obtaining such rule, proceed as in the other cases just pointed out.*

Care should be taken that the rule to plead several pleas be not drawn up before the defendant has appeared (*l*).

Consequence of Pleading several Matters without leave.

Consequence of pleading several Pleas without Leave.] Formerly, in the Common Pleas, if the defendant pleaded several pleas without leave, the plaintiff's course was to apply to the court to strike one or more of them out (*m*). But, in the Queen's Bench, he might have treated the whole as a nullity, and signed judgment (*n*). And now, by a rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 1, *s.* 34, "if a party plead several pleas, avowries, or cognizances, without a rule for that purpose, the opposite party shall be at liberty to sign judgment" (*o*). This rule does not apply to the case of several pleas which, taken together, afford but one answer to the whole declaration (*p*). In a case before this rule, where the plaintiff signed judgment for want of a plea, because the rule to plead several matters was erroneously intitled "C. *v.* W." instead of "C. *v.* W. and *another*," the Court of Common Pleas set aside the judgment without costs, on an affidavit

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(*h*) *Wells* v. *Secret*, 2 Dowl. 447: *Spenceley* v. *Shouls*, 5 Dowl. 562.

(*i*) See the forms, Chit. Forms, 40.

(*k*) Tidd, 557: *Maynard* v. *Bright*, 3 B. & B. 256; 7 Moore, 66, *S. C.*

(*l*) See *Benn* v. *Geary*, Barnes, 331.

(*m*) *Griffiths* v. *Eyles*, 1 B. & P. 415; Tidd, 9th ed. 566, 658.

(*n*) *Bedford* v. *Gatfield*, Tidd, Pract. 9th ed. 567, 658.

(*o*) See *Hockley* v. *Sutton*, 2 Dowl. 700.

(*p*) *Archer* v. *Garrard*, 6 Dowl. 132; 3 M. & W. 63, *S. C.*

that the pleas were true, and that the defendant had a good defence (*q*).

Setting aside Rule to plead several Matters.

Setting aside Rule to plead several Matters.] The court will not in general discharge the rule to plead several matters, unless where it is clear it ought not to have been allowed, or under some other special circumstances. In a recent case they refused to set aside one of several pleas, where a rule to plead them was drawn up by consent (*r*). Where several pleas in covenant traversing plaintiff's title were pleaded, after defendant had paid rent to the plaintiff, the rule to plead double was rescinded (*s*).

9. *Withdrawing, Striking out, Amending, and Adding Pleas.*

9. Withdrawing, &c., Pleas.

Withdrawing Pleas.] By rule of *H. T.*, 2 *W.* 4, *r.* 46, "the defendant shall not be at liberty to waive his plea without leave of the court or a judge." If he do, plaintiff may, it seems, sign judgment (*t*). The court or a judge, however, will in general give leave to do so, upon the terms of the defendant's taking short notice of trial, and that the plaintiff, if he have a verdict, shall have judgment of the term (*u*), or the like, when necessary (*x*). So, they have given leave to withdraw the general issue, in order that the defendant might pay money into court, and then re-plead it (*y*), or in an action by the assignees of a bankrupt, re-plead it with a notice of disputing the commission, &c. (*z*). They have also allowed a defendant to withdraw a special plea, even although a sham one, and plead again specially, upon terms of pleading issuably, taking short notice of trial, and giving the plaintiff judgment of the term if he should have a verdict (*a*). And in a recent case, after a bad plea of "no consideration" to a declaration on a bill of exchange, by which the plaintiff had been delayed the long vacation, the court, under special circumstances, allowed the defendant to withdraw his plea, and plead *de novo*, and have an inspection of the bill, and this without an affidavit of the merits (*b*). But where a defendant, having first pleaded a plea in abatement, afterwards, without the leave of the court or a judge, pleaded a sham plea of judgment recovered, the court, upon application, allowed the plaintiff to

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(*q*) *Christie* v. *Walker*, 1 Bing. 187; 7 Moore, 599, *S. C.*

(*r*) *Howen* v. *Carr*, 5 Dowl. 305: and see *Maclellan* v. *Howard*, 4 T. R. 194: *Rama Chitty* v. *Hume*, 13 East, 255: *Hammond* v. *Teague*, 6 Bing. 197: *Whale* v. *Lenny*, 2 Moo. & P. 19: 5 Bing. 12, *S. C.*; 4 Id. 525; 5 Id. 42: *Thomas* v. *Vandermoolen*, 2 B. & Ald. 197: *Bones* v. *Punter*, Id. 777: 1 Chit. Rep. 564, *S. C.*; Tidd, 9th ed. 656.

(*s*) *Haigh* v. *Struck*, 25 Feb. 1830, *cor. Bayley*, J., 1 Chit. Plead. 6th ed. 562.

(*t*) See the former practice, Tidd's New Pract. 413: *Pulmer* v. *Dixon*, 5 D. & R. 623: *Samuels* v. *Dunn*, 3 Taunt. 386.

(*u*) *Taylor* v. *Joddrell*, 1 Wils. 254: *Wilkes* v. *Wood*, 2 Id. 204.

(*x*) See *Jeffereys* v. *Walter*, 1 Wils. 177: *Meard* v. *Philips*, 2 Str. 906: *Herbert* v. *Griffiths*, Id. 1181: *Harrison* v. *Morris*, Barnes, 346, 344.

(*y*) *Tarlton* v. *Wragg*, 2 Str. 1271: *Devaynes* v. *Boys*, 7 Taunt. 33; 2 Marsh, 356, *S. C.*

(*z*) *Post*, Vol. II. Book III. Part II. Ch. 9.

(*a*) *Free* v. *Hawkins*, 7 Taunt. 278; 1 Moore, 28, *S. C.*: see *Law* v. *Law*, 2 Str. 900: *Martindale* v *Galloway*, Barnes, 330. In *Cox* v. *Rolt*, 2 Wils. 253, the court refused to allow the defendant to withdraw the general issue, and plead it again with the Statute of Limitations; but that case is overruled. (See *Rucker* v. *Hannay*, 3 T. R. 124: *Maddox* v. *Holme*, 1 B. & P. 228). And in one case, *Gaselee*, J., at chambers, allowed the defendant to withdraw a general demurrer framed for delay, and plead the general issue, although the defence intended to be set up under it was gaming. (MS.)

(*b*) *Paplief* v. *Codrington*, 4 Dowl. 497.

sign judgment as for want of a plea (*c*); and the same where the defendant pleaded twice on the same day for the purpose of misleading the plaintiff by his second plea (*d*).

Where Defendant succeeds on Demurrer to one Plea.

When there are two pleas to the whole action, upon one of which issue is joined to the country, and upon the other judgment is given for the defendant upon demurrer, the court or a judge will allow the defendant to withdraw the plea on which issue is joined (*e*).

Pleading "forthwith," and "instanter."

If the defendant be allowed to withdraw his plea, and be ordered to plead *forthwith*, he must plead within twenty-four hours; when ordered to plead *instanter*, he must plead on the same day, or plaintiff may sign judgment.

Striking out or setting aside Pleas at Plaintiff's Instance.

Sriking out or setting aside Pleas at Plaintiff's Instance.] The court or a judge may, if a plea has been pleaded which ought not to have been, order it to be struck out, or, if pleaded by itself, order it to be set aside (*f*); and, sometimes, will allow the plaintiff to sign judgment. Thus, where, in an action on a bill of exchange by indorsee against acceptor, the defendant, having obtained an inspection of the bill, pleaded pleas denying the acceptance, the drawing, and the indorsement, and also a plea founded on the 3 & 4 *W.* 4, *c.* 97, *s.* 17, that the bill was written on paper improperly stamped with an old die, the court struck out the last plea, for it was clear that the subject-matter of it was available, if at all, as a defence, upon the plea denying the acceptance (*g*). But the fact of a plea being insufficient in law, will not enable the court to set it aside and suffer judgment to be signed, if the defendant were not under terms of pleading issuably (*h*), or unless the plea be palpably tricky, and on the face of it merely pleaded for the purpose of delay, in which cases, according to a late resolution of the judges, it will be set aside. So, if a plea was a good plea when pleaded, but by the occurrence of subsequent matter becomes no answer to the action, the court will not, on that account, direct it to be taken off the file: therefore, where to a *scire facias* to revive a judgment, the defendant pleaded the pendency of a writ of error, the court refused to permit that plea to be taken off the file, on the writ of error being quashed (*i*). Where a defendant fraudulently obtains a release from the plaintiff, who is merely a nominal one, to the prejudice of the party really interested, and for whose benefit the action is brought, or from one of several plaintiffs, to the prejudice of the rest, the court or a judge will set aside the plea, and order the release to be delivered up to be cancelled (*j*). And other instances in which the court or a judge will strike out or set aside a plea, will be found *ante*, 167, 180 (*k*).

(*c*) *Palmer* v. *Dixon*, 5 D. & R. 623.

(*d*) *Samuel* v. *Dunn*, 3 Taunt. 386.

(*e*) *Young* v. *Beck*, 3 Dowl. 804.

(*f*) Where the plaintiff has consented to a rule to plead several matters, the court will not entertain an application to set aside any of these pleas, for the application should be to discharge that rule, and by consenting to the rule he is concluded by it. (*Flower* v. *Carr*, 5 Dowl. 305).

(*g*) *Dawson* v. *Macdonald*, 2 M. & W. 26.

(*h*) *Cowper* v. *Jones*, 4 Dowl. 591; 1 H. & W. 642, *S. C.*: and see *La Forest* v. *Langan*, 4 Dowl. 642; 1 Hodges, 410, *S. C.*: and *Edwards* v. *Greenwood*, 5 Bing. N. C. 476.

(*i*) *Snook* v. *Madox*, 1 H. & W. 584.

(*j*) *Johnson* v. *Holdsworth*, 4 Dowl. 63: *Jones* v. *Herbert*, 7 Taunt. 421: *Newel* v. *Newman*, 4 B. & Ald. 419. See cases referred to *post*, Book I. Part I. Ch. III. Sect. 4.

(*k*) Striking out plea to enable plaintiff to sign judgment for want of a rejoinder. (Legal Obs. 17th Feb. 1838).

Amending or adding Pleas.

Amending, or adding, Pleas.] As to the amendment of pleas in general, *see post, Vol. II. Book IV. Part I. Ch.* 28. In general the defendant may obtain leave of the court or a judge to add a further plea, if necessary for his defence, or if it be a matter of doubt whether it be so or not (*l*). Under particular circumstances, leave has been given to add a plea after the lapse of two terms since the defendant first pleaded (*m*); and in another case, even after issue had been joined in the action upwards of twelve months (*n*). And the Court of Exchequer have allowed the amendment of a plea after the cause was in the paper for trial (*o*). In prudence, however, the application should be made as promptly as possible (*p*). Where, in an action of covenant on a charter-party, the defendant pleaded several special pleas, to some of which the plaintiff demurred, and after argument obtained judgment, the court held, that the defendant could not afterwards file additional pleas, although it was sworn that facts had come to his knowledge material for his defence since the argument on demurrer, and with which facts he was then unacquainted (*q*). And a defendant in an action on a banker's cheque, having pleaded a plea, admitting the making of the cheque, the court would not permit him subsequently to add a plea that it was not made pursuant to the provisions of the stamp act (*r*).

Rule to Plead several Matters after.

If the defendant be allowed to add a plea to those already pleaded, there is no occasion on that account to draw up a rule to plead several matters (*s*).

Rule to abide by Plea.

Rule to abide by Plea.] We have just seen, that, by rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 46, the defendant is not at liberty to waive his plea without the leave of the court or a judge. Since this rule, therefore, the former practice of obtaining a rule or order for defendant to abide by his plea no longer prevails (*t*).

10. *New Rules as to the Form and Effect of the Plea.*

10. New Rules of H. T., 4 W. 4, as to the Form &c. of the Plea.

The New Rules of *H. T.*, 4 *W.* 4, commence with the following recital:—"Whereas it is provided by the statute 3 & 4 *W.* 4, *c.* 42, *s.* 1, that the judges of the superior courts of common law at Westminster, or any eight or more of them, of whom the chiefs of each of the said courts should be three, should and might, by any rule or order to be from time to time by them made, in term or vacation at any time within five years from the time when the said act should take effect, make such alterations in the *mode* of *pleading* in the said courts, and in the *mode* of *entering* and *transcribing pleadings, judgments*, and other *proceedings* in actions at law, and such

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(*l*) *Smith* v. *Dixon*, 4 Dowl. 571; 1 H. & W. 668, *S. C.*

(*m*) *Waters* v *Bovell*, 1 Wils. 223: see *Bludwick* v. *Usborne*, Barnes, 19.

(*n*) *Brown* v. *James*, Barnes, 362: and see *Huber* v. *Steiner*, 4 M. & Scott, 328; 2 Dowl. 781, *S. C.*

(*o*) *Jones* v. *Roberts*, 2 Dowl. 698.

(*p*) See *Kirby* v. *Simpson*, 3 Dowl. 791.

(*q*) *Munnings* v. *Lennox*, 12 Moore 135: and see *Farebrother* v. *Worsley*, 1 Price, N. R. 70; 1 C. & J. 563, *S. C.*

(*r*) *Jenkins* v. *Creech*, 5 Dowl. 293: *M'Dowall* v. *Lister*, 2 M. & W. 52.

(*s*) *Hoyle* v. *Holt*, *coram Maule*, B., at chambers, July, 1839.

(*t*) See the former practice, in Tidd, 9th ed. 674.

regulations as to the payment of *costs* and otherwise, for carrying into effect the said alterations, as to them might seem expedient; which rules, orders, and regulations were to be laid before both Houses of Parliament as therein mentioned, and were *not to have effect until six weeks after the same shall have been so laid before both Houses of Parliament;* but *after that time* should be *binding* and *obligatory* on the said courts, and *all other courts of common law*, and be of the like *force* and *effect* as if the provisions contained therein had been *expressly enacted by Parliament:*—

"Provided that no such rule or order should have the effect of depriving any person of the power of pleading the *general issue*, and of giving the special matter in evidence, in any case wherein he then was or thereafter should be entitled so to do *by virtue of any act of Parliament* then or thereafter to be in force (u):—

"It is therefore ordered, that, from and *after the first day of Easter Term next inclusive*, (unless Parliament shall in the meantime otherwise enact), the following rules and regulations, made pursuant to the said statute, shall be in force (x):—

Pleadings to be entitled of Day of Month and Year only.

1. "Every *pleading*, as well as the *declaratian*, shall be *intitled* of the day of the month and year when the same was pleaded, and shall bear no other time or date (y); and every *declaration* and other *pleading* shall also be *entered* on the *record* made up for trial, and on the *judgment roll*, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date; *unless* otherwise *specially ordered* by the court or a judge."

[The rule then contains some provisions as to the entry of pleadings, &c.; but these will be found in their proper places in this work.—It is then ordered by]

No Venue to be stated in Body of Pleading.

Reg. 8. "No venue shall be stated in the body of the declaration, or in any subsequent pleading, provided that in cases where local description is now required, such local description shall be given" (z).

Actionem non,

Reg. 9. "In a *plea* or *subsequent pleading*, intended to be

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(u) Notwithstanding this proviso, the late rule, T. 1838, orders, that "in every case in which a defendant shall plead the general issue, intending to give the special matter in evidence, by virtue of any act of Parliament, he shall insert in the margin of the plea the words "by statute," otherwise such plea shall be taken not to have been pleaded by virtue of any act of Parliament; and such memorandum shall be inserted in the margin of the issue, and of the *nisi prius* record." Where a defendant may by statute give matter of justification in evidence under the general issue, as in trespass, for breaking and entering the plaintiff's dwelling-house, and seizing and detaining his goods, the defendant will not be allowed to plead the general issue, and also a special plea of justification, that he entered the house as landlord to seize the goods on a distress for rent. (*Neale* v. *Mackenzie*, 1 C., M. & R. 61; 2 Dowl. 702, 4 Tyr. R. 670, *S. C.*: and see *Fisher* v. *Thames Junction Canal Company*, 5 Dowl. 772: but in *Twigg* v. *Potts*, 1 C., M. & R. 89: *Hooker* v. *Nye*, Id. 258; 4 Tyr. R. 777, *S. C.*, a special justification was pleaded together with the general issue.

(x) These rules do not apply to real actions or revenue cases. (*Miller* v. *Miller*, 3 Dowl. 408: 1 Hodges, 31, *S. C.*) And it will be observed that they do not contain any particular regulations as to the mode of pleading in the actions of account, annuity, debt, or *scire facias* on matters of record, or debt on penal statutes, nor to the action of *replevin* or trespass to the person, though these actions are subject to the general rules and regulations applicable to all pleadings, &c (Tidd, New Pract. 337. and see *Collins* v. *Beaumont*, 5 Dowl. 700, as to *scire facias*).

(y) As to the consequences of a breach of this rule, see *ante*, 145.

(z) See this rule, noticed *ante*, 146.

when necessary.

pleaded in bar of the *whole* action generally, it shall not be necessary to use any allegation of *actionem non*, or to the like effect, or any *prayer of judgment* (*a*), nor shall it be necessary in any *replication* or *subsequent pleading* intended to be pleaded in maintenance of the *whole* action, to use an allegation of '*precludi non*,' or to the like effect, or any *prayer of judgment* (*a*); and all pleas, replications, and subsequent pleadings, pleaded without such formal parts as aforesaid, shall be taken, unless otherwise expressed, as pleaded respectively *in bar of the whole action* or *in maintenance of the whole action*, provided that nothing herein contained shall extend to cases where an estoppel is pleaded"(*b*).

Formal Defence unnecessary.

Reg. 10. "No *formal defence* shall be required in a *plea*, and shall commence as follows: 'The said defendant by—— ——his attorney [*or* in person, &c.] says, that—— ——' "(*c*).

Statement of Leave of the Court &c. unnecessary.

Reg. 11. "It shall not be necessary to state, in a second or other plea or avowry, that it is pleaded by *leave of the court* or *according to the form of the statute*, or to that effect."

Protestation unnecessary.

Reg. 12. "No *protestation* shall hereafter be made in any pleading; but either party shall be entitled to the same advantage in that or other actions, as if a protestation had been made."

Special Traverses to conclude to the Country.

Reg. 13. "All *special traverses*, or *traverses* with an inducement of affirmative matter, shall *conclude to the country*. Provided that this regulation shall not preclude the opposite party from pleading over to the inducement, when the traverse is immaterial"(*d*).

Character in which Parties sue or are sued must be denied specially.

Reg. 21. "In all *actions* by and against *assignees* of a *bankrupt* or *insolvent*, or *executors* or *administrators*, or *persons authorized by act of Parliament* to sue or be sued as nominal parties, the *character* in which the plaintiff or defendant is

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(*a*) But, notwithstanding this rule, a plea must still conclude with a verification, or to the country. (*Knowles* v. *Stevens*, 1 C., M. & R. 26; 2 Dowl. 664; 4 Tyr. 1016, *S. C.*: *Wheatley* v. *Williams*, 1 M. & W. 533: *Reed* v. *Speer*, 5 Dowl. 330).

(*b*) Under this rule it has been held, that the statement of *actionem non* is dispensed with in a plea which is pleaded to the *whole* of one of several counts of a declaration. (*Bird* v. *Higginson*, 4 N. & M. 505; 2 A. & E. 696; 1 H. & W. 61, *S. C.*) And it would seem it is dispensed with though the plea is to *part* only of a count or several counts. The object of the rule is to prevent unnecessary statements in pleading; and when it is said that pleas without the formal parts shall be taken to be pleaded in bar of the *whole* action, it must be understood that they are pleaded in bar in contradistinction to *further maintenance* of it. (*Putney* v. *Swann*, 5 Dowl. 296; 2 M. & W. 72, *S. C*; and see *Jourdain* v. *Johnson*, 2 C., M. & R. 564; 5 Tyr. 421, *S. C.*: *Benmore* v. *Neck*, 2 H. & W. 17; Q B., H. T. 1839, Mss.; Exch. E. T. 1838, MSS.) The case of *Upward* v. *Knight*, 5 Bing. N. C. 338, *contra*, must be considered of questionable authority. It has been doubted, whether a plea directly and expressly denying the facts alleged in one count of the declaration, and wholly inapplicable to the other causes of action stated in the declaration, but without any introductory statement professedly limiting its application to the first count, is to be considered as a plea to that count only, or as an informal answer to the whole declaration. (*Worley* v. *Harrison*, 5 N. & M. 173; 3 A. & E. 669; 1 H. & W. 426, *S. C.*: and see *Putney* v. *Swann*, 5 Dowl. 296; 2 M. & W. 72, *S. C.*: *ante*, 167). According to the case of *Harvey* v. *Grabham*, 5 Ad. & El. 61, it is to be considered as an informal plea to the *first* count.

(*c*) The court, however, will not set aside the plea on the ground of its commencing with a formal defence. (*Bacon* v. *Ashton*, 5 Dowl. 94).

(*d*) The effect of a traverse in pleading is the same as it was before this rule. Where plaintiff declared against defendant for carelessly running with a ship against plaintiff's bridge, and defendant pleaded that the plaintiffs improperly narrowed the channel by an obstruction, without this, that the damage was occasioned by the carelessness of defendants: it was held, under this plea, that the defendants were entitled to give evidence in disproof of carelessness after they had failed to establish the obstruction imputed to plaintiffs. (*Cross Keys Bridge Company* v. *Rawlings*, 3 Bing. N. C. 71).

stated on the record to sue or be sued, shall not in any case be considered as in issue, unless specially denied."

The rule then contains provisions as to *pleadings in* PARTICULAR *actions*, thus :—

Effect of non assumpsit.

Instances.

In ASSUMPSIT it orders, that, 1. "In all actions of *assumpsit*, (except in bills of exchange and promissory notes), the plea of *non assumpsit* (*e*) shall operate only as a *denial in fact* of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law. *Ex. gr.*, in an action on a *warranty*, the plea will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach; and in an action on a *policy of insurance*, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties. In actions against *carriers and other bailees*, for not delivering or not keeping goods safe, or not returning them on request, and in actions against *agents* for not accounting; the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach. In an action of *indebitatus assumpsit* for goods sold and delivered, the plea of *non assumpsit* will operate as a denial of the sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of the money and the existence of those facts which makes such receipt by the defendant a receipt to the use of the plaintiff"(*f*).

Non assumpsit not pleadable to Bill or Note.

2. "In actions upon *bills of exchange* and *promissory notes*, the plea of *non assumpsit* shall be inadmissible(*g*). In such actions, therefore, a plea in denial must traverse some matter of fact; *ex. gr.*, the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note."

Matters in Confession and Avoidance to be pleaded specially in Assumpsit.

3. "In every species of *assumpsit* all matters in *confession* and *avoidance*, including, not only those *by way of discharge*, but those which shew the transaction to be either *void* or *voidable* in point of law, on the ground of fraud or otherwise, shall be *specially pleaded*; *ex. gr.*, infancy, coverture, release, payment (*h*), performance, illegality of consideration, either by

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(*e*) It is no longer properly called the general issue: see *per Park*, J., *Barnett* v. *Glosso.*, 3 Dowl. 627.

(*f*) As to what plea will amount or not to the general issue, see *post*, 188, &c.

(*g*) But though *non assumpsit* were pleaded, still it seems that plaintiff could not treat it as a nullity. (See *ante*, 166). In an action by an executor on a promissory note, the declaration alleged promise to the plaintiff after the death of his testator; it was held that *non assumpsit* was a good plea. (*Timmis* v. *Platt*, 5 Dowl. 748; 2 M. & W. 720, *S. C.*)

(*h*) Previous to the R. T. 1838, there was some conflict between the authorities as to whether payment could be given in evidence in mitigation of damages, though not pleaded; (see *Belbin* v. *Butt*, 5 Dowl. 604: *Shirley* v. *Jacobs*, 4 Dowl. 136; 3 Id. 82; 2 Scott, 157, *S. C.*: *Kenyon* v. *Wakes*, 2 M. & W. 764: *Richardson* v. *Robertson*, 5 Dowl. 82); and also as to whether an admission in the particulars of a specified sum paid did not preclude the necessity of a plea of payment of that sum. (See *Ernest* v. *Brown*, 5 Dowl. 637; 3 Bing. N. C. 764; 4 Scott, 385, *S. C.*: *Kenyon* v. *Wakes*, 2 M. & W. 764: *Nicholls* v. *Withams*, Id. 758). But this conflict has been set at rest by that rule which orders, that in any case in which the plaintiff (in order to avoid the expense of the plea of payment) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, it shall not be necessary for the defendant to plead the payment of such sum or sums of money. But this rule is not to apply

Payments credited in Particulars need not be pleaded.

Instances.

statute(*i*) or common law, drawing, indorsing, accepting, &c., bills or notes by way of accommodation, set-off (*k*), mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences, must be pleaded."

Statement of Interest of assured.

4. "In actions on *policies* of *insurance* the interest of the assured may be averred thus:—'That *A.*, *B.*, *C.*, and *D.*, or some or one of them, were or was interested, &c.' And it may also be averred, 'that the insurance was made for the use and benefit, and on the account, of the person or persons so interested.'"

Effect of non est factum.

In covenant *and* debt it orders, that, 1. "In *debt* on *specialty* or *covenant*, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable"(*l*).

Nil Debet abolished.

2. "The plea of '*nil debet*' shall not be allowed in any action"(*m*).

Nunquam indebitatus pleadable in Debt on simple Contract.

3. "In actions of debt on *simple contract*, other than on bills of exchange and promissory notes, the defendant may plead that 'he never was indebted in manner and form as in the declaration alleged,' and such plea shall have the same operation as the plea of *non assumpsit* in *indebitatus assumpsit;* and all matters in confession and avoidance shall be pleaded specially as above directed in actions of *assumpsit*"(*n*).

Pleas in other Actions of Debt.

4. "In other actions of debt in which the plea of *nil debet* has been hitherto allowed, including those on *bills of exchange* and *promissory notes*, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance."

Effect of Non Detinet.

In detinue it orders, that "the plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein, and no other defence than such denial shall be admissible under that plea."

Effect of not guilty in Case.

In case it orders, that, 1. "In actions *on the case*, the plea of *not guilty* shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement (*o*), and no other defence than such denial shall be admissible under that plea: all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration. *Ex.*

Evidence of Payment not admissible to reduce Damages.

to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums. And payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar. Even before this rule it was held that payments cannot be given in evidence under plea of set-off of money paid. (*Cooper* v. *Morecroft*, 6 Dowl. 562).

(*i*) See the cases, *post*, 193, 194.

(*k*) A defendant cannot now avail himself of a *notice* of set-off: the set-off must be pleaded. (*Graham* v. *Partridge*, 5 Dowl. 108.)

(*l*) As to what will amount or not to *non est factum*, see *post*, 191.

(*m*) This does not do away with the plea of *nil debet* in penal actions under 21 Jac. 1, c. 4. (*Jones* v. *Williams*, 4 M. & W. 375; 7 Dowl. 207, *S. C.*: see *Earl of Spencer* v. *Swannell*, 3 M. & W. 154).

(*n*) As to what will amount or not to the plea of *nunquam indebitatus*, see *post*, 188. A plea that the defendant never did *promise* is a nullity in an action of debt. (*King* v. *Myers*, 5 Dowl. 686).

(*o*) As to what plea will amount to or not to the general issue, see *post*, 188, &c.

Rule as to Effect of not guilty in Case.

gr., In action on the case for *nuisance* to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as the denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house. In an action on the case for *obstructing a right of way*, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way; and in an action for converting the plaintiff's goods, the conversion only, and not the plaintiff's title to the goods (*p*). In an action of *slander* of the plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present, in denial of speaking the words, or speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged. In actions for an *escape*, it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings. In this form of action *against a carrier* the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received" (*q*).

2. "All matters in *confession* and *avoidance* shall be pleaded specially, as in actions of *assumpsit*."

Effect of not guilty in Trespass.

In trespass, it orders, that, 2. "In actions of trespass *quare clausum fregit*, the plea of *not guilty* shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession or right of possession of that place, which, if intended to be denied, must be traversed specially."

3. "In actions of trespass *de bonis asportatis*, the plea of *not guilty* shall operate as a denial of the defendant having committed the trespass alleged, by taking or damaging the goods mentioned, but not of the plaintiff's property therein."

Plea of Right of Way to be taken distributively.

4. "Where in an action of trespass *quare clausum fregit*, the defendant pleads a *right of way* with carriages and cattle, and on foot in the same plea, and issue is taken thereon, the plea shall be taken distributively (*r*); and if a right of way with cattle, or on foot only, shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of way so found; and for the plaintiff in respect of such of the trespasses as shall not be so justified."

Plea of Right of Common distributive.

5. "And where, in an action of trespass *quare clausum fregit*, the defendant pleads a *right of common of pasture* for divers kinds of cattle, *ex. gr.*, horses, sheep, oxen, and cows, and issue is taken thereon, if a right of common for some particular kind of commonable cattle only be found by the jury, a ver-

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(*p*) See *Stancliffe* v. *Hardwick*, 3 Dowl. 762; 2 C., M. & R. 2, *S. C.*

(*q*) As to what plea will or not amount to not guilty in actions in the case, see *post*, 193.

(*r*) See *Knight* v. *Woore*, 5 Dowl. 201; 3 Bing. N. C. 3, *S. C.*; *Phythian* v. *White*, 1 M. & W. 216.

dict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of common so found; and for the plaintiff in respect of the trespasses which shall not be so justified."

The same, in case of other similar Rights.

6. "And in all actions in which such right of way or common as aforesaid, or other similar right, is so pleaded that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively."

Certain Rules not to apply where Declaration dated before E. T. 1834.

"Provided, nevertheless, that nothing contained in the 5th, 6th, or 7th of the above-mentioned general rules and regulations, or in any of the above-mentioned rules or regulations relating to pleading in particular actions, shall apply to any case in which the declaration shall bear date *before the first day of Easter Term next.*" (1834).

General Issue by Statute, how pleaded.

General Issue by Statute, how pleaded.] By *R. T.* 1838, it is ordered that, in every case in which a defendant shall plead the general issue, intending to give the special matter in evidence, by virtue of an act of Parliament, he shall insert, in the margin of such plea, the words "by statute;" otherwise such plea shall be taken not to have been pleaded by virtue of any act of Parliament; and such memorandum shall be inserted in the margin of the issue, and of the *Nisi Prius* record.

Recent Decisions as to what may be given in Evidence under the general Issue.

Recent Decisions as to what may be given in Evidence under the General Issue, &c.] The following are some of the principal recent decisions on the construction of the new rules relating to the general issue. Those rules do not alter the nature of the general issue: they have only circumscribed the species of evidence which may be given under it; but they have still left the general issue as pleaded to such parts of the declaration as it applies to the same, and all the old objections arising on it equally sustainable as before (*s*). It seems as a general rule that in all cases in *assumpsit*, or debt on simple contract, where the defence shews an original liability different from the promise or liability alleged in the declaration, the general issue is the proper plea (*t*). In general, also, with respect to the common counts, it may be stated, that where there has been a special agreement between the parties, and the plaintiff declares on the implied *assumpsit*, the defendant may give the special agreement in evidence under the general issue; and if pleaded, it will be specially demurrable as being an *argumentative* denial of the presumption which the plaintiff seeks to raise from the facts stated in his declaration.

The decisions on this subject in the several forms of action will now be stated *seriatim*, with this exception, that the decisions as to what statutory defences must be specially pleaded will be found collected in a separate paragraph.

In an Action for Use and Occupation.

In an action for *use and occupation*, the defence of payment to a mortgagee in pursuance of notice may be taken advantage of under the general issue, as to rent falling due after the

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(*s*) *Per Abinger*, C. B., in *Gough* v. *Bryan*, 2 M. & W. 774.

(*t*) See *Jones* v. *Nanny*, 5 Dowl. 90; 1 M. & W. 333, *S. C.*: *Jones* v. *Read*, 5 Dowl. 216.

notice; but must be pleaded as to rent already in arrear when the notice was given (*u*).

In Action for Goods sold.

In an action for *goods sold and delivered*, the following defences amount to the general issue, and will be specially demurrable if pleaded; *viz.*, that the goods were sold on credit, which had not expired at the commencement of the suit (*x*); that the goods did not accord with the sample (*y*); that they were of so bad a quality as to be useless (*y*); that there was an agreement to pay a certain sum, but that the goods had turned out to be unsound, and only worth a less sum, which the defendant had paid at the time of the sale (*z*). It is questionable whether the adultery of the defendant's wife, to whom the goods have been supplied, need be pleaded (*a*).

In Action for Work and Labour.

In an action for *work and labour*, the following defences also amount to the general issue; *viz.*, that the work was done in an unskilful manner, so as to be of no use to the defendant (*b*); that there was a special agreement that the plaintiff (an attorney) was only to receive his disbursements (*c*); or a special agreement that the plaintiff was to receive no remuneration (*d*); or that the work was done under an indemnity from the plaintiff to the defendant as to costs and expenses (*e*); or that the work &c. was done in endeavouring to prevent a chimney of the defendant's from smoking, upon an agreement that it should not be paid for unless the plaintiff succeeded in preventing the chimney from smoking (*f*). On the other hand, it must be pleaded specially that the work and labour sued for were performed by the plaintiff (an attorney) in preparing an illegal agreement, and prosecuting an unsuccessful action thereon (*g*); or that one of the plaintiffs (who sued as attornies on a joint retainer) was not admitted of the court in which the business was done (*h*), or that no signed bill was delivered in pursuance of the statute (*i*).

In Action for Money had and received.

In an action for *money had and received*, the defence, that the money was received in pursuance of an illegal contract, must be pleaded specially (*j*).

In Action for Money paid.

In an action for *money paid*, the following defences amount to the general issue; *viz.*, that the money was paid in respect of damages occasioned by the negligence of plaintiff's servants and himself in the management of a ship, of which the plaintiff and defendant were part-owners (*k*); that it was paid by the plaintiff as part-owner with the defendant, but that the voyage

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(*u*) *Waddilove* v. *Barnett*, 2 Bing. N. S. 538; 4 Dowl. 347, *S. C.* As to how far this is a defence, see *Evans* v. *Elliott*, 1 Per. & D. 256.

(*x*) *Broomfield* v. *Smith*, 1 M. & W. 574: overruling *Edmunds* v. *Harris*, 4 N. & M. 182: see also *Taylor* v. *Hillary*, 1 C., M. & R. 741; 5 Tyr. 373, *S. C.*: *Hayselden* v. *Staff*, 5 Ad. & El. 159.

(*y*) *Cousins* v. *Paddon*, 2 C., M. & R. 542, in which case *Roffey* v. *Smith*, 6 C. & P. 662, was overruled.

(*z*) *Dicken* v. *Neale*, 1 M. & W. 556; 5 Dowl. 176, *S. C.*

(*a*) *Semble* not: see *Symes* v. *Goodfellow*, 4 Dowl. 642.

(*b*) *Cousins* v. *Paddon*, 2 C., M. & R. 547; 4 Dowl 488, *S. C.*

(*c*) *Jones* v. *Reed*, 1 Nev. & P. 12; 5 Dowl. 216, *S. C.* And this defence is not waived by payment of money into court.

(*d*) *Jones* v. *Nanny*, 1 M. & W. 333; 5 Dowl. 90, *S. C.*

(*e*) *Hill* v. *Allen*, 2 M. & W. 283; 5 Dowl. 471, *S. C.*

(*f*) *Hayselden* v. *Staff*, 5 Ad. & Ell. 153.

(*g*) *Potts* v. *Sparrow*, 1 Bing. N. C. 594; 3 Dowl. 630, *S. C.*

(*h*) *Hill* v. *Sidney*, 3 Nev. & P. 161; *quære* whether the defence would be good if pleaded. (Ibid.)

(*i*) *Robinson* v. *Rowland*, 6 Dowl.: *Lane* v. *Glenny*, 2 Nev. & P. 258.

Coverture of Plaintiff.

(*j*) *Martin* v. *Smith*, 6 Dowl. 639; 4 Bing. N. C. 436, *S. C.* In that case the question was started in argument, whether the coverture *of the plaintiff* need be pleaded specially in assumpsit? and *Tindal*, C. J., *Parke*, J., and *Coltman*, J., seem to have been of opinion that it need not.

(*k*) *Gregory* v. *Hartnoll*, 1 M. & W. 183; 4 Dowl. 695, *S. C.*

was undertaken on the plaintiff's account only, and that the defendant was not concerned in it (*l*); that it was paid under an agreement, that, in consideration of the defendant's indorsing to the plaintiff a bill at three years, drawn on J. S., the plaintiff would advance a sum of money for him, in such sums as he should require, and that plaintiff still retained the bill for and on account of the sums advanced (*m*). But a plea that the money was paid in respect of a policy of insurance, so framed as to be useless, has in one case been considered good (*n*).

In Action on an Account stated.

In an action on an *account stated*, a plea that the cause of action arose out of partnership transactions amounts to the general issue (*o*). But to take advantage of a subsequent account stated, it must be pleaded either in the form of payment or set-off (*p*).

In Actions on Bills and Notes.

In actions *on bills of exchange and promissory notes*, we have seen that the rule *H.*, 4 *W.* 4, prohibits the use of the general issue, and requires that the defendant should deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance. This rule is confined to cases where the action is *only* on the bill or note, and on the promise to pay contained in or implied by law from it, it is to be read as if it were worded thus:—"in all actions on bills of exchange and promissory notes *simpliciter*, without any other matter" (*q*); therefore, where an executor declares on a bill or note payable to his testator, laying a promise to pay him, (the executor), such promise may be denied by a plea of *non assumpsit* (*r*). And if, in any case to assumpsit or debt on a bill or note, the defendant pleads *non assumpsit* or *nil debet*, and the plaintiff, instead of demurring, takes issue on it, and goes down to trial, it is open to the defendant to avail himself of any defence applicable to the plea (*s*). Under a plea, denying the making &c. of a bill of exchange, the defendant may avail himself of a defence arising from an alteration in the bill, whether the plaintiff declares on the original bill (*t*) or on the bill as altered (*u*), so he may insist that the bill was improperly stamped (*x*).

In Action on a Policy.

In an action on a *policy of insurance*, a defence, that plaintiff has no interest, must be pleaded specially (*y*).

In Actions on other Contracts.

No Consideration.

In an action on a special *agreement*, the defence, that there is no consideration, must be pleaded specially, if such defence is to be established by matter collateral to the contract declared upon; *ex. gr.*, by proving that the plaintiff was bound by a previous contract to do that which forms the alleged consideration

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(*l*) *Gregory* v. *Hartnoll*, 1 M. & W. 695; 4 Dowl. 183, *S. C.*

(*m*) *Maude* v. *Meesham*, 6 Dowl. 570.

(*n*) *Cole* v. *Le Souef*, 5 Dowl 41. This case has been doubted by the Court of Q. B., (*Francis* v. *Baker*, T. T. 1839, 3 Jurist, 771), where a plea that the money was paid for railway shares, and that plaintiff refused to deliver over the certificates of the shares, and converted them to his use, was held bad.

(*o*) *Worrall* v. *Grayson*, 1 M. & W. 166; 4 Dowl. 718, *S. C.*

(*p*) *Fidgett* v. *Penny*, 1 C., M. & R. 108; 2 Dowl. 714, *S. C.* Both payment (*Belbin* v. *Butt*, 2 M. & W. 422) and set-off (*Graham* v. *Partridge*, 1 T. & G. 754) must be specially pleaded.

(*q*) *Per Parke*, B., *Timmins* v. *Platt*, 2 M. & W. 720.

(*r*) *Timmins* v. *Platt*, 2 M. & W. 720.

(*s*) *Finlayson* v. *M'Kenzie*, 3 Bing. N. C. 284.

(*t*) *Calvert* v. *Baker*, 7 Dowl 17.

(*u*) *Cook* v. *Corwell*, 2 C., M. & R. 291; 4 Dowl. 188. *S. C.*

(*x*) *Dawson* v. *M'Donald*, 2 M & W. 26; *Field* v. *Woods*, 2 Nev. & P. 117; 6 Ad. & El. 114; 8 C. & P. 52, *S. C.*

(*y*) *Mills* v. *Campbell*, 2 You. & Col. 389.

of the contract on which he declares (*z*). So must a defence arising from the plaintiff's non-performance of the alleged consideration; therefore, where the agreement declared on was, that in consideration that the plaintiff would (amongst other things) assign certain gas shares, the defendant undertook to pay the plaintiff the amount of his costs in a certain Chancery cause; on *non assumpsit* pleaded, Lord *Abinger* held, that the question, whether the plaintiff had assigned the gas shares, &c., could not be gone into, and that if the defendant meant to insist that any part of the consideration was unperformed, that point should have been specially pleaded (*a*). And where the declaration stated that the plaintiff had composed and written an opera, and, as composer and writer, had a right to the music and poetry, and, in consideration of the premises, and that the plaintiff would sell him such right, the defendant undertook to buy it, &c.; on *non assumpsit* pleaded, *Tindal*, C. J., held, that the defendant was not at liberty to contend either that the plaintiff was not the author, or that he had not the right, or that he did not sell (*b*). And where the plaintiff declared, that in consideration that the plaintiff would give the defendant a horse and 2*l*., the defendant promised, &c., on *non assumpsit* pleaded, Lord *Abinger* held, that the plaintiff was not bound to prove the delivery of the horse or of the 2*l*., as the plea only traversed the promise, and not the consideration for it (*c*). Also, a defence arising from the defendant's performance of the contract must be pleaded specially; therefore, in an action on the warranty of a horse, (breach unsoundness), Lord *Abinger* held, that the defendant could not, under *non assumpsit*, give evidence that the horse was sound (*d*). On the other hand, a plea which, in answer to the contract declared on, sets up another contract incompatible with it, amounts to the general issue (*e*); thus, in *assumpsit* against a carrier for loss of goods, a plea that the plaintiff agreed to follow the defendant's cart and to take care of the goods, but that he had not taken care of them, by which means they were lost, amounts to the general issue (*f*); so does a plea denying the identity of the subject-matter of the contract made and that declared on (*g*). And the defendant may shew, under *non assumpsit*, that the consideration alleged in the declaration is not the actual consideration to be inferred from the instrument declared upon (*h*).

Non-performance by Plaintiff.

Performance by Defendant.

Variance in Contract.

In *debt on bond* it seems clear that the illegality of the bond at common law, or by statute, could not be insisted on under *non est factum* (*i*). And it seems that the obligor cannot under that plea insist on a variance between the name by which he executed the bond, and that by which he is sued, if his identity be proved (*k*). And where a bond was given to secure the performance of a building contract within a speci-

In Debt on Bond.

(*z*) *Passenger* v. *Brookes*, 7. C. & P. 100; 1 Scott, 560; 1 Bing. N. C. 587, *S. C.*: commented on by *Parke*, B., in *Bennion* v. *Darison*, 3 M. & W. 179.

(*a*) *Gibson* v. *Harris*, 8 C. & P. 378.

(*b*) *De Pinna* v. *Pothill*, 8 C. & P. 78.

(*c*) *Smith* v. *Parsons*, 8 C. & P. 200, n.

(*d*) *Smith* v. *Parsons*, 8 C. & P. 199.

(*e*) *Morgan* v. *Preber*, 3 Bing. N. C. 457; and see *Jones* v. *Nanny*, 5 Dowl. 90; 1 M. & W. 333, *S. C.*

(*f*) *Brind* v. *Dale*, 2 M. & W. 775.

(*g*) *Smith* v. *Dixon*, 2 Nev. & P. 1.

(*h*) *Raikes* v. *Todd*, 1 Per. & D. 138.

(*i*) See *Mestayer* v. *Biggs*, 2 Dowl. 695: *Massey* v. *Nanny*, 3 N. C. 478: *Whelpdale's case*, 5 Rep. 119, and the notes.

(*k*) *Williams* v. *Bryant*, Exch. T. 1839, 3 Jurist, 63.

fied time, it was held that the question whether any action could be maintained on the bond after the time specified in it had been altered by agreement, could not be raised on *non est factum* (*l*). On the other hand, in a case decided before the rules of *H.*, 4 *W.* 4, in debt on bond against an incorporated company, it was held that the defendants, under *non est factum*, might give in evidence that certain requisitions of the act of incorporation necessary to the validity of the execution had not been complied with (*m*). And the ground of that decision is still applicable, *viz.*, that the defendant's case was not that the deed, *though executed by them*, was invalidated by collateral matter, but that having been executed in defiance of the enactments which alone gave them power to execute such instruments, it was not in point of law *executed* at all. Also, under *non est factum* the defendant may shew an alteration in the deed in a material part (*n*).

In Trover.

In an action of *trover*, the plea of not guilty only admits sufficient property in the plaintiff to maintain the action, and such admission does not preclude the defendant from shewing that he is tenant in common with the plaintiff; if, however, there has been a conversion in fact, a justification arising from the relation of tenancy in common must be pleaded specially (*o*). So must leave and license (*o*). So must a defence that the goods belonged to a third person (*p*), or that the plaintiff had parted with his property in the goods at the time of the conversion (*q*). In trover against a sheriff who has levied under a *fi. fa.*, if the act of conversion be the seizure of the goods, a justification under the writ must be pleaded specially; but if the conversion be the sale of the goods, the justification may be given in evidence, under a plea denying the plaintiff's right of possession (*r*). So may the defence that the plaintiff was entitled to the goods only under a bill of sale, fraudulently made, to defeat an execution against the real owner (*s*). In trover by the assignees of a bankrupt, in order to raise the question whether the having disposed of the property as general agent of the bankrupt, and without knowledge of the bankruptcy, be a defence, it must be specially pleaded (*t*). In cases where there has been no actual conversion, but merely a demand, and a refusal to deliver the property by one who has a right to retain it, *ex. gr.*, in case of a lien, it is doubtful whether such right need be pleaded specially (*u*). It may at all events be insisted on under a plea denying the plaintiff's title (*x*). Express colour may be given in trover,

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(*l*) *Warre* v. *Calvert*, 2 Nev. & P. 126, in which case it was also held, that defendant might prove (under *non est factum*) *in reduction of damages*, that plaintiff's losses were caused by unauthorized advances to the contractor, and not by breach of the contract.

(*m*) *Hill* v. *The Manchester and Salford W. W. Co.*, 2 N. & M. 573.

(*n*) *Per Gurney*, B., *Cock* v. *Cowell*, 2 C., M. & R. 291: and *per Parke*, B., *Calvert* v. *Baker*, 22 Nov. 1838.

(*o*) *Stancliffe* v. *Hardwicke*, 2 C., M. & R. 1; 3 Dowl. 762, *S. C.* See further as to pleading in case of tenancy in common, *Farrar* v. *Beswick*, 1 M. & W. 682: *Kieran* v. *Sandars*, 1 Nev. & P. 625; 6 Ad. & El. 515, *S. C.*

(*p*) *Finch* v. *Blount*, 7 C. & P. 478. Even to mitigate damages. (Ibid.)

(*q*) *Vernon* v. *Shipton*, 2 M. & W. 9.

(*r*) *Per Parke* and *Alderson*, BB., *Samuel* v. *Duke*, 6 Dowl. 544.

(*s*) *Nicholls* v. *Bastard*, 2 C., M. & R. 662: *per Parke*, B., *Ashby* v. *Minuett*, 3 Nev. & P. 231: *Howell* v. *White*, 1 M. & Rob. 400, is a questionable decision.

(*t*) *Pearson* v. *Graham*, 2 Nev. & P. 636.

(*u*) See *per cur.* *Stancliffe* v. *Hardwicke*, 2 C., M. & R. 1. It would seem that this defence need not be pleaded, for demand and refusal are merely evidence of the conversion, and the claim of lien is set up to rebut the *presumption* of conversion raised by such *evidence* at the trial, and does not confess and avoid the *actual* conversion stated in the declaration

(*x*) *Owen* v. *Knight*, 4 Bing. N. C. 54: see *Samuel* v. *Morris*, 6 C. & P. 620.

and it would seem that by giving express colour almost any defence may be put upon the record in an affirmative form (*y*).

In Actions on the Case.

For Injury to Mill.

To Reversion.

For false Return.

In an action on the *case* for wrongfully diverting a water-course from plaintiff's mill, the plea of "not guilty" merely puts in issue the fact of the diversion; and the formal word "wrongfully," usual in declarations in actions *ex delicto*, does not operate to put in issue the wrongfulness of the act complained of (*z*). In case for injury to a reversionary interest, by the plea of "not guilty," the injurious act alone is put in issue, and the plaintiff's reversionary interest is admitted (*a*). In case against the sheriff for a false return of *nulla bona* to a *fi. fa.*, on which a levy had been made, the plea of not guilty puts in issue only the fact of the sheriff having the money in his hands, and making the return alleged; and it is not competent for him, under that plea, to set up a defence of the bankruptcy of the debtor before the execution of the writ (*b*). In case for not levying when he might have done so, and returning *nulla bona*, the plea of "not guilty" admits the judgment, the writ, the delivery of it to the sheriff, that there were goods in his bailiwick, and that he had notice of it; the only matters of defence available in such an action under that plea, are, that he did levy within a reasonable time, and that he did not make the return alleged (*c*).

Malicious Law Proceedings.

In case for maliciously and without probable cause outlawing the plaintiff, the defendant cannot, under the general issue, dispute the reversal of the outlawry (*d*). In case for a malicious prosecution, the defendant may, under the general issue, prove the existence of probable cause, the want of probable cause being a substantial part of the injury (*e*).

Dangerous Animals.

So, in case for injury to cattle by defendant's dogs, "not guilty," puts in issue the defendant's knowledge of their dangerousness (*f*).

Libel.

In an action for *libel*, the defence, that the words used were a privileged communication, may be given in evidence under the general issue (*g*); but all the inducement is admitted unless specially traversed (*h*).

Negligent Driving.

In case for *negligence in driving* an omnibus against plaintiff's carriage, a plea that the plaintiff's carriage was under the government of one of his sons, and that, if the son had driven in a moderate and skilful manner, the collision would not have happened, but that he drove so unskilfully and with such velocity that the plaintiff's carriage struck against defendant's omnibus, concluding with a special traverse, that the collision was caused by the carelessness of defendant's servant, was held bad, as amounting to the general issue (*i*). In the same kind of action, *Coleridge, J.* held, that a defence that the defendant was not owner of the vehicle cannot be raised on the general issue (*k*). And the Court of C. P. held, that the defendant

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(*y*) *Morant* v. *Sign*, 2 M. & W. 95; 5 Scott, 307.

(*z*) *Frankum* v. *Earl of Falmouth*, 4 N. & M. 330; 1 H. & W. 1, *S. C.*: and see *Duke* v. *Gostling*, 1 Bing. N. C. 588; 1 Scott, 570; 3 Dowl. 619, *S. C.*

(*a*) *Per Vaughan*, J., *Raine* v. *Alderson*, 4 Bing. N. C. 702; 6 Scott, 691.

(*b*) *Wright* v. *Lainson*, 2 M. & W. 739.

(*c*) *Lewis* v. *Alcock*, 6 Dowl. 389; 3 M. & W. 188, *S. C.*

(*d*) *Drummond* v. *Pigou*, 2 Bing. N.C. 114.

(*e*) *Cotton* v. *Browne*, 3 Ad. & El. 312.

(*f*) *Thomas* v. *Morgan*, 2 C., M. & R. 496; 4 Dowl. 223; 5 Tyr. 1085, *S. C.*

(*g*) *Lillie* v. *Price*, 1 Nev. & P. 16; 5 Dowl. 432, *S. C.*

(*h*) *Fradly* v. *Fradly*, 8 C. & P. 572, *per* Lord *Abinger*.

(*i*) *Gough* v. *Bryan*, 5 Dowl. 765; 2 M. & W. 770, *S. C.*: see *Bridge* v. *Grand Junction Railway Co*, 3 M. & W. 244; 6 Dowl. 340, *S. C.*

(*k*) *Woolf* v. *Beard*, 8 C. &P. 373. The court granted a rule *nisi*.

cannot, under the general issue, shew that he had lent his cart to a third person, who was driving it when the injury happened (*l*). Seduction. In case for *seduction*, defendant may prove under the general issue that the girl was not living with the plaintiff as his servant (*m*). Improper Cultivation. In case for not cultivating according to the custom of the country, neither the general issue nor a denial of the tenancy, *modo et formâ*, puts in issue the holding subject to a duty to cultivate according to the custom (*n*).

In trespass. *In trespass* for false imprisonment, a justification under an attachment must be pleaded specially (*o*). In trespass, *quare clausum fregit*, on a plea denying that the close was the close of the plaintiff, proof of mere possession is sufficient to entitle the plaintiff to a verdict (*p*).

What Statutes must be pleaded specially. The following *statutory defences* may be taken advantage of under the general issue. To an action on an apothecary's bill, that plaintiff was not practising before August, 1815, and had not obtained his certificate from the Apothecaries' Society, under 55 *G.* 3, *c.* 194, *s.* 21 (*q*). The defence, that there was no memorandum in writing under the Statute of Frauds, need not be pleaded specially (*r*). So under the denial of the accepting a bill of exchange the defendant may take advantage of its being on paper stamped with an improper die (*s*). And under the denial of making cheque, defendant may prove in his defence that it was post-dated, and required a stamp (*t*). On the other hand, in an action for demurrage on a charter-party, a defence that the plaintiff had not procured the documents required by 3 & 4 *W.* 4, *c.* 52, *s.* 108, the act for the general regulation of the customs, must be pleaded specially (*u*). So, in an action for the value of a copyright bargained and sold, must a defence that the copyright was not assigned in writing, as required by statute 8 *Ann. c.* 19, *s.* 1 (*x*). So, in an action on a deed for securing an annuity, must a defence that the deed has not been enrolled under 53 *G.* 3, *c.* 141 (*y*). So, in *assumpsit* against a carrier for loss of a parcel, must a defence that it was worth more than 10*l.*, and that the value was not declared at the time of delivery, as required by 11 *G.* 4 & 1 *W.* 4, *c.* 68 (*z*). So, in an action for work and labour as an attorney, must a defence that no signed bill has been delivered in pursuance of the statute (*a*), or that one of the plaintiffs (who sue on a joint retainer) was not admitted of the court in which the business was done (*b*).

(*l*) *Tavernour* v. *Little*, T. T. 1839; 3 Jurist, 702.

(*m*) *Holloway* v. *Abell*, 7 C. & P. 528.

(*n*) *Hallifax* v. *Chambers*, 4 M. & W. 667; 7 Dowl. 342, *S. C.*

(*o*) *Bryant* v. *Clutton*, 5 Dowl. 66; 1 M. & W. 408, *S. C.*

(*p*) *Heath* v. *Milward*, 2 Bing. N. C. 98: *per cur.*, *Carnaby* v. *Welby*, 1 Per. & D. 98.

(*q*) *Morgan* v. *Ruddock*, 4 Dowl. 311: *Shearwood* v. *Hay*, 5 Ad. & El. 383: *Sharp* v. *Wagstaffe*, 5 Dowl. 566; 3 M. & W. 521, *nom. Wagstaffe* v. *Sharp*, where the Court of Exchequer felt bound by the authority, though they doubted the correctness of the decisions in Q. B.

(*r*) *Elliott* v. *Thomas*, 3 M. & W. 170; on the 17th section, *Buttemer* v. *Hayes*, Exch. T. T. 1839; 3 Jurist, 704, on the 4th section. But it seems the statute *may* be pleaded specially, if preferred. (*Maggs* v. *Ames*, 1 M. & P. 294; 4 Bing. 470, *S. C.*)

(*s*) *Dawson* v. *M'Donald*, 2 M. & W. 26: and see *Jenkins* v. *Creech*, 5 Dowl. 293.

(*t*) *Field* v. *Woods*, 2 Nev. & P. 117; 7 Ad. & El. 114; 8 C. & P. 52, *S. C.*

(*u*) *Alcock* v. *Taylor*, 6 N. & M. 296.

(*x*) *Barnett* v. *Glossop*, 1 Bing. N. C. 633; 1 Hodges, 94; 3 Dowl. 625, *S. C.*: see *De Pinna* v. *Polhill*, 8 C. & P. 78.

(*y*) *Mestayer* v. *Biggs*, 2 Dowl. 695: *Massey* v. *Nanny*, 3 Bing. N. C. 478, *per C. J.*

(*z*) *Syms* v. *Chaplin*, 1 Nev. & P. 129; 5 Dowl. 429, *S. C.*

(*a*) *Moore* v. *Dent*, 1 M. & Rob. 462: *Lave* v. *Glenny*, 2 Nev. & P. 258.

(*b*) *Hill* v. *Sidney*, 3 Nev. & P. 161. *Quære*, would this defence be good if pleaded? Ib.

SECT. 3.

The Replication, and subsequent Pleadings (*c*).

Replication, 195.	*Judgment for want of Replication, &c.*, 198.
New Assignment, 197.	*Judgment for want of Rejoinder, &c.*, 198.
Rejoinder, 197.	
Surrejoinder, &c., 198.	

Time for replying, &c.

The Replication.] THERE is no time limited for replying, rejoining, &c.; but the parties may do so at any time they think proper, unless they have been ruled to reply, rejoin, &c.

Rule to Reply

In order to rule the plaintiff to reply in the Court of Queen's Bench, *get a rule from one of the masters on the back of the plea* (*d*); *enter the rule with him, and serve a copy of it on the plaintiff's attorney or agent, on plain paper* (*e*). In the Common Pleas and Exchequer, in order to rule the plaintiff to reply, *make out a memorandum of the rule* (*f*); *take it to one of the masters, who will enter it in a book kept for that purpose; then serve a copy of it on the plaintiff's attorney or agent on plain paper.* Actual service of the rule is requisite, it is not sufficient to leave the rule at the office (*g*).

Service of Rule is a sufficient Demand of Replication, &c.

It was formerly not necessary, in the Queen's Bench, to entitle a defendant to sign judgment of *nonpros*, that he should first demand a replication, &c., the service of a copy of the rule being deemed a demand of itself (*h*). In the Common Pleas such a demand was necessary (*i*); and by a general rule of all the courts (*k*), "no judgment of *nonpros* shall be signed for want of a replication, or other subsequent pleading, until *four* days next after a demand thereof shall have been made in writing upon the plaintiff, his attorney or agent, as the case may be." But, by a subsequent rule of *H. T.*, 2 *W.* 4, *r.* 1, *s.* 54, "service of a rule to reply, or to plead any subsequent pleading, shall be deemed a sufficient demand of a replication, or such other subsequent pleading."

At what Time the Rule may be given.

The rule to reply "may be given at any time when the office is open" (*l*). Formerly, in the Queen's Bench and Exchequer, it could only have been given in term, or within sixteen days after it (*m*). If the defendant obtain an order for time to plead, and deliver his plea before the time so given him, he may, it seems, rule the plaintiff to reply before that time (*n*).

When it expires.

The rule to reply, rejoin, &c., expires in *four* days exclusive after service; and Sunday, or any holiday on which the court does not sit, or the office is not open, is reckoned, unless it be the last of the four (*o*).

(*c*) As to *demurrers*, see Book II. Part II.; as to *discontinuing*, see *post*, Vol. II. Book II. Part I. Ch. 19; as to entering a *nolle prosequi*, see *post*, Vol. II. Book IV. Part I. Ch. 25.

(*d*) See the form, Chit. Forms, 42.

(*e*) Ib.

(*f*) Ib.

(*g*) *Pound* v. *Lewis*, 3 M. & Scott, 210; 2 Dowl. 744, *S. C.*

(*h*) Imp. K. B. 10th ed. 263.

(*i*) Tidd, 9th ed. 676, 693.

(*k*) R. T., 1 W. 4, r. 4.

(*l*) R. H., 2 W. 4, r. 53.

(*m*) Dax, Ex. Prac. 1st ed. 61: Imp. K. B. 10th ed. 264. In the Common Pleas, after Easter term, it must have been entered within ten days.

(*n*) *Gandy* v. *Borrowdale*, 1 N. R. 273: *Roberts* v. *Monkhouse*, 8 East, 547.

(*o*) R. T., 1 G. 2, K. B.: R. H., 2 W. 4, c. 8: *ante*, 93.

Further Time to reply, &c.

If the party be ready to reply, &c., within this time, he should reply, &c., accordingly; if not ready, he may obtain a *further time* by summons in the same manner as before directed as to pleading. (*See ante*, 39). If the plaintiff do not mean to proceed in the action, he should discontinue it, or enter a *nolle prosequi, stet processus*, or *cassetur breve;* or in an action against an executor or administrator, who pleads *plene administravit*, take a judgment of assets *in futuro*, &c., all of which modes of putting an end to the suit will be treated of in the Second Volume of this work.

Replying, &c., between 10th August and 24th October.

At Easter.

At Christmas.

It is to be observed, that no replication or rejoinder, or other pleading after declaration, can be delivered between the 10th of August and the 24th of October (*p*); and in case the time for pleading a replication or other pleading after declaration does not expire *before* the 10th of August, the plaintiff has the same number of days for that purpose *after* the 24th of October, as if the replication, &c., had been delivered *on* the 24th of October; but in such case it will not be necessary for defendant to give a fresh rule to reply, &c. (*q*). Where, on the 5th of August the defendant delivered his plea, and on the same day served a rule to reply, and the plaintiff not having replied, the defendant on the 27th of August signed judgment of *nonpros*, the court were of opinion that, as the plaintiff was prevented by the operation of the statute 2 *W.* 4, *c.* 39, *s.* 11, from delivering his replication, it followed that the defendant could not sign judgment for want of it, having allowed the 10th of August to go by, and therefore that the judgment was irregular; and they made the rule absolute for setting it aside with costs (*r*). It seems, also, that by rule of *E. T.*, 2 *W.* 4, (*ante*, 93), the days between Thursday next before, and the Wednesday next after Easter-day, are not to be reckoned or included in the time for replying, &c. Nor, it seems, are Christmas and the three days after it to be reckoned (*s*).

Term's Notice of Rule to Reply, &c., when Four Terms have elapsed.

If the rule to reply, rejoin, &c., be not given until after *four terms* from the time of the last pleading, the party intended to rule the other to reply, rejoin, &c., must, it seems, give the other a *term's notice of his intention to do so* (*t*), unless the cause have, in the meantime, been stayed by injunction or privilege (*u*), or it seems at the request or of the prevention of the other party (*x*). *Such notice must be given before the first day of the term after which you intend to proceed* (*y*); *and then the day after the end of the term get the rule to reply, &c., from, and enter it with, one of the masters, and serve the copy of it as above directed.* Formerly, if the cause had stood over several terms, there must have been a rule to reply given in or of the term in which it was intended to sign judgment of *nonpros*, &c., although there had been a rule of a prior term (*z*); but such new rule is not, it seems, in such a case any longer requisite (*a*).

Form of Replication.

As regards the form of the replication, it is not within the

(*p*) 3 W. 4, c. 39, s. 11.

(*q*) R. M., 3 W. 4, r. 12: *ante*, 24.

(*r*) *Anon.*, 13 Leg. Obs. 120: Tidd, New Prac. 433: *sed quære.*

(*s*) *Wheeler* v. *Green*, 7 Dowl. 194—a case of a plea.

(*t*) See *Lord* v. *Hilliard*, 9 B. & C. 621.

(*u*) R. T. 5 & 6 G. 2, Q. B.: and see R. E., 13 G. 2, r. 2, C. P. See the form of notice, Chit. Forms, 43.

(*x*) *Evans* v. *Davies*, 3 Dowl. 786: *Bland* v. *Darley*, 3 T. R. 530: *Bosworth* v. *Phillips*, 2 W. Bl. 784.

(*y*) *Bogg* v. *Rose*, 2 Str. 1164.

(*z*) *Brook* v. *Lawrence*, 2 Chit. Rep. 283.

(*a*) See *Pryer* v. *Smith*, 2 Dowl. 114; 1 C. & M. 855, *S. C.*: *Mould* v. *Murphy*, Id. 54; 1 C. & M. 495, *S. C.*: *Usborne* v. *Pennell*, 1 Bing. N. S. 320.

object of this work to treat of it. It may be as well, however, to observe, that the new rules of pleading do not apply to replications unless where they are expressly mentioned in them, or unless the rules are expressly made applicable to all pleadings: such as the rules as to the Title, (*ante*, 145), Commencement, (*ante*, 146), and Conclusion &c., (*ante*, 147), of pleadings. If the plea, or all the pleas, if more than one, conclude to the country, the plaintiff may reply by simply adding on the *similiter* (*b*), and with it may deliver the issue (*infra*). A *similiter* added by the plaintiff for the defendant need not be dated (*c*).

How delivered.

Engross the replication on plain paper, and deliver (*ante*, 170) *it to the plaintiff's attorney, or in country causes to his agent, before nine o'clock at night* (*ante*, 52). *If it conclude with a verification, get it signed by counsel; and do so if there be several replications, and any one of them so conclude* (*ante*, 171). If it, or all the replications, where more than one, conclude to the country, it need not be signed (*ante*, 171). If the plaintiff have been ruled to reply, he must actually deliver his replication, even although it conclude to the country, or be merely the similiter (*b*); otherwise the defendant may sign judgment of *nonpros* (*d*).

Indorsing Notice of Trial on.

By general rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 59, "in all cases where the plaintiff in pleading *concludes to the country*, the plaintiff's attorney *may give notice of trial* at the time of delivering his replication, or other subsequent pleading; and in case issue shall afterwards be joined, such notice shall be available; but if issue be not joined on such replication or other subsequent pleading, and the plaintiff shall sign judgment for want thereof, and *forthwith give notice of executing a writ of inquiry*, such notice shall operate from the time that notice of trial was given as aforesaid." And see further as to the notice of trial, *post*, 205.

Withdrawing Replication.

After replication delivered, the court will, in some cases, allow the plaintiff to withdraw it, and reply *de novo* (*e*).

New Assignment.

New Assignment.] If the plaintiff new assign, instead of replying, the new assignment must be delivered to the defendant's attorney or agent before nine at night; after which, the defendant may be ruled, &c., to plead to it, in the same manner as upon the original declaration (*f*).

The Rejoinder.

Rule to rejoin.

The Rejoinder.] If the replication, or any of the replications, if more than one, conclude with a verification, the plaintiff may rule the defendant to rejoin. *This rule is obtained from one of the masters, on the back of the replication, and is entered, served, &c., in the same manner as the rule to reply* (*g*). This rule to rejoin is requisite, although the defendant is under terms to rejoin gratis, if the replication or any of the replications conclude with a verification, though not so if they all conclude to the country (*ante*, 164).

Proceedings without Rule by adding Si-

By general rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 108, "in all special pleadings, where the plaintiff takes issue on the

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(*b*) See the form of *similiter*, Chit. Forms, 43.

(*c*) *Shackell* v. *Ranger*, 6 Dowl. 562.

(*d*) *Hollis* v. *Buckingham*, 3 D. & R. 1.

(*e*) See *Alder* v. *Chip*, 2 Bur. 755: *Huton* v. *Brice*, 5 Id. 2692.

(*f*) Tidd, 9th ed. 693. See form of memorandum for rule to plead to new assignment, and of the rule, Chit. Forms, 42.

(*g*) *Vide ante*, 195, 196. See the form, Chit. Forms, 42.

militer for Defendant.

defendant's pleading, or traverses the same, or demurs, so that the defendant is not let in to allege any new matter, *the plaintiff may proceed without giving a rule to rejoin;*" that is, if the defendant's pleading conclude to the country, the plaintiff may, of course, add the *similiter;* or the plaintiff, if all his own pleadings conclude to the country, may add the *similiter*, and may then proceed to make up the issue; and the plaintiff, in making up the issue, may add the *similiter* before he delivers it to the defendant's attorney or agent. (*See the next Section*). Where a defendant was under terms of rejoining gratis, and the plaintiff signed judgment for want of a rejoinder, when he might himself have added a *similiter*, the court set aside the judgment, but without costs (*h*).

Demand of Rejoinder.

A *demand* of a rejoinder, or other pleading, on the part of the defendant, is, in general, requisite before judgment can be signed against him, unless he be *expressly under terms to rejoin, &c.*, without such a demand, or unless the defendant has been *ruled* to rejoin (*i*). Being under terms to rejoin *gratis* does not dispense with it (*ante*, 164). The demand when given expires in twenty-four hours (*j*). By *R. H. T.*, 2 *W.* 4, *r.* 1, *s.* 54, (*ante* 195), service of a rule to rejoin shall be deemed a sufficient demand of a rejoinder.

Surrejoinder, &c. Rule to surrejoin, &c.

Surrejoinder, &c.] The plaintiff may be ruled to surrejoin, the defendant to rebut, &c., in the same manner as they were ruled to reply and rejoin; the rules in all these cases being obtained, entered, served, &c., in the same manner (*k*).

Plaintiff when compellable to take more than one step in a Term.

It may be here observed, that formerly, you could not compel the plaintiff to take more than one step in the same term; thus, for instance, if the plaintiff replied, the defendant could not compel him to surrejoin during the same term, nor, of course, sign judgment of *nonpros* for his not doing so (*l*). But the practice is now otherwise, except as to proceedings *after issue joined*, in which, as before, the plaintiff cannot be compelled to take more than one step in the same term.

Demurrer.

Demurrer.] As to demurrers, *see post, Vol. II. Book II. Part II.*

Judgment for Want of Replication, &c.

Judgment for Want of Replication, &c.] If the plaintiff do not reply, surrejoin, surrebut, &c., within the time limited for that purpose after service of the rule, or specified in the order for further time, the defendant may, in general, sign judgment of *nonpros*. If, however, the defendant's plea or rejoinder be a *nullity*, the defendant cannot regularly sign such judgment (*m*). As to the mode of signing the judgment, *see post, Vol. II. Book IV. Part I. Ch.* 18.

Judgment for Want of Rejoinder, &c.

Judgment for Want of Rejoinder, &c.] If the defendant do not rejoin, rebut, &c., it is deemed an abandonment of the plea, and the plaintiff may strike out all the previous pleadings having reference to the matter omitted to be rejoined, &c., to, and sign judgment as for want of plea (*n*).

(*h*) *Seaton* v. *Scale*, 1 H. & W. 210; 3 Dowl. 537, *S. C.*: and see *Wye* v. *Fisher*, 3 B. & P. 443.

(*i*) Tidd, 9th ed. 478: R. H., 2 W. 4, r. 108: *Wye* v. *Fisher*, 3 B. & P. 443.

(*j*) Chit. Sum. Prac. 144.

(*k*) See the form, Chit. Forms, 42.

(*l*) *Izaacs* v. *Goodman*, 1 C. & M. 494; 2 Dowl. 34, *S. C.*: *Wingrove* v. *Hodson*, 2 Dowl. 379: *Holland* v. *Brown*, MS., H. 1821.

(*m*) *Garratt* v. *Hooper*, 1 Dowl. 28.

(*n*) *Petree* v. *Fitzroy*, 5 T. R. 152.

SECT. 4.

The Issue.

Form of, 199.
When made up, 202.
By whom made up, 203.
When and how Delivered, 203.
Defective, or Irregular Issue, 203.
Entry of on Roll, 204.

The Issue.

THE next step requisite in the cause is to make up the issue in order to proceed to trial. Issue cannot in general be said to be joined until the *similiter* is added (*o*).

Form of, in general.

Form of.] As regards the form of the issue in actions commenced by the process prescribed by 2 *W.* 4, *c.* 39, (the Uniformity of Process Act) (*p*), the rule of *H. T.*, 4 *W.* 4, has ordered that it shall be in the following form, or to the like effect, *mutatis mutandis;* with a proviso that, in case of non-compliance, the court or a judge may give leave to amend.

"*In the Queen's Bench* [or, *In the Common Pleas;* or, *In the Exchequer*].

"*The* —— [date of declaration] *day of* —— *in the year of our Lord*, 18——

[Venue.] "*A. B., by E. F., his attorney*, [or, "*in his own proper person*," or, "*by E. F., who is admitted by the court here to prosecute for the said A. B., who is an infant within the age of twenty-one years, as the next friend of the said A. B.*," as the case may be,] *complains of C. D., who has been summoned to answer the said A. B.* [or "*arrested*" or "*detained in custody*," (*q*)] *by virtue* [or "*served with a copy*," as the case may be] *of a writ issued on* [date of first writ] *the*——*day of*—— *in the year of our Lord* 18—, *out of the court of our Lady the Queen, before the Queen herself at Westminster*, [or, "*out of the court of our Lady the Queen, before her Justices at Westminster*," or "*out of the court of our Lady the Queen, before the Barons of her Exchequer at Westminster*," (as the case may be) (*r*)]; *For that* [copy the declaration from these words to the end, and the plea and subsequent pleadings to the joinder of issue.] *Thereupon the sheriff is commanded that he cause to come hereon the* —— *day of* —— *twelve &c., by whom &c., and who neither &c., to recognise &c., because as well &c.* (*s*)."

When the issue is directed to be tried before the sheriff, &c., the conclusion after the end of the statement of the pleadings is different (*t*). See the form, *post, Book I. Part I. Ch.* 3.

(*o*) See *Smith* v. *Rigby*, 3 Dowl. 105: Co. Lit. 126. b.

(*p*) As to the form of the issue before this rule, see Tidd, New Prac. 441.

(*q*) This portion of the form applies only to actions commenced by bailable process under 2 W. 4, c. 39; but see now 1 & 2 V. c. 110, ss. 1 & 2.

(*r*) The form of action need not be inserted. (See *Ball* v. *Humlet*, 3 Dowl. 188; 1 C., M. & R. 575, *S. C.*: and see *Ferguson* v. *Mitchell*, 4 Dowl. 513; 2 C., M. & R. 687, *S. C.*) But, in an action of *debt*, where the declaration in the commencement has, as is usual, demanded a sum certain, that demand should perhaps be here inserted in the issue.

(*s*) Where there are issues of law and fact, the *venire* should be *tam ad triandum quam ad inquirendum*, even though they arise on the same count. (*Codrington* v. *Lloyd*, 1 Per. & D. 157).

(*t*) See *Peel* v. *Ward*, 5 Dowl. 169: post, 204.

Form of, in Lancaster or Durham.

When the venue is laid in the county palatine of Lancaster or Durham, *instead of an award of the venire, you insert a special award of a mittimus to the justices there, commanding them to issue the jury process, and when the cause is tried, to send back the record to the superior court* (*u*).

Entry of Pleadings in Issue.

The declaration and pleadings must be correctly copied in the issue (*x*), each forming a separate paragraph; and under the special pleas, &c., the names of the counsel by whom they are signed should be inserted (*y*).

The dates when the respective pleadings were delivered must be inserted in the issue (*z*). (*See post, as to the Nisi Prius record*). And the omission to insert them in the issue constitutes a variance, of which the defendant, if he do not appear at the trial (*a*), is entitled to avail himself after trial when the roll is made up; although the dates appear on the roll (*b*).

Return Day of Venire Facias in.

By the 3 & 4 *W.* 4, *c.* 67, *s.* 2, the *venire facias* may be made returnable *forthwith;* but it seems that in the issue a particular day must be named, on which it is returnable (*c*).

Entry of Continuances in Issue abolished.

Formerly it was requisite, in some cases, to enter imparlances or continuances on the issue; but now, by rule of all the courts of *H. T.*, 4 *W.* 4, *r.* 2, *s.* 2, "no *entry* of *continuances*, by way of *imparlance*, *curia advisari vult*, *vicecomes non misit breve*, or *otherwise*, shall be made upon any record or roll whatever, or in the pleadings, except the *jurata ponitur in respectu*, which is to be retained. Provided that such regulation shall not alter or affect any existing rules of practice as to the times of proceeding in the cause."

Suggestions in, of Interest of Sheriff, and Award of Venire to Coroner, &c.

In some cases it is necessary to enter *suggestions* previously to the award of the *venire* (*d*). As, when the sheriff is interested in the event of the cause, or related by blood or affinity to either of the parties, a suggestion to this effect should be entered on the issue, and the *venire* is then awarded to the other sheriff, if there be two (*e*); or, if there be but one, then to the coroner (*f*); or, if the coroner be also interested, &c., then to two persons appointed by the court, called elisors (*g*).

Suggestion in local Actions where Venire changed for Convenience.

In local actions, by 3 & 4 *W.* 4, *c.* 42, *s.* 22, reciting that "unnecessary delay and expense is sometimes occasioned by the trial of local actions in the county where the cause of action has arisen;" it is therefore enacted, "that, in any action depending in any of the said superior courts, the venue in which is by law local, the court in which such action shall be depending, or any judge of any of the said courts, may, on the application of either party, order the issue to be tried, or writ of inquiry to be executed, in any other county or place than

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(*u*) See the forms, Chit. Forms, 48.

(*x*) See *Aaron* v. *Chaundry*, 4 D. & R. 41; 2 B. & C. 562, *S. C.*

(*y*) R. E., 18 C. 2. It will be seen that the form given by the rule of H. T., 4 W. 4, *supra*, does not in its directions *specifically* require the counsel's names to be inserted.

(*z*) R. H., 4 W. 4, r. 1. But this rule does not apply to a *similiter* added by one party for the other. (*Shackell* v. *Ranger*, 6 Dowl. 562).

(*a*) If he appear at the trial *under protest*, he may, according to the decisions in C. P., take advantage of such a defect. (See *Blissett* v. *Tenant*, 6 Dowl. 436). But according to the decisions in the Exchequer he cannot. (*Farwig* v. *Cockerton*, 6 Dowl. 337).

(*b*) *Worthington* v. *Wigley*, 5 Dowl. 209.

(*c*) *Williams* v. *Calverly*, 14 Leg. Obs. 13.

(*d*) See as to this subject more particularly Vol. II. Book IV. Part I. Ch. 31.

(*e*) *R.* v. *Warrington*, 1 Salk. 152: see *Letsom* v. *Bickley*, 1 M. & Sel. 144.

(*f*) Fortesc. de laud. LL. c. 25: Co. Lit. 158.

(*g*) Ib.: *Holland* v. *Heron*, Barnes, 465: *Mayor of Norwich* v. *Gill*, 8 Bing. 27. See forms of these suggestions, Chit. Forms, Book IV. Part I. Ch. 34.

that in which the venue is laid; and for that purpose, any such court or judge may order a suggestion to be entered on the record, that the trial may be more conveniently had, or writ of inquiry executed, in the county or place where the same is to take place" (*h*). The application to change the venue under this enactment cannot be made till after issue has been joined (*i*).

The same where Venue changed for an impartial Trial.

So, in local actions, where a fair and impartial trial cannot be had in the county where the venue is laid, the court, upon a proper case to that effect being stated to them by affidavit, will upon motion grant leave to enter such a suggestion upon the issue, with a *nient dedire*, and an award of the *venire* to the sheriff of the next adjoining county (*j*); and it seems to be immaterial whether the next adjoining county be a county palatine or not (*k*). The affidavits upon which such an application is founded should specify the facts from which it is to be inferred that a fair trial is not to be had in the county where the venue is laid (*l*).

Suggestions where Venue changed from Town Corporate to adjoining County.

So, in actions, transitory or local, depending in any of the courts at Westminster, where the venue is laid in the county of any city or town corporate, in England, (with the exception of London, Westminster, Bristol, Chester, and the borough of Southwark), the court, upon the application of either party, may, if they think proper, award the venire, &c., to the sheriff of the county next adjoining to the county of such city or town corporate, in order that the action may be there tried (*m*); and this, it seems, even although the venue have been changed to the city upon the usual affidavit (*n*).

The same where Venire does not run, and is awarded to neighbouring County.

So, where the *venue* is laid in a place where the queen's writ of *venire* does not run, then, upon a suggestion that the issue ought to be tried in the next adjoining English county, the *venue* is awarded to the sheriff of each county accordingly: thus, where the *venue* is laid in Berwick-upon-Tweed, the *venire*, upon suggestion, may be awarded to the county of Northumberland (*o*), and the like (*p*).

Other Cases where Venire awarded out of the common Course.

And, in all cases, where either party would suggest any special matter, as to the awarding of the *venire* out of the common course, a copy should be given to the opposite party, and he should be allowed a reasonable time to consider it, before a *nient dedire* is entered (*q*).

Suggestion of Death of Party.

Lastly, where one of several plaintiffs or defendants, in a personal action, dies *before* issue joined, a suggestion of his death should be entered in whatever part of the issue it becomes necessary, according to the truth of the fact; as before declaration, between declaration and plea, between plea and

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(*h*) See *Doe Baker* v. *Harmer*, 1 H. & W. 80. See the forms, Chit. Forms, Book IV. Part I. Ch. 34.

(*i*) *Bell* v. *Harrison*, 4 Dowl. 181; 2 C., M. & R. 733, *S. C.*

(*j*) *R.* v. *Harris*, 3 Burr. 1333: *R.* v. *Amery*, 1 T. R. 365: *R.* v. *Hunt*, 3 B. & Ald. 444.

(*k*) *R.* v. *Inhabitants of St. Mary*, 7 T. R. 735.

(*l*) *R.* v. *Harris*, 3 Burr. 1333: *Mayor of Bristol* v. ——, 1 Wils. 77. See forms of suggestion, Chit. Forms, Book IV. Part I. Ch. 34: and see *R.* v. *Hunt*, 3 B. & Ald. 444.

(*m*) 38 G. 3, c. 52, ss. 1, 10: *R.* v. *Inhabitants of St. Mary*, 7 T. R. 735.

(*n*) *Bird* v. *Morse*, 7 Taunt. 305. See form of suggestion, Chit. Forms, Book IV. Part I. Ch. 34.

(*o*) *Mayor of Berwick* v. *Ewart*, 2 W. Bl. 1636.

(*p*) *Goodright* v. *Williams*, 2 M. & Sel. 270: and see *Ambrose* v. *Rees*, 11 East, 370: *R.* v. *Cowle*, 2 Burr. 855: *Way* v *Yally*, 2 Salk. 651; and see form of suggestion, Chit. Forms, 48.

(*q*) *Brocas* v. *London, City of*, 1 Str. 235.

replication, &c. But if it happen *after* issue joined, it seems that it need not be suggested until you are making up the judgment roll (r).

Suggestion of Breaches in Debt on Bond.

As to the suggestion of breaches in debt on bond within *stat.* 8 *&* 9 *W.* 3, *c.* 11, *s.* 8, when the defendant pleads *non est factum*, *&c.*, *see Vol. II. Book II. Part IV. Ch.* 4, *Sect.* 3, *and see the form, Chit. Forms.*

Suggestion, how entered.

In entering a suggestion on the issue, begin it in a new paragraph ; then add, in the same paragraph, the part of the issue immediately following, such as the award of the venire, the plea, or replication, &c.

Indorsement of Notice of Trial on.

On the back of the issue, or on a separate paper, you may write the notice of trial, as directed in the next section (s).

When the Issue may be made up. By Plaintiff.

When the Issue may be made up.] Formerly, when the plaintiff, in his replication, concluded to the country, or demurred, the issue in the Queen's Bench could not have been made up till a four-day rule had been given and expired, to rejoin, or join in demurrer ; but the practice in this respect was afterwards altered, and it was settled, that, in all special pleadings, where the plaintiff took issue upon the defendant's pleading, or traversed the same, or demurred, so as the defendant was not let in to allege any new matter, the plaintiff might make up the paper book, without giving a rule to rejoin (t) ; but, otherwise, a rule must have been given for that purpose, unless the defendant was bound by a judge's order to rejoin *gratis*. In the Common Pleas, when the plaintiff's replication concluded to the country, he could not regularly have made up the issue without previously giving a four-day rule to rejoin, unless the defendant were under terms for rejoining *gratis* (u). Now, by a general rule of all the courts of Hilary Term, 2 *W.* 4, *r.* 1, *s.* 108, "in all special pleadings where the plaintiff takes issue on the defendant's pleadings or traverses the same, or demurs, so that the defendant is not let in to allege any new matter, the plaintiff may proceed, without giving a rule to rejoin."

By Defendant.

There is no time, however, limited for making up the issue : but if either party have demurred, or pleaded a plea, &c., concluding to the country, and the plaintiff will not make up the issue, the defendant may make it up, and deliver it to the plaintiff's attorney, in order that he may carry down the record to trial by proviso. (*See ante*, 195, 198). Or, if neither party have as yet demurred or pleaded a plea, &c., concluding to the country, then the defendant, if he wish to force the plaintiff to proceed, should rule him to reply, surrejoin, &c., as directed *ante*, 195, 196, and sign judgment of *nonpros* if such a rule be not complied with.

Against Prisoners.

In proceedings against prisoners, the plaintiff is bound to proceed to trial within a certain time. (*See post, Vol. II. Book III. Part II. Ch.* 4, *Sects.* 1, 2).

(r) See *Far* v. *Denn*, 1 Burr. 363. See forms of such suggestion, Chit. Forms, Book IV. Part I. Ch. 34. Where, indeed, one of several plaintiffs died after issue joined and before trial, it was held that a trial without a suggestion of the death on the record was extra-judicial, (*Rex* v. *Cohen*, 1 Stark. 511): *sed vide* Chit. Col. Stat. 2, n. (*e*): *Newnham* v. *Law*, 5 T. R. 577: *Far* v. *Denn*, 1 Bur. 363; from which it should seem that the death, in such case, might be suggested at any time before judgment.

(s) See the form, Chit. Forms, 59.

(t) R. T., 1 G. 2, (*a*), Q. B.: Tidd, New Prac. 441.

(u) Tidd, Prac. 9th ed. 483, 718: Tidd, New Prac. 441.

By whom to be made up.

By whom to be made up.] The issue is usually made up by the plaintiff's attorney, or in country causes by his agent in town. It may be made up by the defendant, his attorney, or agent, in order to have a trial by proviso, as above mentioned. And in replevin, prohibition, and *quare impedit*, either plaintiff or defendant may make it up, and try the cause without proviso, both parties in these cases being deemed actors. By *R. H.*, 4 *W.* 4, *r.* 5, "the issue shall, on all occasions, be made up by the plaintiff, (suitor), his attorney or agent, as the case may be; and not, as heretofore, by any officer of the court."

When and how to be delivered, &c.

When and how to be delivered, &c.] *The issue must be delivered to the defendant's attorney, or, in country causes, to his agent in town* (*y*), *at least the number of days previous to the sittings or assizes at which it is intended to try the cause, which it is necessary to give as notice of trial.* It must not be delivered later than nine at night. Formerly the defendant was obliged to pay the costs of making up the issue, called "issue-money," upon the issue being delivered to him; otherwise the plaintiff might sign judgment. But now, judgment shall not be signed for non-payment of the issue-money; but the issue-money shall remain to be taxed as part of the costs in the cause (*z*); and this extends, not only to general issues, but also to all special issues (*a*). Where several defendants appear by several attornies, a copy of the issue should be delivered to each of them (*b*).

Where another has been previously delivered.

If, after issue delivered, and notice of trial given, the plaintiff enter a suggestion on the roll, and assign breaches under *stat.* 8 & 9 *W.* 3, *c.*11, he cannot deliver the second issue without a judge's order first obtained for that purpose (*c*).

Defective or irregular Issue.

Defective or irregular Issue.] If there be any variance between the issue and the pleadings, (*as to variances between the issue and the Nisi Prius record, see Vol. II., "New Trial"*), or any other irregularity in making it up, the defendant's attorney or agent, if he wish to avail himself of such variance or irregularity, should, within four days after the delivery of the issue, take out a summons, and obtain a judge's order for setting it aside, or for setting it right at plaintiff's cost (*d*); otherwise he admits that it is properly made up, or, at least, waives any irregularity in it (*e*). He cannot take advantage of such variance or irregularity by merely refusing to accept or by returning the issue. The substitution of 1837 for 1836, as the date of the writ of summons, and of the word *defendant* for *defendants*, and the award of *venire* being directed to the *then* sheriff in the issue, are irregularities which should be amended on an application to a judge at chambers, and not to

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(*y*) See *Haselfoot* v. *Duke*, Barnes, 251.

(*z*) R. H., 35 G. 3: 6 T. R. 218.

(*a*) R. M., 36 G. 3: *Fuller* v. *Osborne*, 6 T. R. 477.

(*b*) Tidd, 9th ed. 725.

(*c*) *Ethersey* v. *Jackson*, 8 T. R. 255.

(*d*) Tidd, 9th ed. 727, 669: *Iken* v. *Plevin*, 5 Dowl. 594: *Hart* v. *Dally*, 2 Dowl. 257.

(*e*) *Shepley* v. *Marsh*, 2 Str. 1131: *Combe* v. *Pitt*, 3 Burr. 1682; 1 W. Bl. 525, *S. C.*: *Mather* v. *Brinker*, 2 Wils. 243: *Doe* v. *Cotterill*, 1 Chit. Rep. 277, and note: *Whipple* v. *Mauly*, *supra*.

the court (*g*). Where the issue was not dated, the court, in a prior case, granted a rule *nisi* to set it aside for irregularity (*h*). The record of the issue, drawn up in conformity with the prescribed form, is conclusive evidence of the facts stated therein, and evidence on a trial to shew that a writ issued on a different day from that stated in the record cannot be admitted: the proper course would be to move to alter the record, at the expense of the plaintiff's attorney (*i*). Where the issue omitted the dates of the pleadings, and the defendant did not appear on the trial, the court set aside a verdict for the plaintiff, and ordered a new trial, although the roll contained the dates (*k*). Where an issue, to be tried before the sheriff, concluded with an award of the *venire* in the usual form, the court set it, and the notice of trial, aside (*l*). Where two issues were joined, one of law and another of fact, (on pleas to the same count), and the issue contained an entry of *venire ad triandum* only, and not of *quam ad inquirendum* also, the issue and notice of trial were set aside with costs (*m*). The plaintiff on a summons for that purpose may obtain a judge's order to amend the issue on payment of costs: and see in general as to the plaintiff's amending it, *post, Vol. II. Book IV. Part I. Ch.* 28.

Striking out Similiter and Demurring.

When the issue is delivered to the defendant's attorney or agent, he cannot, as formerly, strike out the defendant's plea and plead *de novo*, without the leave of the court or a judge (*ante*, 180); but he may, within four days exclusive, after the delivery of the issue, strike out the *similiter* which the plaintiff may have added for him, and demur to the replication or other last pleading of the plaintiff, if there be ground for so doing: in which case, perhaps, he ought to give plaintiff notice of his having struck out the *similiter*, and demurred, stating that he will not accept the issue as such (*n*), but only as a replication, &c., as the case may be.

Issue Roll unnecessary.

Entry of Issue on Roll.] Formerly, after the issue was joined, the plaintiff was, in strictness, bound to enter it upon an issue-roll, in order to proceed to a trial; but in practice this was seldom done until after the trial, and immediately before it became necessary to carry in the roll, when the issue was entered on the roll *verbatim*, together with all the proceedings subsequent to the award of the *venire*, to the judgment inclusive; and the roll was then termed the "judgment-roll." (*See post, Ch.* 4, *Sect.* 2). Either the issue itself or an *incipitur*, however, must have been entered on the roll at the time of passing the record of *Nisi Prius;* otherwise the record could not be passed or sealed at the *Nisi Prius* Office (*o*). If the plaintiff neglected to enter the issue, the defendant in the Queen's Bench might have compelled him to enter it, by

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(*g*) *Iken* v. *Plevin*, 5 Dowl. 594.

(*h*) *Ball* v. *Hamlet*, 3 Dowl. 188; 1 C., M. & R. 575, *S. C.*

(*i*) *Whipple* v. *Manly*, 1 M. & W. 432; 1 T. & G. 672; 5 Dowl. 100, *S. C.*

(*k*) *Worthington* v. *Wigley*, 5 Dowl. 209: See *Blissett* v. *Tenant*, 6 Dowl. 436. But the case of *Worthington* v. *Wigley* seems to bear too harshly on a mere irregularity; and in *Hiam* v. *Smith*, 6 Dowl. 710, Lord *Abinger*, C.B., said, "I am glad that I am not a party to that decision. Such cases, instead of facilitating justice, are rather opposed to it." A *similiter* added by the plaintiff for the defendant need not be dated. (*Shackell* v. *Ranger*, 6 Dowl. 562).

(*l*) *Peel* v. *Ward*, 5 Dowl. 169.

(*m*) *Codrington* v. *Lloyd*, 1 Per. & D. 157.

(*n*) See the forms, Chit. Forms, 50.

(*o*) *Wordsworth* v. *Brown*, 3 Dowl. 698.

obtaining a rule from the master on the back of the issue, giving a certain day to the plaintiff to enter it, and entering this with the clerk of the rules, and serving the plaintiff's attorney with a copy of it. In the Common Pleas the defendant obtained a rule from the secondary for that purpose, serving the plaintiff or his attorney or agent with a copy of it; and if he did not carry in the roll within the time limited by the rule, defendant might have signed judgment of *nonpros*, with costs. In the Exchequer there was no rule to enter the issue, but four days' notice must have been given before motion for judgment as in case of a nonsuit (*p*). But now, by rule of all the courts of *H. T.*, 4 *W.* 4, *r.* 15, "the *entry* of *proceedings* on the *record for trial*, or on the *judgment-roll*, (according to the nature of the case), shall be taken to be, and shall be in fact, the *first entry* of proceedings in the cause, or of any part thereof, upon record; and no fees shall be payable in respect of any *prior entry* made, or supposed to be made, on any *roll* or *record* whatever." And also, by *R. H.*, 2 *W.* 4, *r.* 70, "no entry of the issue shall be deemed necessary to entitle a defendant to move for judgment as in case of a nonsuit, or to take the cause down to trial by proviso."

And since the above rule of *H. T.*, 4 *W.* 4, *r.* 15, the entry of proceedings on the issue-roll, being a prior entry to that "on the record for trial, or on the judgment-roll," may be considered as altogether abolished; and it is therefore not necessary in any case to rule the plaintiff to enter the issue, nor can he be compelled to enter it at any stage of the proceedings (*q*).

SECT. 5.

Notice of Trial.

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What Notice of Trial necessary.

In Middlesex.

What Notice of Trial necessary.] When the trial is to be had in *Middlesex*, and the defendant lives *within forty* miles of London (*r*), there must be *eight* days' notice of trial, exclusive of the day on which it is given, and inclusive of that on which the trial is to be had; or, where there are *several defendants*, if any one of them reside within forty miles of London, eight days' notice will be sufficient: but if the defendant or all the defendants reside *above forty* miles from London, then *fourteen*

(*p*) *Coaltsworth* v. *Martin*, 2 C. & J. 123: Dax, Prac. 70, 76. By rule in that court, (28th May, 1742, 1 Bur. 227), it was ordered, "that where issue is joined, the plaintiff do enter the issue upon record *when required* by the defendant."

(*q*) *Hodges* v. *Diley*, 7 Dowl. 555.

(*r*) See *Bates* v. *Pettipher*, 2 Str. 954: *Osgood* v. *Lyon*, Id. 1216. The miles are reckoned as computed miles.

days' notice must be given (*s*). Even where the defendant resided in India, a verdict for the plaintiff was set aside, because fourteen days' notice was not given (*t*); and the same where the defendant resided in Ireland (*u*). The master of a coasting vessel, who has no permanent residence on shore, is deemed to be resident at the port to which his ship belongs; and if that be distant above forty miles from London, he will be entitled to fourteen days' notice (*u*). If the defendant reside within forty miles of London at the commencement of the action, but afterwards, and before notice of trial given, change his residence permanently to a place beyond that distance, he will be entitled to fourteen days' notice (*x*), if he have apprized the plaintiff of his removal (*y*). And if he reside above forty miles from London, he will be entitled to fourteen days' notice, although he may happen to be in London when the notice is served (*z*).

In London.

When the trial is to be had in *London*, and notice is given for the sittings in term, or for the first day of the sittings after term, it must be an eight or fourteen days' notice, as in Middlesex. But if the notice be given for the *adjournment day*, it will be sufficient to give such notice *eight days* before the *first* day of the sittings after term, if the defendant reside above *forty* miles from London; and *four* days before the said first day, if the defendant reside within that distance (*a*).

At the Assizes.

When the trial is to be had at the *assizes*, *ten* days' notice of trial *before* the commission day must be given, one day exclusive, and the other inclusive (*b*).

Before the Sheriff, &c.

When the trial is to be had before the *sheriff* or the judge of an inferior court, (in pursuance of an order of the court or a judge for that purpose, under 3 & 4 *W.* 4, *c.* 42, *s.* 17), it should seem that the same time should be given by the notice as in other cases; *viz.* an eight or fourteen days' notice when the trial is to be had in London or Middlesex, or a ten days' notice when it is to be had in any other county, exclusive of the day on which it is given, and inclusive of that on which the trial is to be had.

"Short Notice of Trial," what.

"*Short Notice of Trial*" in *country* causes, must, it seems, formerly have been given in the Common Pleas two days before the commission-day (*c*), but in the Queen's Bench it must have been four days (*d*); and now, by a general rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 58, "the expression '*short notice of trial*' shall, in country causes, be taken to mean *four* days," and this means four days before the commission-day, one day exclusive, the other inclusive (*e*). In *town* causes

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(*s*) R. M., 4 A. c. Q. B.: R. E., 56 G. 3, Exch.: see 14 G. 2, c. 17, s. 4: *Bowler* v. *Jenkin*, Barnes, 305: see *per Ashurst*, J., *Perry* v. *Jackson*, 4 T. R. 520.

(*t*) *Douglass* v. *Ray*, 4 T. R. 552.

(*u*) *Gorman* v. *Boyle*, Barnes, 297: see *Blaaw* v. *Chaters*, 6 Taunt. 458; 2 Marsh. 151, *S. C.*

(*x*) *Spencer* v. *Hall*, 1 East, 688: *Brind* v. *Torres*, 2 W. Bl. 1205: and see *Raine* v. *Hodgson*, 2 Price, 279.

(*y*) *Rochfort* v. *Robertson*, 12 East, 427.

(*z*) *Blaaw* v. *Chaters*, 6 Taunt. 458; 2 Marsh. 151, *S. C.*

(*a*) R. E., 51 G. 3, Q. B.: R. H., 1 W. 4, Exch.: 13 East, 392: R. H., 31 G. 3, C. P.

(*b*) 14 G. 2, c. 17, s. 4: *Legge* v. *Williams*, R. H., 2 W. 4, r. 8, *ante*, 93.

(*c*) *Butler* v. *Johnson*, Barnes, 301: *Hood* v. *Darby*, Pr. Reg. 390.

(*d*) R. E., 30 G. 3. See further as to the meaning of "short notice of trial" in country causes, *Pounds* v. *Penfold*, 5 N. & M. 186.

(*e*) R. E., 30 G. 3, Q. B.: R. H., 2 W. 4, r. 8, *ante*, 93: see *Lawson* v. *Robinson*, 1 C. & M. 499.

two days' notice seems sufficient, although it is usual to give as much more as the time will admit (*f*). But in both cases, the defendant by his delay of pleading or otherwise might so act as to render a shorter number of days' notice sufficient, and the defendant might be compelled to accept such shorter notice if so ordered by a judge, but not otherwise (*g*). If the terms be, to take short notice of trial "for the sittings after term," the defendant is not thereby obliged to take short notice of trial for the *adjourned* sittings after term (*h*). So, if the terms be to take short notice of trial *in* term, the defendant is not thereby bound to take short notice of trial for the sittings *after* term (*ante*, 164). Nor is the defendant bound to take short notice of inquiry, by being under terms to take short notice of trial (*i*).

Holidays, how reckoned, in Notice of.

Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, is reckoned as one of the days in these notices, unless it be the last day (*j*). But it is proper to add, that the days between the Thursday before Easter-day and the Wednesday after are reckoned in notices of trial and notices of inquiry, although not in other proceedings (*k*).

In what Case Notice is unnecessary.

In what Cases Notice of Trial unnecessary.] Notice of trial must be given in all cases; even where the plaintiff is under a peremptory undertaking to try at the next assizes, or the like (*l*); or where the cause has been made a *remanet* at the assizes (*m*); or where the trial is put off, by rule of court, from one term to another (*n*); or notwithstanding a special day be fixed for the trial by rule of court (*o*). But where a cause is made a *remanet* from one sittings to another (*p*), or put off by order of *Nisi Prius* (*q*), a fresh notice of trial is not necessary.

When to be given.

When to be given.] The plaintiff in a town cause is not bound to give notice of trial until the term after that in which issue is joined (*r*). Thus, if issue is joined in a town cause in Trinity vacation or in Michaelmas term, the plaintiff is not bound to give notice of trial till Hilary term (*s*). In country causes if issue be joined in an issuable term, or in the vacation of a non-issuable term (*t*), the plaintiff is not bound to give notice of trial until the second assizes (*u*); but if issue be joined in a non-issuable term, he must give notice for the next assizes (*x*). Where the defendant demurs to part of the pleadings, the plaintiff is not bound to try the issues in fact,

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(*f*) Prac. Reg. 390: *Butler* v. *Johnson*, Barnes, 301: Tidd, 9th ed. 472, 757: and see *Price* v. *Simpson*, 1 Taunt. 343.

(*g*) *Lawson* v. *Robinson*, 2 Dowl. 69; 1 C. & M. 499; 3 Tyr. 490, *S. C.*

(*h*) *Abbott* v. *Abbott*, 7 Taunt. 452; 1 Moore, 160, *S. C.*

(*i*) *Blaaw* v. *Chaters*, 6 Taunt. 158.

(*j*) R. H., 2 W. 4, r. 8: *ante*, 93: see R. M. 4 A. c.

(*k*) R. E., 2 W. 4, r. 1: *ante*, 93.

(*l*) *Ifield* v. *Weeks*, 1 H. Bl. 222: *Monk* v. *Wade*, 8 T. R., 246, n. A fresh notice must be given, although the cause remains in the paper. (*Sulsh* v. *Cranbroke*, 1 Dowl. 148).

(*m*) *Gains* v. *Bilson*, 1 Moo. & P. 87; 4 Bing. 414, *S. C.*

(*n*) *Jacks* v. *Mayer*, 8 T. R. 245.

(*o*) *Ellis* v. *Trusler*, 2 W. Bl. 798.

(*p*) *Jacks* v. *Meyer*, 8 T. R. 245: *Ham* v. *Greg*, 6 B. & C. 125; 9 D. & R. 125, *S. C.*

(*q*) *Shepherd* v. *Butler*, 1 D. & R. 15.

(*r*) *Hall* v. *Buchanan*, 2 T. R. 34: and see R. H. 20 & 21 C. 2.

(*s*) *Gough* v. *White*, 2 M. & W. 363: *Heale* v. *Curtis*, Id. 76; 5 Dowl. 294, *S. C.*

(*t*) *Harrison* v. *Williams*, 6 Dowl. 772.

(*u*) Ibid.: *post*, Vol. 2, "Judgment as in case of a nonsuit."

(*x*) *Robinson* v. *Taylor*, 5 Dowl. 518: *Evans* v. *Barnard*, 3 M. & W. 276: see *Apperley* v. *Morse*, 6 Dowl. 505.

until the demurrer is decided (*z*). If the plaintiff neglect to give notice of trial, the defendant may proceed to a trial by proviso (*a*), or to obtain judgment as in case of a nonsuit (*b*).

In all cases where the plaintiff, in pleading, concludes to the country, he may give notice of trial at the time of delivering his replication, or other subsequent pleading; and in case issue be afterwards joined, such notice shall be available; but if issue be not joined on such replication or other subsequent pleading, and the plaintiff sign judgment for want thereof, and forthwith give notice of executing a writ of inquiry, such notice will operate from the time that notice of trial was given, as above mentioned (*c*).

The notice must be given before nine at night (*d*).

To whom to be given.

To whom to be given.] If the defendant have appeared in person, the notice must of course be given to him; if by attorney, it must be given to such attorney, if his place of residence be known (*e*); or if not known, then to the defendant (*f*); and if given to the attorney, he is bound to acquaint his client of it in due time (*g*). In country causes, formerly, the notice must, in the Queen's Bench, have been given to the agent in town, in the Common Pleas it might have been given either to the agent in town, or to the attorney in the country, except where it was given on the back of the issue, in which case, as the issue must have been delivered, so the notice of trial must, of necessity, have been given to the agent in town (*h*). But now, by rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 57, "notice of trial shall be given in town." If there be several defendants, unless they appear by one attorney, a notice must be given to each. A personal service is, perhaps, not absolutely requisite, but it must appear to have come to the defendant's hands, if he has appeared in person. Where the notice was at the defendant's request put through the door of his office, instead of being personally served; on an affidavit by the defendant that it had "never come to his hands, possession, or knowledge," a verdict for the plaintiff was set aside (*i*).

Form of Notice of.

Form of Notice of Trial.] The notice of trial must be in writing (*k*). It is usually, in ordinary cases, written on the back of the issue; but it may be written on a separate paper, and is so where you give it at the time of delivering the replication or other subsequent pleading, which concludes to the country (*l*), and it is also given on a separate paper in all cases of notice of trial by continuance, new notices, &c. (*m*).

If the notice be given on the issue, it need not of course be intitled; nor need it be so particular as when written on a separate paper. Where the notice indorsed on the issue was, "*Take notice of trial at the next assizes,*" without mention of

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(*z*) *Ferguson* v. *D'Arcy Mahon*, B. C. 2 Jurist, 820. Notice in writing to the marshal of such demurrer is not required by R. H., 2 W. 4, s. 87, Id.

(*a*) See Vol. II. Book IV. Part, I. Ch. 22.

(*b*) Id. Ch. 24.

(*c*) R. H., 2 W. 4, r. 59: *ante*, 196, 197.

(*d*) *Ante*, 52.

(*e*) *Lee* v. *Bradford*, Barnes, 300.

(*f*) Say. 133: Ca. Pr. C. B. 62.

(*g*) See *Collins* v. *Griffin*, Barnes, 37.

(*h*) Tidd, New Pract. 459: Tidd, 9th ed. 97, 753.

(*i*) *Fry* v. *Mann*, 1 Dowl. 419.

(*k*) R. M., 4 A. c. Q. B.: R. E., 10 G. 2, C. P.

(*l*) See as to this, R. H., 2 W. 4, r. 59: *ante*, 196, 197.

(*m*) See forms, Chit. Forms, 50.

date, county, or attorney's name, yet the court held it to be sufficient; although it would have been clearly bad, if written on a separate paper (*n*). A notice of trial for the *sittings after Term* at the Guildhall, *London*, must specify whether the trial is to be had at the first day of the sittings, or on the adjournment day (*o*). A notice of trial at "Guildhall, Westminster," at which place the Court of Queen's Bench do not sit, is, it seems, defective, if the defendant will swear positively that he was misled by it (*p*).

Conflicting Notices.

If the issue be delivered with a notice of trial indorsed for one day, and with it a separate notice of trial for a different day, it is an irregularity (*q*).

Where one Defendant suffers Judgment.

If there be two or more defendants, and one of them lets judgment go by default, and the other pleads, the notice of trial should state, that the issue joined with the latter will be tried, and that the jury will at the same time assess the damages against the former (*r*).

Notice of Trial by Continuance.

Notice of Trial by Continuance.] When notice of trial in London or Middlesex has been given, and the plaintiff is not ready to proceed, then, instead of countermanding his notice, he may continue it to the next sitting, (not to the adjourned sittings), by giving *a notice of trial by continuance* (*s*). It must be served two clear business days prior to the sittings at which the cause was to have been tried, the one day inclusive, the other exclusive, as Monday for Wednesday, and the like (*t*); and Sunday cannot be reckoned as one of the two days (*u*). It can be given only once in a term (*x*).

Must be two clear Days.

Only once in a term.

Not used in Country Causes.

A notice by continuance, being nothing else in effect than a short notice of trial, is never adopted where there is time to countermand a former notice and give a new one, and consequently never used in country causes.

Not after Countermand.

It cannot be given after the plaintiff has countermanded his notice of trial (*y*).

When deemed an original Notice.

Also, if the original notice were void, the notice by continuance will be void also; yet in such a case, if such a time intervene between the service of the notice by continuance, and the sittings to which the original notice is thereby continued, as would be sufficient to give a notice of trial, the court will deem such notice an original or new notice of trial, and valid (*z*). But if a good notice be once given, and then a continuance of that notice, the plaintiff cannot treat the continuance as an original notice, so as to continue it again in the same term, though it be given in time sufficient to have made it a good original notice, if the first had been void (*a*).

Notice after Ne Recipiatur.

Notice after ne recipiatur.] If the defendant enter a *ne recipiatur*, so as to hinder the plaintiff from trying his cause at a

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(*n*) *Henbury* v. *Rose*, 2 Str. 1237: see also *Tyte* v. *Steventon*, 2 W. Bl. 1298.

(*o*) R. H., 1 W. 4, Exch.: 1 C. & J. 386: Chit. Sum. Prac. 158: R. E., 51 G. 3, Q. B. 13 East, 393; R. H., 31 G. 3, C. P.

(*p*) *Cross* v. *Long*, 1 Dowl. 342.

(*q*) *Kerry* v. *Reynolds*, 2 C., M. & R. 310; 4 Dowl. 234, *S. C.*

(*r*) See the form. Chit. Forms, 51.

(*s*) R. M., 4 A. c. Q. B.: R. M. 1654, s. 21, C. P.: *Smith* v. *Hoff*, Barnes, 301. See the forms, Chit. Forms, 51.

(*t*) *Price* v. *Bambridge*, Barnes, 297.

(*u*) *Grosjean* v. *Manning*, 2 C. & J. 635; 2 Tyr. 725, *S. C.*: *Wardle* v. *Ackland*, 2 Dowl. 28; 4 Tyr. 819, *S. C.*

(*x*) *Green* v. *Giffard*, 2 Str. 1119: *Wyatt* v. *Stocken*, 6 Ad. & El. 803: see *Stewart* v. *Abraham*, 2 Dowl. 709.

(*y*) *Smith* v. *Hoff*, Barnes, 301.

(*z*) *Boyes* v. *Twist*, Barnes, 292: *Tyte* v. *Steventon*, 2 W. Bl. 1298.

(*a*) *Wyatt* v. *Stocken*, 6 Ad. & El. 803.

certain sittings in term, the plaintiff may, during such sittings, give the defendant notice of trial for the next sittings, and proceed to the trial of his cause accordingly (*b*).

Term's Notice of Intention to proceed.

Term's Notice of Intention to proceed.] Where no proceedings have been had within *four terms* exclusive after issue joined, or, as it seems, in the Queen's Bench for a *year* after issue joined, a term's notice must be given of the plaintiff's intention to proceed in the action, before he can give notice of trial (*c*).

A notice that plaintiff will proceed in the cause, though not acted under (*d*), or a notice of trial, though countermanded (*e*), or a judge's summons, if an order be obtained on it, but not otherwise (*f*), is deemed a proceeding in the cause, so as to render a term's notice unnecessary. But suing out a *venire facias* in the vacation of the fourth term, tested as of the fourth term, is not such a proceeding (*g*). Nor is the obtaining an order for changing the attorney in the cause (*h*).

In what Cases unnecessary.

This rule as to a term's notice does not extend to a notice of trial by proviso (*i*), nor to a motion for judgment as in case of a nonsuit (*j*), nor to a motion for costs of the day (*k*); nor to a motion to set aside proceedings (*l*), nor does it extend to proceedings after verdict (*m*), or final judgment: but it does to proceedings after interlocutory judgment, as notices of inquiry, &c. (*n*). If the proceeding in the cause were suspended by injunction (*o*), or delayed by consent, or at the defendant's request (*p*), the plaintiff may, within a year afterwards, proceed without giving a term's notice.

How given.

Formerly, this notice must have been served before the essoign day of the fifth term (*q*); but now, "where a term's notice of trial or inquiry is required, such notice may be given at any time before the first day of term" (*r*). Giving notice of trial before the first day of term for the sittings after term, would be insufficient; there should be a notice before the first day of the term of the plaintiff's intention to proceed, and after the end of the term a notice of trial (*s*).

Notice of Countermand.

Notice of Countermand.] The plaintiff has a liberty of countermanding his notice of trial even in the case of a trial at bar (*t*). The notice for this purpose must be in writing (*t*). It may be directed to, and served upon, the attorney in the country, or

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(*b*) R. M., 4 A.: and see *Higmore* v. *Walker*, 2 Salk. 653.

(*c*) R. M., 4 A. c. Q. B: R. M., 1654, s. 21: R. E., 13 G. 2, r. 2, C. P. See *Ashwin* v. *Corbill*, 2 Salk. 650, 457, 645: and see *Lord* v. *Hilliard*, 9 B. & C. 621.

(*d*) *Richards* v. *Harris*, 3 East, 1: *Green* v. *Gauntlett*, 1 Str. 531.

(*e*) *Richards* v. *Harris*, 3 East, 2, n.: *Hatchell* v. *Griffiths*, 2 Salk. 645.

(*f*) 1 Sellon, 408: R. E., 13 G. 2, r. 2: *sed vide Deacon* v. *Fuller*, 1 Dowl. 675; 1 C. & M. 349, *S. C.* Even signing a concilium when that proceeding was adopted, was deemed a proceeding so as to render the term's notice unnecessary. (*Bland* v. *Darley*, 3 T. R. 530).

(*g*) *Ashwin* v. *Corbill*, 2 Salk. 650. See form of term's notice, Chit. Forms, 52.

(*h*) *Deacon* v. *Fuller*, 1 Dowl. 675; 1 C. & M. 349, *S. C.*

(*i*) *Theobald* v. *Crickmore*, 2 B. & Ald. 594; 1 Chit. Rep. 317, *S. C.*

(*j*) *Shinfield* v. *Laxton*, 2 Dowl. 778; 4 M. & Scott, 187, *S. C.*: *Mawby* v. *Wortley*, 2 W. Bla. 1223.

(*k*) *French* v. *Burton*, 2 C. & J. 634.

(*l*) *Lownley* v. *Hempson*, 6 Dowl. 558.

(*m*) *May* v. *Wooding*, 3 M. & Sel. 500: but see *Tipton* v. *Meeke*, 8 Moore, 579: *Deacon* v. *Fuller*, *supra*.

(*n*) See *Peyton* v. *Burdus*, 2 Str. 1100.

(*o*) *Hayley* v. *Riley*, 1 Doug. 71, 72, and n.: *Bosworth* v. *Philips*, 2 W. Bl. 784.

(*p*) *Bland* v. *Darley*, 3 T. R. 530: *Watkins* v. *Haydon*, 2 W. Bl. 762: *Hayley* v. *Riley*, Doug. 71: *Evans* v. *Davis*, 3 Dowl. 786.

(*q*) *Bogg* v. *Rose*, 2 Str. 1164: *Geale* v. *Chapman*, Barnes, 291.

(*r*) R. H., 2 W. 4, r. 52: see *ante*, 155.

(*s*) *Smith* v. *Colman*, MS., E. 1820.

(*t*) R. M. 4 A. See form, Chit. Forms, 62.

the agent in town, at the plaintiff's option, unless otherwise ordered by the court or a judge (*x*). It may be given by the attorney or agent either in town or country (*y*).

How long.

"In *country causes*, or *where the defendant resides more than forty miles from town*, a countermand of notice of trial shall be given *six* days before the time mentioned in the notice of trial, unless *short notice* of trial has been given" (*z*). "In *town causes*, where the defendant lives within forty miles of town, *two* days' notice of countermand shall be deemed sufficient" (*a*). Where notice of trial was given for the sittings after Easter term, which began on the 12th May, but that day was only an adjournment day to the 16th, motion of countermand on the 14th was held to be too late (*b*). The days in all these cases are reckoned, the one inclusive, the other exclusive (*c*). The defendant's being under terms to take short notice of trial does not entitle the plaintiff to give less than the usual notice of countermand (*ante*, 164).

Neglect to give.

If the plaintiff do not countermand his notice in time, and do not proceed to trial according to his notice, the defendant will be entitled to his costs of the day (*d*); and may move for judgment as in case of a nonsuit (*e*).

New Notice, when necessary.

New Notice.] In the case of notice by continuance, or of notice for the next sittings after a *ne recipiatur*, if the plaintiff do not proceed to try the cause at the sittings for which he has so given notice (*g*), and in all other cases if the plaintiff do not proceed to trial at the time for which he originally gave notice (*h*), he must afterwards give a new notice, the same as the original one, before he can carry down the cause for trial; and this even where the trial is put off to the next sittings or assizes, by rule of court, or although the plaintiff have given a peremptory undertaking to try (*i*). So, he must give a fresh notice if the cause has been made a *remanet* at the assizes (*k*). But where a cause is made a *remanet* from one sittings to another (*l*), or is put off by order of *Nisi Prius* (*m*), no new notice of trial is necessary.

Form of.

The form of a new notice of trial is the same as other notices of trial.

Irregular or void Notice.

Irregular or Void Notice.] If the notice be irregular or insufficient, and the defendant do not defend at the trial, and the plaintiff obtain a verdict, the court upon application will set the verdict aside; and this although the defendant does not swear to merits (*n*). The court, however, are not very strict as to the form of such notices; if they be good in sub-

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(*x*) R. H., 2 W. 4, r. 57, by which rule it is ordered, that "countermand of notice of trial may be given either in town or country, unless otherwise ordered by the court or a judge." (See Tidd, New Prac. 461).

(*y*) *Cheslyn* v. *Pearce*, 4 Dowl. 693: 1 M. & W. 56; 1 Gale, 423, *S. C.*

(*z*) R. H., 2 W. 4, r. 61: and see 14 G. 2, c. 17, s. 5.

(*a*) R. H., 2 W. 4, r. 62: R. M. 4 A. c.: and see 14 G. 2, c. 17, s. 5.

(*b*) *Cooper* v. *Whitmarsh*, 4 M. & W. 73.

(*c*) R.H., 2 W. 4, r. 8: *ante*, 93: *Stewart* v. *Abraham*, 2 Dowl. 709.

(*d*) See Vol. II. Book IV. Part I. Ch. 24.

(*e*) See Id. Ch. 23.

(*g*) R. M., 4 A. c.

(*h*) R. M. 1654, s. 18.

(*i*) *Jacks* v. *Meyer*, 8 T. R. 245: *Field* v. *Weeks*, 1 W. Bla. 222: *Monk* v. *Wade*, 8 T. R., 246, n.: *Sulsh* v. *Cranbroke*, 1 Dowl. 148.

(*k*) *Ham* v *Gregg*, 6 B. & C. 125: 9 D. & R. 126, *S. C.*: *Gains* v. *Bilson*, 1 Moo. & P. 87; 4 Bing. 414, *S. C.*

(*l*) *Jacks* v. *Meyer*, 8 T. R. 245: R. M. 4 A. c.: see *Gibbons* v. *Phillips*, 8 B. & C. 437: *Gains* v. *Bilson*, 4 Bing. 414.

(*m*) *Shepherd* v. *Butler*, 1 D. & R. 15.

(*n*) *Williams* v. *Williams*, 2 Dowl. 350: *Wright* v. *Carr*, Q. B., 2 Jurist, 516.

stance, that is, if they be such as to apprize the defendant, with certainty, when and where the plaintiff means to proceed to trial, they will be deemed sufficient. (*See ante*, 208, 209). Or, if insufficient, yet the defendant, by defending the action at the trial, or the like, will thereby waive the irregularity, or even the want of notice, and the court will not, in such a case, set aside the verdict (*o*). A notice of trial in due time, according to the practice of the court, is regular, although a previous void notice has been given, and not countermanded (*p*).

Not waived by retaining it.

The defendant is not bound to return an irregular notice of trial, and therefore does not waive the irregularity by retaining it (*q*).

Postponement of Trial.

Postponement of Trial.] As to this, see *post*, *Vol. II. Book IV. Part I. Ch.* 21.

Sect. 6.

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Obtaining Admission of Documents before Trial.

1. *Obtaining Admission of Documents before Trial.*

By rule of *H. T.*, 4 *W.* 4, *r.* 20, made in pursuance of the

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(*o*) *Doe Antrobus* v. *Jepson*, 3 B. & Ad. 402: *Fraas* v. *Paravacini*, 4 Taunt. 545: *Gillingham* v. *Waskett*, M'Clel. Rep. 198.

(*p*) *Fell* v. *Tyne*, 5 Dowl. 246: *Ranger* v. *Bligh*, Id. 235.

(*q*) *Dignam* v. *Mostyn*, 6 Dowl. 547: *Dignam* v. *Ibbotson*, 3 M. & W. 431.

Notice to admit.

Proceedings on Summons to admit.

Costs of.

Law Amendment Act, 3 & 4 *W.* 4, *c.* 42, *s.* 15, "either party *after plea pleaded* and a *reasonable* (*r*) *time before trial*, may give *notice* to the other, either in town or country, in the form hereto annexed, marked A, (*post*, 215), or to the like effect, *of his intention to adduce in evidence* certain *written* or *printed* documents; and unless the adverse party *shall consent, by indorsement on such notice*, within forty-eight hours to make the admission specified, the party requiring such admission may call on the party required, *by summons* (*s*) *to shew cause before a judge* (*t*), *why he should not consent to such admission;* or, in case of refusal, be subject to pay the *costs of proof.* And, unless the party required shall expressly consent to make such admission, the judge shall (if he think the application *reasonable*) *make an order that the costs of proving any document specified in the notice*, (which shall be proved at the trial to the satisfaction of the judge or other presiding officer, certified by his indorsement thereon), shall be paid by the party so required, whatever may be the result of the cause. Provided, that if the judge shall think the application *unreasonable, he shall indorse the summons accordingly.* Provided also, that the judge may give such *time for inquiry* or examination of the documents intended to be offered in evidence, and give such directions for the inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit (*u*). If the party required *shall consent to the admission*, the judge shall order the same to be made. No *costs* of proving any written or printed document shall be allowed to any party who shall have adduced the same in evidence on any trial, *unless he shall have given such notice as aforesaid*, and the adverse party shall have refused or neglected to make such admission, or the judge shall have indorsed upon the summons that he does not think it reasonable to require it." A judge may make such order as he may think fit, respecting the costs of the application and the costs of the production and inspection, and in the absence of a special order, the same shall be costs in the cause (*x*).

Not compulsory to apply or to admit.

As observed by Mr. Bagley, in his work on the Practice at Chambers, p. 307, it is not compulsory in any case, on the party intending to produce documents in evidence, to adopt the course here pointed out; and when it is considered unad-

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(*r*) See *Tynn* v. *Billingsley*, 3 Dowl. 810; 2 C., M. & R. 253; 5 Tyr. 788, *S. C.*

(*s*) See form, Chit. Forms, 54.

(*t*) The full court has no jurisdiction to order the admission of documents under this rule, and if a judge at chambers refer the parties to the full court, they will hear the case argued, and intimate their opinion to the judge, but will not pronounce judgment. (*Smith* v. *Bird*, 3 Dowl. 611).

(*u*) Where a judgment and other documents required to be admitted were abroad, at Brussels, an order was made under this rule, on the terms, that the defendant should have a fortnight's time to inspect them, and that the plaintiff should pay the costs occasioned by such inspection, to be taxed by the prothonotary. (*Smith* v. *Bird*, 3 Dowl. 641).

(*x*) By the former rule of H. T., 2 W. 4, r. 6, it is ordered, that "the expense of a witness called only to prove the copy of any judgment, writ, or other *public* document, shall not be allowed in costs, unless the party calling him shall, within a reasonable time before the trial, have required the adverse party, by notice in writing, and production of such copy, to admit such copy, and unless such adverse party shall have refused or neglected to make such admission." Also, by the former rule of H. T., 2 W. 4, r. 7, it is ordered, "That the expense of a witness, called only to prove the handwriting to, or the execution of, any written instrument stated upon the pleadings, shall not be allowed, unless the adverse party shall, *upon a summons before a judge, a reasonable time before the trial*, (such summons stating therein the name, description, and place of abode of the intended witness), *have neglected or refused to admit such handwriting or execution, or unless the judge, upon attendance before him, shall indorse upon such summons, that he does not think it reasonable to require such admission.*"

visable to inform the opposite party of the nature or contents of the documents proposed to be offered at the trial, the premature disclosure may be avoided; but, in that event, the costs of proving the document fall inevitably on the party producing it in evidence. On the other hand, when no solid objection exists to putting the adverse party in possession of the nature of the documents proposed to be offered in evidence, and any considerable expense is likely to be incurred in proving them, it seems judicious, in all cases, to require their admission in the manner prescribed; for, whether the judge shall determine that the required admission is reasonable or unreasonable, the party producing the document in evidence will not be entitled to the costs of proof in any event, unless he has availed himself of the rule. If a judge, upon hearing the parties, intimates his opinion that a document ought to be admitted, the admission is generally assented to; but if it should still be refused, the only event in which the party refusing can escape from the obligation to pay the costs incurred in proving the document, is where the party adducing such document has failed to prove it to the satisfaction of the judge presiding at the trial, as testified by the absence of his indorsement on the document. It is altogether in the discretion of the judge before whom the summons is made returnable, to say when it is reasonable to call for the admission of the document specified; but it is presumed, that it would not be considered reasonable to require the admission of any document, when it appeared from the pleadings that the validity of such document was clearly in issue; as where *non est factum* is pleaded to an action on a specialty, or forgery to an action on a promissory note or bill of exchange; nor does it seem reasonable, in general, to require an admission of the execution of a private instrument, to which the party called upon to admit it is in no respect privy. Even in such instances, however, although the judge should be of opinion that it was unreasonable to require the admission, unless the party producing the document applies for its admission in the manner prescribed, he cannot recover the costs of proof, although the issue should be determined in his favour. The judge cannot, it seems, order an admission of documents against a party's consent (*y*).

Proceedings at Trial after Admission.

If, on a summons to admit the handwriting of the defendant, his attorney refuse to admit it, and the usual order is made, the judge at the trial will certify for the costs of a witness who is called to prove the handwriting, if such witness, on his examination in chief, depose to no other fact (*z*). Where a plaintiff was nonsuited in consequence of a refusal by the defendant's counsel at the trial to admit certain documents in evidence which had been agreed to be admitted by the defendant's attorney's agent, the court granted a new trial, with costs to be paid by the defendant (*a*). A variance in the date of a note declared on and of one admitted by a judge's order is immaterial, where it does not appear that the defendant has been misled (*b*). Where defendant had by judge's order ad-

(*y*) See *Smith* v. *Bird*, 3 Dowl. 641; 1 Hodges, 96, *S. C.*: *Stracey* v. *Blake*, 7 C. & P. 404.

(*z*) *Stracey* v. *Blake*, 7 C. & P. 404.

(*a*) *Doe Tindal* v. *Roe*, 5 Dowl. 420.

(*b*) *Field* v. *Henning*, Dowl. 450; 1 M. & H. 21, *S. C.*

mitted a document described as a counterpart of a lease, and at the trial the instrument turned out to be a lease with only a counterpart stamp; he was held to be precluded by his admission from taking the objection (*c*).

Form of the Notice to admit.

The following is the form of the notice referred to in the above rule:—

A.

"*In the Queen's Bench* [or, *Common Pleas*, or *Exchequer*].

A. B. v. *C. D.*

Take notice, that the $\begin{Bmatrix}\textit{Plaintiff}\\ \textit{Defendant}\end{Bmatrix}$ *in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the* $\begin{Bmatrix}\textit{Defendant}\\ \textit{Plaintiff}\end{Bmatrix}$ *his attorney or agent, at* ——— *on* ——— *between the hours of* ———; *and that the* $\begin{Bmatrix}\textit{Defendant}\\ \textit{Plaintiff}\end{Bmatrix}$ *will be required to admit that such of the said documents as are specified to be originals, were respectively written, signed, or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered, respectively; saving all just exceptions to the admissibility of all such documents as evidence in this cause. Dated &c.*

To E. F. G. H., *Attorney*.

Attorney or *Agent for* $\begin{Bmatrix}\textit{Defendant}\\ \textit{Plaintiff}\end{Bmatrix}$ *for* $\begin{Bmatrix}\textit{Plaintiff}\\ \textit{Defendant}\end{Bmatrix}$"

[Here describe the documents, the manner of doing which, may be as follows] :—

ORIGINALS.

Description of the Documents.	Date.
Deed of covenant between A. B. and C. D., 1st part; and E. F., second part . . .	*1st January*, 1828
Indenture of lease from A. B. to C. D. . .	*1st February*, 1828
Indenture of release between A. B. and C. D., 1st part, &c.	*2nd February*, 1828
Letter, defendant to plaintiff	*1st March*, 1828
Policy of insurance on goods by ship Isabella, on voyage from Oporto to London .	*3rd December*, 1827
Memorandum of agreement between C. D., captain of said ship, and E. F.	*1st January*, 1828
Bill of exchange for £100 at three months, drawn by A. B., on and accepted by C. D., indorsed by E. F. and G. H.	*1st May*, 1829

(c) *Doe Wright* v. *Smith*, 3 Nev. & P. 335.

COPIES.

Description of Documents.	Date.	Original, or duplicate, served, sent, or delivered, when, how, and by whom.
Register of baptism of A. B. in the parish of X. . . .	*1st January*, 1828.	
Letter —— plaintiff to defendant . .	*1st February*, 1828	*Sent by General Post, 2nd February*, 1828
Notice to produce Papers	*1st March*, 1828	*Served 2nd March*, 1828, *on defendant's attorney, by E. F., of* ——.
Record of a judgment of the Court of King's Bench, in an action, J. S. v. *J. N.*.	*Trinity Term*, 10 *Geo. IV.*	
Letters Patent of King Charles II. in the Rolls Chapel .	*1st January*, 1680.	

We shall now proceed to notice the various modes of proof, and the effect thereof, in the following order:—

2. *Records and Public Documents, &c.*

Public Statutes.

Public Statutes.] Public acts of parliament are proved (if ever requisite) by the copies printed by the queen's printer (*d*). By stat. 41 *G*. 3, *c*. 90, *s*. 9, the statutes of Ireland, prior to the Union, printed and published by the queen's printer, shall be received as conclusive evidence in any court in Great Britain (*e*).

Private Statutes.

Private Statutes.] Copies printed by the queen's printer are not evidence of a private act of parliament (*f*). When, therefore, it becomes necessary to prove a private statute, *bespeak a copy of it at the Parliament Office, in time, before the trial; and when ready, call there and examine it with the clerk. It is sufficient in this and all other cases of examining records, for you to examine the copy while the officer reads the record; it is not necessary that the officer should also read the copy while you examine the record* (*g*). *Afterwards, upon producing it in evidence, you will be required to swear that you examined the copy, whilst the clerk read the original from the roll; and that it is correct.* A private act containing a clause "that it shall be deemed and taken to be a public act, and shall be judicially taken notice of without being specially pleaded," renders it unnecessary to prove it by an examined copy (*h*).

(*d*) 2 Bac. Abr. Evidence (F): Gilb. Ev. 12.

(*e*) See Roscoe, 53.

(*f*) 2 Bac. Abr., Evidence (F): see Bul. N. P. 225.

(*g*) See *Reid* v. *Margeson*, 1 Camp. 469, 471, (n.): *Rolf* v. *Dart*, 2 Taunt. 52.

(*h*) Phillips's Evid. 383, 7th ed.; and MSS., M.T 1833: *Beaumont* v. *Mountain*, 10 Bing. 404: overruling *Brett* v. *Beales*, 1.

Records of the Queen's Courts.

Production of.

Records of the Queen's Courts.] Records are not complete until delivered into court on parchment (*i*). When matter of record forms the gist of the action, and issue is joined upon *nul tiel* record, the record itself must be brought into court, if it be a record of the court in which the action is pending, in order that it may be inspected; but if it be a record of another court, the tenor of it is returned into the court in which the action is pending upon a *certiorari* (*k*).

Examined Copy.

But when matter of record comes in question merely *collaterally*, as where it is stated in the pleadings as inducement, and must be proved, an examined copy of the record will be sufficient evidence (*l*). For this purpose, *bespeak a copy of the record from one of the masters, and examine it with him in the same manner as is above directed with respect to private statutes.* The roll, of course, must have been previously carried in. The judgment paper signed by the master is not evidence (*m*).

Judgment Paper.

Office Copy

An office copy in the same court and in the same cause is equivalent to a record; but in another court or in another cause, the copy must be proved (*n*). Where a copy is made by a person intrusted for that purpose, it is admissible in evidence, without proof of its having been actually examined (*o*).

Verdict.

In order to prove a verdict, you must give in evidence an examined copy of the whole record, including the judgment; for it would not otherwise appear but that judgment had been arrested, or a new trial granted. The case of an issue out of Chancery, however, is an exception to this rule, because it is not usual to enter up judgment in such a case; and the decree of the Court of Chancery is equally proof that the verdict was satisfactory and conclusive (*p*). The *postea*, however, when marked, is sufficient evidence that a trial was had between the parties, so as to let in proof of what a witness, since dead, swore at the trial (*q*), or an examined copy of a judgment of nonsuit may be given in evidence for the same purpose (*r*). And, in an action for a moiety of the money paid by the plaintiff under a verdict recovered by A., in a suit against the plaintiff and defendant, *Nisi Prius* record and *postea* have been held to be evidence of the verdict and damages in the former suit, without proof of the judgment (*s*).

Postea.

Issuing of Writ.

In order to prove the issuing of a writ, if the writ be the gist of the action, you must get it returned, and then obtain an examined copy of it from one of the masters. But if it be matter of inducement merely, it need not be returned; and, as it is not a record until returned, it is not necessary in such a case to prove it by an examined copy (*t*); but the

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M. & M. 421: *Bromhead* v. *Beaumont*, at Lincoln, 15th July, 1833. S. P., decided by *Parke*, J., after consulting with *Taunton*, J.: *Wormwood* v. *Cotton*, 1 C., M. & R. 44.

(*i*) *R.* v. *Bellamy*, R. & M. 171: B., N. P. 228: *Godefroy* v. *Jay*, 1 M. & M. 236; 3 C. & P. 192, *S. C.* But parchment is not essential to all records. (*R.* v. *Yearsley*, 1 Per. & D. 60).

(*k*) See the proceedings upon *nul tiel record*, *post*, Vol. II. Book II. Part III.: Roscoe, 73.

(*l*) Peake, Ev. 29: 2 Bac. Abr., Evidence (F).

(*m*) *Godefrey* v. *Jay*, 1 M. & M. 236; 3 C. & P. 192, *S. C.*

(*n*) *Per* Lord *Mansfield*, in *Denn* v. *Fulford*, 2 Bur. 1179.

(*o*) B., N. P. 229.

(*p*) 2 Bac. Abr., Evidence (F): Bull. N. P. 234; Peake Ev. 50, 51.

(*q*) *Pitton* v. *Walker*, 1 Str. 162: *R.* v. *Browne*, 1 M. & M. 315; Peake, Ev. 51.

(*r*) Peake, Ev. 51.

(*s*) *Foster* v. *Compton*, 2 Stark. 365: and see, as to a set-off, *Garland* v. *Scoones*, 2 Esp. 648. See Rosc. 76.

(*t*) 2 Bac. Abr., Evidence (F).

writ itself, if in your possession, may be given in evidence (*u*); or if in the possession of the other party, then, upon proving the service of a notice upon him to produce it, and that it has not been returned and filed with the masters, but was in the other party's possession after the day on which it was returnable, you will be allowed to give a copy of it in evidence (*x*). In some cases, to prove a writ of execution, it is necessary also to give in evidence an examined copy of the judgment upon which it is founded (*y*). A copy of the judgment roll, containing an award of an *elegit* and the return of the inquisition, is evidence of the *elegit* and inquisition in an action for use and occupation (*z*).

Judgment of House of Lords.

A judgment of the House of Lords is proved by an examined copy of it from the minute-book (*a*); which may be had upon application at the office of the clerk in parliament.

Convictions.

Convictions before justices of peace are proved by examined copies, which the clerk of the peace of the proper county will make out for you upon application for that purpose, and you may examine them.

Indictments.

The records of indictments are also proved by examined copies, which may be obtained of the clerk of the peace, if the indictments were found at the sessions; or from the clerk of arraigns, if the indictment were found or the trial had at the assizes; or you may serve a *subpœna duces tecum* on the officer in whose custody the indictment is, and he will produce it at the trial. In actions for malicious prosecutions, however, before the record of an indictment for felony can be given in evidence, or before the officer will be authorized in giving you a copy, you must obtain an order for that purpose from the court at the Old Bailey, if the bill were preferred or the trial had there, or from the Attorney-General, if the bill were perferred or the trial had in any other court (*b*). The minute-book of the clerk of the peace is not evidence to prove that an indictment was preferred (*c*). A minute-book, from which an entry of the proceedings at sessions is made, and from which book the roll containing the record of such proceedings is subsequently made up, is not admissible in evidence (*d*). But if the minute-book be the only record of the proceedings, it is admissible (*e*).

Fine and Proclamations.

To prove the passing of a fine, the chirograph is conclusive evidence, without further proof (*f*); but if it be necessary to prove the proclamations, you must obtain an examined copy of the record (*g*).

Recovery.

A common recovery is proved in the same manner as an ordinary judgment, (see *ante*, 217); but you must also prove the seisin of the tenant to the *præcipe*, unless the recovery be ancient (*h*).

(*u*) B., N. P. 234.

(*x*) *Edmonstone* v. *Plaisted*, 4 Esp. 160.

(*y*) See 2 Bac. Abr., Evidence (F).

(*z*) *Ramsbottom* v. *Buckhurst*, 2 M. & Sel. 565.

(*a*) *Jones* v. *Randall*, Cowp. 17: *R.* v. *Gordon*, 2 Doug. 593.

(*b*) *Legatt* v. *Tollervey*, 14 East, 303. As to the right to a copy, see *R.* v. *Just. of Huntingdon*, 5 D. & R. 588; 1 Burn. J., 26th ed. 848.

(*c*) R. v. *Smith*, 8 B. & C. 341.

(*d*) R. v. *Bellamy*, R. & M. 171: *R.* v. *Ward*, 6 C. & P. 366.

(*e*) *Queen* v. *Yeaveley*, 1 Per. & D. 60. Parchment is not essential. (Ib.)

(*f*) Plowd. 110 b; 2 Bac. Abr., Evidence (F).

(*g*) 2 Bac. Abr., Evidence (F): Arch. Pl. & Ev. 364.

(*h*) See Rosc. 19.

Deed enrolled.

To prove a deed which has been *enrolled*, the indorsement of the enrolment upon the deed is evidence sufficient, without further proof of the deed (*i*). But if the deed be lost, it can be proved only by an examined copy of the enrolment (*k*). This, however, must be understood of deeds only which need enrolment; for if any other deed be enrolled, (as, for instance, a bargain and sale for years, or the like), and be afterwards offered in evidence, it must be proved in the ordinary way, by the subscribing witness, because the officer had no legal authority to enrol it (*l*).

Letters Patent.

Letters Patent.] Letters patent may be given in evidence without further proof; or they may be proved by exemplification under the great seal (*m*).

3. *Matters* quasi *of Record.*

Proceedings in Parliament.

Proceedings in Parliament.] Entries in the journals of the House of Lords and House of Commons are proved by examined copies from their minute-books (*n*).

Proceedings in Equity.

Proceedings in Equity.] The bill and answer must be proved by the production of them, or by examined copies (*o*), which copies you may obtain from the Six Clerks' Office, upon application for that purpose. In order to prove the answer, you are obliged to produce the bill, or give in evidence an examined copy of the bill as well as of the answer; but where it was proved by the proper officer that he had searched diligently in the office for the bill, and could not find it, the court allowed the answer to be read without it (*p*). But if the answer be adduced in evidence merely as an admission of the party on oath, it may be sufficiently proved by an examined copy, without proof of a decree or of the party's handwriting (*q*). The entire answer must be copied, however irrelevant some parts of it may be; for if you give any part of an answer in evidence, the opposite party has a right to have the entire of it read (*r*). If the copy of the answer be given in evidence against the party who was defendant in the suit in equity, the court will also in general require some evidence of identity (*s*). Proof of the party's handwriting to it will suffice to prove it (*t*). So, if the name and description of the party at law agree with the name and description of the party answering in equity, it is *primâ facie* evidence of identity (*u*).

Depositions in Equity.

Depositions in equity, when evidence in this court, must be proved here by examined copies also (*x*). In order to render them evidence, however, you must first give in evidence an examined copy of the bill and answer, and then prove that the

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(*i*) 2 Bac. Abr., Evidence (F): Peake, Ev. 32: *Smartle* v. *Williams*, 1 Salk. 280.

(*k*) 2 Bac. Abr., Evidence (F): Peake, Ev. 33: *Baikie* v. *Chandless*, 3 Camp. 20.

(*l*) 5 Co. 54; Style, 445: 2 Bac. Abr., Evidence (F), 365.

(*m*) 3 & 4 Ed. 6, c. 4; explained by 13 El. c. 6. See 1 Saund. 189, n.: *Roberts* v. *Arthur*, 2 Salk. 497.

(*n*) *Jones* v. *Randall*, Cowp. 17: *R.* v. *Gordon*, Doug. 594.

(*o*) Rosc. 77.

(*p*) 2 Bac. Abr., Evidence (F).

(*q*) *Lady Dartmouth* v. *Roberts*, 16 East, 334: *Ewer* v. *Ambrose*, 4 B. & C. 35; 6 D. & R. 127, *S. C.*: *Highfield* v. *Peake*, 1 M. & M. 109.

(*r*) 2 Bac. Abr., Evidence (F).

(*s*) *Hodgkinson* v. *Willis*, 3 Camp. 401.

(*t*) *Dartnell* v. *Howard*, R. & M. 169.

(*u*) *Hennell* v. *Lyon*, 1 B. & Ald. 182.

(*x*) 2 Bac. Abr., Evidence (F).

deponent is dead, or out of the jurisdiction of the court, or that he has been diligently sought for and could not be found, or that he has been *subpœnaed*, but fell sick by the way, or the like (*y*). But the bill and answer need not be proved, if the depositions be offered in evidence as an admission merely, or for the purpose of contradicting a witness (*z*).

Decree in Equity.

A decree in equity, if it remain in paper, may be proved by an examined copy, together with an examined copy of the bill and answer; but if it have been enrolled, it must be proved by an exemplification under the great seal, which requires only to be produced in evidence without further proof (*a*).

Will.

Where a will remains in Chancery, by order of that court, it may be proved by an examined copy (*b*).

Proceedings at Law, not being Records.

Examination of Witness at former Trial.

Proceedings at Law, not being Records.] If it be intended to give in evidence the examination of a witness on a former trial, you must first give in evidence either the *postea*, or an examined copy of the record; next you must prove the death of the witness, and then give parol evidence of his examination (*c*). Proof of his death, however, is not in all cases necessary; the court, in one case, allowed such examination to be given in evidence, where the witness did not attend at the second trial, and it appeared probable that he had been kept away by the persuasion and practice of one of the parties (*d*). Perhaps, also, the same grounds for allowing depositions in equity to be given in evidence (*ante*, 219), would be deemed sufficient in this case (*e*). Also, if the witness give evidence at the second trial different from what he gave at the first, his former examination may be given in evidence in order to discredit him.

Rules.

Rules are proved by office-copies (*f*); or one of the masters, upon service of *subpœna*, will attend at the trial, and prove the rules from the book in which they were originally entered, for which you pay him one guinea. A rule of court is not matter of record (*g*).

Judge's Order.

A judge's order may be proved by the production of the order itself, or by an office-copy of the rule, if any, by which it has been made a rule of court (*h*).

Affidavits.

Affidavits, if they have been made use of in court, and filed with the masters, may be proved, it should seem, by office-copies. All other affidavits, not filed, can be proved only by production of the affidavits themselves, and by parol evidence of their having been sworn (*i*); or if not proved to be sworn, yet perhaps they may be received as admissions of the deponents, upon proof of their handwriting (*k*). They are admis-

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(*y*) 2 Bac. Abr., Ev. (F): and see *Cazenove* v. *Vaughan*, 1 M. & Sel. 4: *Rushworth* v. *Countess of Pembroke*, Hard. 472. This rule, however, is founded on the nature of depositions in equity, where a party who obtains such depositions does not know beforehand what they are; but if a party make use of an affidavit on an application to the court, it will be afterwards admissible in evidence against him, though the deponent be in court. (*Brickill* v. *Hulse*, 2 Nev. & P. 429; 7 Ad. & El. 454. S. C.).

(*z*) 1 Phil. Ev. 375; *Highfield* v. *Peake*, 1 M. & M. 109.

(*a*) Rosc. 77.

(*b*) 2 Bac. Abr., Ev. (F): but see Comb. 46.

(*c*) See 2 Bac. Abr., Ev. (F); 2 P. Wms. 564; 5 Esp. 56.

(*d*) Bull. N. P. 243.

(*e*) 2 Bac. Abr., Ev. (F).

(*f*) Peake, Evidence 33: *Selby* v. *Harris*, 1 L. Raym. 745: *Duncan* v. *Scott*, 1 Camp. 102.

(*g*) *R.* v. *Bingham*, 3 Y. & J. 101.

(*h*) *Israel* v. *Benjamin*, 3 Camp. 40.

(*i*) See 2 Bac. Abr., Evidence (F).

(*k*) Arch. Pl. & Ev. 368.

sible against a party who has made use of them, though deponent be in court (*m*).

Proceedings in Bankruptcy.

Proceedings in Bankruptcy.] Certain proceedings on fiats of bankruptcy must be entered of record, as directed by stats. 6 *G.* 4, *c.* 16, *s.* 95; 1 & 2 *W.* 4, *c.* 56, *s.* 13, and 2 & 3 *W.* 4, *c.* 114, before they can be produced in evidence; all other proceedings in bankruptcy the Lord Chancellor may, upon petition, order to be entered of record (*n*). And by sect. 97 of 6 *G.* 4, *c.* 16, office-copies shall be good evidence of every original instrument or writing filed in the office or officially in the possession of the Lord Chancellor's secretary of bankrupts (*o*).

Proceedings in Insolvent Court.

Proceedings in Insolvent Court.] By 7 *G.* 4, *c.* 57, *s.* 74, and 1 & 2 *V. c.* 110, *s.* 105, office-copies of proceedings in the Insolvent Court are made evidence (*p*). The seal of the Insolvent Court proves itself (*q*).

Proceedings in Ecclesiastical Courts.

Proceedings in the Ecclesiastical Courts.] The libel, answer, and depositions, in the ecclesiastical and admiralty courts, are proved in the same manner as the bill, answer, and depositions in courts of equity, by examined copies (*r*).

Probate of Will.

The probate of a will, under the seal of the ecclesiastical court, is sufficient evidence to prove a will of personal property (*s*), or that J. S. is executor, or the like; and the seal of the court sufficiently authenticates it, without further proof (*t*). But the probate is not the only evidence of the will being proved; for the act book of the ecclesiastical court, containing an entry of the will having been proved, and of probate granted to the executors therein named, is evidence of those persons being executors (*u*). So are minutes of the proof of the will, and sealing of the probate, indorsed on the will by the surrogate and registrar of the ecclesiastical court, at least if no other record of such grant be kept (*x*).

Grant of Administration.

Grant of administration is proved by production of the letters of administration, or an exemplification thereof (*y*), or a certificate from the ecclesiastical court, that administration was granted; or you may get a clerk from the ecclesiastical court to attend with the book in which the order for granting administration was entered (*z*); or you may prove it by an examined copy of the registry (*a*).

Proceedings

Proceedings in Admiralty Court.] The libel, answer, depo-

(*m*) *Brickill* v. *Hulse*, 7 Ad. & E. 454; 2 Nev. & P. 429, *S. C.*

(*n*) 6 G. 4, c. 16, s. 96.

(*o*) See Arch. Bankrupt Law, 266, 267, 273: and see, as to the evidence generally in cases of bankruptcy, Id.

(*p*) See *Carpenter* v. *Waite*, 3 Moore, 331: *Neal* v. *Isaacs*, 4 B. & C. 335; 6 D. & R. 484, *S. C*: *Gould* v. *Hulme*, 3 C. & P. 625: *Pascall* v. *Brown*, 3 Stark., N. P. C. 54: *Delafield* v. *Freeman*, 6 Bing. 296: *Scott* v. *Clare*, 3 Camp. 236; *Jeffrey* v. *Robinson*, 5 C. & P. 230: *Doe Phillips* v. *Evans*, 1 C. & M. 450. *Quære* if they be evidence, except for the *insolvent* and the creditors? (*Nicholls* v. *Downes*, 2 M. & M. 13).

(*q*) *Doe Dunoan* v. *Edwards*, 1 Per. & D. 408.

(*r*) Rosc. 80.

(*s*) *R.* v. *Barnes*, 1 Stark. 243: *Pinney* v. *Pinney*, 8 B. & C. 335.

(*t*) 1 Ro. Abr. 678: 4 T. R. 258: *Hoe* v. *Nelthrove*, 3 Salk. 154; Bull. N. P. 246; Rosc. 81.

(*u*) *Cox* v. *Allingham*, Jacobs, 514.

(*x*) *Doe Bassett* v *Mew*, and *Doe* v. *Gunning*, 7 Ad. & El. 240; 2 Nev. & P. 260. *S C*

(*y*) An exemplification of letters of administration, *de bonis non*, reciting the former grant, requires to be stamped only as a single proceeding. (*Doe Edwards* v. *Gunning*, 7 A. & E 240; 2 Nev. & P. 260, *S. C.*)

(*z*) Bull. N. P. 246 2 Bac. Abr., Ev. (F): *Eden* v. *Keddell*, 8 East, 187.

(*a*) *Davis* v. *Williams*, 13 East, 232: see Rosc. 81.

sitions, and sentence in the Admiralty Court are proved by examined copies (*b*).

in Admiralty Court.

Proceedings in inferior Courts not of Record.

Proceedings in Inferior Courts not of Record.] Judgments in a county court, court baron, or other inferior court, may be proved by producing the books in which they are entered, or, it should seem, by examined copies (*c*). It seems, that, in proving the judgment of an inferior court, evidence should also be given of the proceedings previous to the judgment (*d*).

Rolls of Court Baron.

If the rolls of a court baron be intended to be given in evidence, you may get the steward or his deputy to produce them at the trial, or they may be proved by an examined copy (*e*); but judgments of a court baron, or other inferior court not of record, can be proved only by the production of the book in which they are entered (*f*). It has been held, that a surrender and presentment may be proved by a draft of an entry produced from the muniments of the manor, and the parol testimony of the foreman of the homage jury who made such presentment (*g*).

Surrender and Presentment.

Inspection of Rolls of Manor.

The rolls of a manor are open to the inspection of the lord and the copyholders, but not of strangers; and if inspection be refused, the court, upon application, will rule the steward or person in whose possession the rolls are to grant it (*h*). The rule will be absolute in the first instance (*i*). Even a person who has a *primâ facie* title to a copyhold is entitled to inspect the court rolls and take copies of them, so far as relates to the copyhold claimed, although at the time no cause be depending respecting it (*k*). But a freehold tenant of a manor has no right to inspect the court rolls (*l*); at least, not unless some cause be depending relative to the manor, &c., in which his right as tenant may be involved (*m*). The court will in no case grant such an inspection to a prosecutor in a criminal proceeding against the lord (*n*).

Proceedings in Foreign Courts.

Proceedings in Foreign Courts.] The proceedings of courts of justice in foreign countries are proved by copies under the respective seals of such courts; but it is necessary also to prove by parol evidence that the seal affixed thereto is the seal of the court (*o*). If, however, it be proved that the court has not a seal, then proof by an exemplification under the hand of the chief justice of the court (his handwriting being proved) will be received (*p*). But records of the courts in Ireland may be proved by examined copies, in the same manner as the records in this country. It is necessary, however, that the court should be satisfied that it was with a *record* the copy was examined; and therefore, where the witness produced to prove the copy, stated that he examined it with a parchment roll, shewn him in a room over the Four

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(*b*) Rosc. 80.

(*c*) Ib.

(*d*) Com. Dig., Evid. (C 1): *Fisher* v. *Lane*, 2 W. Bl. 836; 3 Wils 297, S. C.

(*e*) *R.* v. *Haines*, Comb. 337, 138: *Bray's case*, 12 Mod. 24; 2 Bac. Abr., Ev. (F): see Peake, Ev. 89: Rosc. 80.

(*f*) Peake, Ev. 76, 80.

(*g*) *Doe* v. *Calloway*, 6 B. & C. 484.

(*h*) Peake, Ev. 95: Rosc. 81.

(*i*) R. H., 2 W. 4, r. 102.

(*k*) R. v. *Lucas*, 10 East, 235.

(*l*) *Smith* v. *Davies*, 1 Wils. 104.

(*m*) *R.* v. *Shelly*, 3 T. R. 141: *R.* v. *Allgood*, 7 T. R. 746.

(*n*) *R.* v. *Earl of Cadogan*, 5 B. & Ald. 902; 1 D. & R. 559, S. C.

(*o*) *Henry* v. *Adey*, 3 East, 221.

(*p*) *Alves* v. *Bunbury*, 4 Camp. 28.

Courts at Dublin, without seeing from whence it was taken, or knowing the person who produced it to be an officer of the court, Lord *Ellenborough* refused to receive it in evidence (*q*).

Foreign Law.

The law of a foreign country, if written, can be proved here only by the production of some authenticated copy (*r*); if unwritten, then by the parol evidence of a witness of competent skill (*s*).

Herald's Books, &c.

Herald's Books, &c.] Where the books or rolls in the Herald's Office are intended to be given in evidence, upon application to the office for that purpose, and leaving there a notice stating when and where the trial is to be had, and the book or roll required, a clerk will attend and produce it at the trial (*t*).

Terriers, Surveys, Maps, &c.

Terriers, Surveys, &c.] Old terriers, surveys, and maps of manors, &c., when evidence, must be produced at the trial, and such circumstances connected with them stated in evidence as may induce the court and jury to give credit to them (*u*).

Inquisitions and Public Surveys.

Inquisitions and Public Surveys.] Public surveys and inquisitions, when evidence, should be produced at the trial; or when an inquisition has been returned and filed, an examined copy may be given in evidence (*x*).

Domesday Book.

Domesday Book, as evidence of lands being ancient demesne, must be produced at the trial, by the officer of the Exchequer in whose custody it is, and be inspected by the judges (*y*). But if the question come incidentally before the court, an examined copy of that part of the book relating to it will be sufficient (*z*).

Customary of a Manor.

A customary of a manor, when evidence, must be produced, and some evidence given to induce the court to believe that it has been handed down from steward to steward with the rolls (*a*).

Registers, Certificates, &c.

Registers, Certificates, &c.] An entry in a parish register of a marriage, christening, or burial, may be proved either by the production of the register itself, or by giving in evidence an examined copy of the entry (*b*). You should also be prepared to prove the identity of the parties married, &c. (*c*). To prove the handwriting of the parties in the register, it is not necessary to call the subscribing witness (*d*).

Ships' Registers, Prison-books, Poll-books, &c.

As to ships' registers, the register of the navy, &c., and as to prison-books, poll-books, entries in a family bible, family pedigrees, examined copies of the inscription on tomb-stones, &c., see *Rosc.* 61, 62.

Certificates of Bishops, &c.

As to certificates of bishops, &c., see *Rosc.* 110, 115. The

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(*q*) *Adamthwaite* v. *Synge*, 4 Camp. 372; 1 Stark. 183, *S. C.*

(*r*) *Clegg* v. *Levy*, 3 Camp. 166.

(*s*) Arch. Pl. & Ev. 372: Rosc. 82.

(*t*) See 2. Bac. Abr., Ev. (F): 3 Bl. Com. 105.

(*u*) See 2 Bac. Abr., Ev. (F): *Bridgman* v. *Jennings*, 1 L. Raym. 734: *Vicar of Kellington* v. *Master &c. of Cambridge*, 1 Wils. 170: *Anon.*, 1 Str. 95: Rosc. 85.

(*x*) See Rosc. 77: *Evans* v. *Taylor*, 3 Nev. & P. 174.

(*y*) *Anon.*, Hob. 188; Tr. per Pais, 342.

(*z*) Arch. Pl. & Ev. 373.

(*a*) See *Denn Goodwin* v. *Spray*, 1 T. R. 466.

(*b*) 2 Bac. Abr., Ev. (F): Peake Ev. 88.

(*c*) See *Birt* v. *Barlow*, 1 Doug. 173, 174; Peake, Ev. 88; Rosc. 84; *Doe Graham* v. *Penfold*, 8 C. & P. 536.

(*d*) *Per* Lord *Mansfield*, 1 Doug. 174.

certificate of a British consul abroad is not admissible in evidence in this country (*e*).

Corporation Books.

Corporation Books, &c.] Entries in corporation books, and the books of public companies, relating to things public and general, may be proved by examined copies (*f*); but if they do not relate to corporate acts, the original must be produced (*g*), and instruments of a private nature must be produced at the trial (*h*). If the books be ancient, it must be shewn that they come from the proper custody, as from the chest which has always been in the custody of the clerk of the corporation (*i*); it is not sufficient that they are brought from a chest found in the house of a former clerk after his death (*i*). A party interested in such entries has a right to inspect them and have copies of them; and if this be refused, the court upon motion, grounded upon an affidavit shewing that the evidence likely to be contained in these books is directly material in the cause, or otherwise shewing satisfactorily the interest he has in them, will order that he shall be at liberty to inspect them and have copies (*k*). But in an action by an attorney for work and labour, as such, against a corporation of which he was a burgess, the action having nothing to do with the affairs of the corporation, *Littledale*, J. refused to grant an inspection of the books (*l*).

The Pope's Bulls, &c.

The Pope's Bulls, &c.] A bull or license of the pope, when intended to be given in evidence, must be produced at the trial (*m*); or perhaps an exemplification of a bull under the bishop's seal would be sufficient (*n*).

Public Acts of State, Almanack, History, &c.

Public Acts of State, History, &c.] The queen's certificate under her sign-manual; the gazette, proclamations, and the articles of war, printed by the queen's printer; the almanack; a general history, &c.,—are all, when evidence, to be produced at the trial (*o*).

4. *Written Instruments of a Private Nature.*

Deeds.

Must in general be produced.

Deeds.] When the deed is to be given in evidence, the general rule is, that the deed itself must be produced at the trial (*p*). To this, however, there are some exceptions, arising from necessity; as, where a deed has been lost, burnt, or otherwise destroyed, the contents of it may be proved by a copy, or other secondary evidence; or where it is in the hands of the opposite party, and he has been served with a notice to produce it, if, after the proof of the service of that notice, he refuses to produce it, the contents of it may then be proved by

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(*e*) *Waldron* v. *Coombe*, 3 Taunt. 162

(*f*) Peake, Ev. 92, 93: *R.* v. *Gordon*, 2 Doug. 593, n. 954, n.: see *Reg.* v. *Ledgard*, 3 Nev. & P. 513.

(*g*) *R.* v. *Gwynn*, 1 Str. 401.

(*h*) Rosc. 83.

(*i*) *Mercers of Shrewsbury* v. *Hart*, 1 C. & P. 14.

(*k*) 3 Bac. Abr., Ev. (F): Peake, Ev. 94, 95: *May* v. *Gwynne*, 4 B. & Ald. 301: *Mayor of Lynn* v. *Denton*, 1 T. R. 689, and n.: *Atherfold* v. *Beard*, 2 Id. 616: *Corporation of Barnstaple* v. *Lathee*, 3 Id. 303: *R.* v. *Holland*, 4 Id. 691; 2 East, 70, *S. C.*: *Mayor of Southampton* v. *Graves*, 8 Id. 590: see *Burrell* v. *Nicholson*, 1 Myl. & K. 680.

(*l*) *Stevens* v. *M. of Berwick*, 1 H. & W. 517.

(*m*) Winch. 70: 2 Bac. Abr., Ev. (F).

(*n*) See Peake, Ev. 92.

(*o*) See Arch. Pl. & Ev. 376, 377: Rosc. 150.

(*p*) 10 Co. 92 b. 93.

secondary evidence. So, if it be in the hands of a third person, who refuses to produce it at the trial, after being served with a *subpœna duces tecum* for that purpose, after proof of that circumstance, and of its having been in his hands on the service of the subpœna or afterwards, secondary evidence of its contents will, it seems, be admitted (*q*). This, however, does not, it seems, dispense with the necessity of proving the due execution of the deed itself, either by a subscribing witness, or by some other evidence, care being taken that such evidence be the best which can possibly be procured, under the peculiar circumstances of the case (*r*). Also, if the contents of the deed be proved by a copy, parol evidence of the correctness of the copy must be given by some person who had compared it with the original (*s*). It must also appear that the deed was properly stamped. But in some cases, in which an instrument has been lost, which is not proved to have been properly stamped, that fact may be presumed: as, where an indenture of apprenticeship, executed thirty years before, was lost, it was presumed to have been properly stamped, though an officer from the Stamp Office proved that it did not appear that any such indenture had been stamped (*t*). And where a party refuses to produce an agreement after notice, it will be presumed as against him to be properly stamped (*u*).

Proof of Execution.

Secondly, as to the proof of the execution of the deed:—If there have been no subscribing witness to it, then proof of the handwriting of the parties will be sufficient (*x*); the law in such a case presuming a delivery. But if the deed were attested, the execution must be proved by at least one of the subscribing witnesses (*y*), unless when the fact of execution is one of the admissions in the cause (*z*); for even the acknowledgment of the party, or his admission in an answer to a bill of discovery, are in this case deemed merely secondary evidence, and not sufficient (*a*). Payment of money into court, however, is considered such an admission of the execution of a deed, as dispenses with the necessity of calling the subscribing witnesses (*b*). It does not appear necessary that the subscribing witness should swear that the deed was actually *executed* in his presence; if he were afterwards desired to attest it by the party who executed it (*c*), or in the presence of the party (*d*), and he attest it accordingly, this will be sufficient, provided the attestation and execution be done so nearly at the same time as fairly to be deemed parts of the same transaction (*e*). On the other hand, a person who even sees an instrument executed, but who is not desired by the parties to attest it, cannot, by afterwards putting his name to it, prove it as an attesting witness (*f*). In proving the execution of a deed, the attesting witness frequently states that

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(*q*) 3 Bac. Abr., Ev. (F): Arch. Pl. & Ev. 377, 378.

(*r*) *Sed vide post*, 233, n. (*t*.)

(*s*) 2 Bac. Abr., Ev. (F).

(*t*) *R.* v. *Long Buckley*, 7 East, 45.

(*u*) *Crisp* v. *Anderson*, 1 Stark. 35.

(*x*) Peake, Ev. 100.

(*y*) *Barnes* v. *Trompowsky*, 7 T. R. 266: Peake, N. P. C. 31: *Manners* v. *Postan*, 4 Esp. 240; 3 B. & P. 343, *S. C.*: Peake, Ev. 100, 103: and see *England* v. *Roper*, 1 Stark. 304.

(*z*) *Milward* v. *Temple*, 1 Camp. 375.

(*a*) *Johnson* v. *Mason*, 1 Esp. 89: *Call* v. *Dunning*, 5 Id. 16; 4 East, 53, *S. C.*: see *Bowles* v. *Langworthy*, 5 T. R. 366.

(*b*) *Randall* v. *Lynch*, 2 Camp. 357.

(*c*) *Grellier* v. *Neale*, Peake, N. P. C. 146: *Powell* v. *Blackett*, 1 Esp. 97.

(*d*) *Park* v. *Mears*, 3 Esp. 171; 2 B. & P. 217, *S. C.*

(*e*) MS., E. 1814.

(*f*) *M'Craw* v. *Gentry*, 3 Camp. 2

he does not recollect the fact of the deed being executed in his presence; but that seeing his own signature to it, he has no doubt that he saw it executed; and this has been always received as sufficient proof of the execution (*g*).

Cases where Execution need not be proved by attesting Witness.

To this rule of proving the execution by the evidence of an attesting witness, or otherwise, there are many exceptions. *First*, where money has been paid into court, as above mentioned, it dispenses with the necessity of proving the deed upon which the action is founded; and the same when the execution is one of the admissions in the cause. *Secondly*, where the deed is thirty years old or upwards, the court will presume that it has been duly executed, and will not require it to be proved (*h*); provided possession have followed the deed, or that some satisfactory account be given of it, and provided there be no rasure or interlineation in it, and that it do not import fraud; otherwise it must be proved as in ordinary cases, either by the attesting witness or by the evidence of his and the party's handwriting (*i*). *Thirdly*, where a deed enrolled (and to which enrolment was necessary) is given in evidence, it is not necessary to prove the execution of it by the subscribing witness; but it may be proved by the enrolment indorsed on it, or, if the deed be lost, by an examined copy of the enrolment, as already mentioned (*ante*, 219). *Fourthly*, where one deed is recited in another, proof of the second deed is deemed proof of so much of the former deed as is recited (but no more) (*l*), and that only as between the parties to the second deed, and those claiming under them (*m*). *Fifthly*, if the name of a fictitious person be put as the only subscribing witness, evidence of the handwriting of the party alone will be sufficient (*n*). So, if the subscribing witness be since dead (*o*); or have become insane (*p*) or blind (*q*), or be abroad, out of reach of the process of the court (*r*), whether domiciled there or not (*s*); or if he have set out for the purpose of leaving the kingdom (*t*); or if, from circumstances, it may fairly be presumed that he has left the kingdom (*u*); or if it appear that he is serving in the navy (*x*), or the like; or if, after a *bonâ fide*, serious, and diligent inquiry, he cannot be found (*y*); or if he be interested in the event of the suit (*a*), or

(*g*) *Maugham* v. *Hubbard*, 2 M. & R. 7; 8 B. & C. 16, *S. C.*

(*h*) Bull. N. P. 255: *Chelsea Water Works Company* v. *Cowper*, 1 Esp. 275, 278.

(*i*) 3 Bac. Abr., Ev. (F) Bull. N. P. 255: *Doe* v. *Woolley*, 8 B. & C. 22; Rosc. 93: and see *Swinnerton* v. *Marquis of Stafford*, 3 Taunt. 91.

(*l*) *Gillett* v. *Abbott*, 3 Nev. & P. 24; 7 Ad. & E. 783.

(*m*) 2 Bac. Abr., Ev. (F): *Ford* v. *Grey*, 1 Salk. 285: see *Lampon* v. *Corke*, 5 B. & Ald. 607; 1 D. & R. 211, *S. C.*

(*n*) *Fassett* v. *Browne*, Peake, N. P. C. 23.

(*o*) Rosc. 87: *Nelson* v. *Whittall*, 1 B. & Ald. 19: and see *Doe* v. *Jesson*, 6 East, 85.

(*p*) 12 Viner's Abr. 224: *Currie* v. *Child*, 3 Camp. 283.

(*q*) See *Wood* v. *Drury*, 1 L. Raym. 734: *Pedler* v. *Page*, 1 M. & Rob. 258.

(*r*) Peake, N. P. C. 99: *Cooper* v. *Marsden*, 1 Esp. 2: *Barnes* v. *Trompowsky*, 7 T. R. 265; 12 Vin. Abr. 224: and see *Hodnett* v. *Forman*, 1 Stark. 90.

(*s*) *Prince* v. *Blackburn*, 2 East, 250.

(*t*) *Ward* v. *Wells*, 1 Taunt. 461.

(*u*) *Wardell* v. *Fermor*, 2 Camp. 282: *Hay* v. *Brookman*, 3 C. & P. 555.

(*x*) *Parker* v. *Hoskins*, 2 Taunt. 223.

(*y*) *Coghlan* v. *Williamson*, 1 Doug. 93: *Cunliffe* v. *Sefton*, 2 East, 183: *Barnes* v. *Trompowsky*, 7 T. R. 266: *Crosby* v. *Percy*, 1 Camp. 303; 1 Taunt. 364, *S. C.*: *Wardell* v. *Fermor*, 2 Camp. 282: *Pytt* v. *Griffith*, 6 Moore, 538: *Burt* v. *Walker*, 4 B. & Ald. 697: *Hill* v. *Phillips*, 5 C. & P. 356: *Willman* v. *Worrall*, 8 C. & P. 380. Where a witness could not be found after sufficient inquiry, it was held that evidence of his handwriting was admissible, although a letter not disclosing his retreat had been received from him a few days before the trial. (*Morgan* v. *Morgan*, 2 M. & Scott, 491; 9 Bing. 359, *S. C.*)

(*a*) *Buckley* v. *Smith*, 2 Esp. 697: *Swire* v. *Bell*, 5 T. R. 371: *Godfrey* v. *Norris*, 1 Str. 34; Peake, Ev. 100.

Cases where Execution need not be proved by attesting Witness.

become subsequently incompetent as a witness (*b*); then, upon proof of any one of these circumstances, you will be permitted to give secondary evidence of the execution of the deed, that is, you may prove the deed by proving the handwriting of the witness and party (*c*). But it is not a sufficient ground for admitting evidence of the witness's handwriting, that he is unable to attend from illness, and lies without hope of recovery (*d*). If there be two witnesses to the deed, and any of the circumstances just now mentioned apply only to one of them, the deed must of course be proved by the other (*e*). Also, by stat. 26 *G.* 3, *c.* 56, *s.* 38, deeds executed in the East Indies, when the subscribing witnesses are resident there, may be given in evidence in Great Britain, upon proof of the handwriting of the parties and of the witnesses. *Sixthly*, if the deed appear to be attested by one or more persons, but in point of fact these persons never saw the deed executed or delivered, the attestation may be deemed a nullity, and the deed be proved by proving the handwriting of the party (*f*). *Seventhly*, where a party producing a deed under a notice to produce claims a beneficial interest under it, it will not be necessary for the party calling for the deed to prove the execution of it (*g*). But this rule does not apply to a case where the party has had it so long in his possession (as nine months) that he might have been prepared to prove the execution (*h*). *Eighthly*, where a party in the cause is in possession of a deed, and has had notice to produce it, but does not do so, then, on proof of the service of such notice and of his possession of the deed, the opposite party need not prove his execution of it. At all events, where the plaintiff declared on a deed which he averred to be in the possession of the defendant, who pleaded *non est factum*, and at the trial the deed was proved to be in the hands of the defendant, who had been served with notice to produce, it was held, that, on the non-production of the deed, the plaintiff might give parol evidence of the contents without calling the subscribing witness, who was in court (*i*). *Ninthly*, if the deed be lost, and it is not proved that the party proving the deed knew the names of the subscribing witnesses, he may recover without subpœnaing them (*k*).

Will of Lands.

To prove a will of lands, it is only necessary to call one of the witnesses who attested it (*l*); if the opposite party wish, he may call the other two (*m*). The witnesses called, however, should be prepared to give parol evidence of every circum-

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(*b*) *Jones* v. *Mason*, 2 Str. 833: see *Hovill* v. *Stephenson*, 3 Moo. & P. 146; 5 Bing. 493, 496, *S. C.*

(*c*) See *Nelson* v. *Whittall*, 1 B. & Ald. 19: *Adam* v. *Kerr*, 1 B. & P. 360.

(*d*) *Harrison* v. *Blades*, 3 Camp. 457: *Doe* v. *Evans*, 3 C. & P. 221.

(*e*) Arch. Pl. & Ev. 379.

(*f*) *Fitzgerald* v. *Elsee*, 2 Camp. 635, 636: *Ley* v. *Ballard*, 3 Esp. 173, n.; Peake, N. P. C. 146: *Talbot* v. *Hodson*, 7 Taunt. 251; 2 Marsh, 527, *S. C.*: *Boxer* v. *Rabith*, Gow, 175: but see *Phipps* v. *Parker*, 1 Camp. 412: *Goodtitle* v. *Clayton*, 4 Bur. 2224.

(*g*) *Pearce* v. *Hooper*, 3 Taunt. 62: *Orr* v. *Morice*, 3 B. & B. 139; 6 Moore, 347, *S. C.*: *Burnett* v. *Lynch*, 5 B. & C. 589; 8 D. & R. 368, *S. C.*: *Doe* v. *Heming*, 6 B. & C. 28; 9 D. & R. 15, *S. C.*: *Gordon* v. *Secretan*, 8 East, 548: *Doe* v. *Wainwright*, 1 Nev. & P. 8, S. P.; as to livery of seisin, Ib.

(*h*) *Vacher* v. *Cocks*, 1 B. & Adol. 147: see *Carr* v. *Burdiss*, 1 C., M. & R. 782.

(*i*) *Cook* v. *Tanswell*, 8 Taunt. 450; 2 Moore, 513, *S. C.*: *Jackson* v. *Allen*, 3 Stark. 74: *Dixon* v. *Haigh*, Esp. 409: see *Poole* v. *Warren*, 3 Nev. & P. 293: Rosc. 94, 95.

(*k*) *Keeling* v. *Ball*, Peake, Ev. App. 82: *Gillies* v. *Smither*, 2 Stark. 528.

(*l*) Peake, Ev. 103: *Doe* v. *Smith*, 1 Esp. 391; Skin. 413: *Holdfast* v. *Dowsing*, 2 Str. 1253; 1 W. Bl. 8, *S. C.* This is the general rule at law, but on an issue out of Chancery, directed in a suit instituted by the devisee, to establish the will against the heir at-law, all the witnesses ought to be called. (*Booth* v. *Blundell*, 19 Ves. 494: 1 Cooper, 136: see *Tatham* v. *Wright*, 2 Russ. & M. 1, 17).

(*m*) Bull. N. P. 264.

stance attending the attestation, necessary to shew that the will was duly executed and attested according to the directions of the statute. A will of personal property only is proved by the probate, as mentioned *ante*, 221 (*n*).

Proof of Handwriting.

The *handwriting* of a witness or party may be proved by some person who has a knowledge of it, either from having seen him write (*o*), or from having been in the habit of corresponding with him (*p*); or from his belief founded on rational grounds (*q*); or the handwriting of a party may be proved by his own acknowledgment or admission (*r*). But it cannot be proved by comparing it with other writings, although confessedly of his handwriting (*s*); unless where the writing admitted to be genuine is already in evidence in the cause (*t*); or, perhaps, where the writing is so ancient that no witness can be found who can prove it (*u*); these exceptions are of necessity, and the court or jury may always make such comparison (*v*). A person who is skilled in the detection of forgeries, may, it seems, prove that the writing is in a feigned hand, though he never saw the party write (*x*); but this has been since questioned, and with good reason (*y*). In a late case, where this subject was much discussed, it seems to have been settled, that an opinion as to handwriting formed by the witness on an *immediate* comparison at the trial is inadmissible (*z*). In the same case, the attesting witness to a disputed will being called, admitted that certain specimens put into his hand were of his writing, and that certain signatures made to depositions in the ecclesiastical court were also his; an inspector at the Bank, skilled in handwriting, who had previously gained a knowledge of the witness's handwriting by inspection of these admitted specimens only, was called to prove that the attestation to the will was not in the handwriting of the witness, *Vaughan*, J., ruled that the evidence was inadmissible. On motion for a new trial the evidence was held to be admissible by Lord *Denman*, C. J., and *Williams*, J.; inadmissible by *Patteson*, J., and *Coleridge*, J. (*z*).

Stamp.

Care must be taken that the deed be properly stamped (*a*).

Writings not under Seal.

Writings not under Seal.] Writings not under seal are proved in the same manner as deeds; that is, by the subscribing witness, if there be one (*b*); or if not, then by proof of the party's handwriting (*c*). A warrant to distrain (*d*), or

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(*n*) *Gorton* v. *Dyson*, 1 B. & B. 219; 3 Moore, 558, *S. C.*: *Pinney* v. *Pinney*, 8 B. & C. 335: and see further, Rosc. 96.

(*o*) Rosc. 92: and see *Garrets* v. *Alexander*, 4 Esp. 37: *Stranger* v. *Searle*, 1 Id. 14: *Lewis* v. *Sapio*, 1 M. & M. 39.

(*p*) *Gould* v. *Jones*, 1 W. Bl. 384: *Harrington* v. *Fry*, R. & M. 99: *R.* v. *Slaney*, 5 C. & P. 213.

(*q*) *Reg.* v. *Murphy*, 8 C. & P. 297: *Jarrells* v. *Alexander*, 4 Esp. 37: *Burr* v. *Harper*, Holt, C. N. P. 420.

(*r*) *Waldridge* v. *Kennison*, 1 Esp. 143.

(*s*) *Macferson* v. *Thoytes*, Peake, N. P. C. 20: *Greaves* v. *Hunter*, 2 C. & P. 477: *Stranger* v. *Searle*, 1 Esp. 14: *Burr* v. *Harper*, Holt, C. N. P. 420.

(*t*) *Doe Parry* v. *Newton*, 1 Nev. & P. 1: see *Allesbrook* v. *Roach*, 1 Esp. 351: *Goodtitle* v. *Braham*, 4 T. R. 497: Peake, Ev. 106 to 108, and App. lxxxi. to lxxxiv.

(*u*) Gilb Ev. 25, 26: see *Brookbard* v. *Woodley*, Peake, N. P. C. 20, n.: *Taylor* v. *Cook*, 8 Price, 652.

(*v*) *Griffith* v. *Williams*, 1 C. & J. 47: *Allport* v. *Meek*, 4 C. & P. 267.

(*x*) *R.* v. *Cator*, 4 Esp. 117: *Stranger* v. *Searle*, 1 Id. 14: *Goodtitle* v. *Braham*, 4 T. R. 497: see *Batchelor* v. *Honeywood*, 2 Esp. 714.

(*y*) *Gurney* v. *Langlands*, 5 B. & Ald. 330: see *Doe* v. *Suckermore*, 2 Nev. & P. 16.

(*z*) *Doe Mudd* v. *Suckermore*, 2 Nev. & P. 16: 5 A. & El. 703, *S. C.*

(*a*) See Rosc. 154.

(*b*) *Wetherston* v. *Edgington*, 2 Camp. 94: *Stone* v. *Metcalf*, 1 Stark. 53; 4 Camp. 217, *S.C.*: *Higgs* v. *Dixon*, 2 Stark. 180: see *Barnes* v. *Trompowsky*, 7 T. R. 266.

(*c*) Arch. Pl. & Ev. 381: Rosc. 8.

(*d*) *Higgs* v. *Dixon*, 2 Stark. 180.

notice to quit (*e*), if attested, must be proved by the attesting witness. It is said, also, that an ancient writing of this kind shall be received in evidence without proof, in the same manner as an ancient deed (*f*). If lost or destroyed, copies, or other secondary evidence of their contents, will be received; but evidence must be given, at the same time, of the genuineness of the original instrument (*g*).

Bill of Exchange or Promissory Note.

In an action by a payee against the acceptor of a bill of exchange, or against the maker of a promissory note, on an issue denying the defendant's acceptance of the bill or making of the note, you must produce the note or bill, and prove the handwriting of the defendant (*h*). If the action be brought by an indorsee, and the indorsements be also put in issue, he must also prove the handwriting of the first indorser, and of the intermediate indorsers if they be mentioned in the declaration and their indorsements be put in issue (*h*). In an action by indorsee against an indorser of a bill of exchange or promissory note, or drawer of a bill of exchange, on an issue disputing the indorsement, you must produce the bill or note, and prove the defendant's handwriting; you must also, if the presentment be denied, prove a presentment for payment or acceptance, and refusal, and that the defendant had due notice thereof. If it be a foreign bill of exchange, the non-payment or non-acceptance is proved by the mere production of the protest, without further proof. The notice must be proved by the person who either left it, or put the letter containing it into the post-office. If an averment of want of effects to excuse the notice of dishonour in an action against the drawer or indorser be put in issue, you should be prepared to prove that he had no effects in the hands of the drawee, from the time of the drawing of the bill until the time of the non-payment or non-acceptance (*h*).

Awards.

Awards.] An award is proved in the same way as a deed or other written instrument. The submission must be proved as well as the award (*i*). As to proof of awards by Commissioners of Inclosure Acts, see Roscoe, 5th ed. 101.

Books of Accounts, &c.

Books of Accounts, &c.] When an entry in a book of accounts is evidence, the book must be produced at the trial, and either proved by the clerk who made the entry (*k*), or (where the effect of the entry is to charge the clerk who made it) (*l*) by proof of the clerk's death, and then proving his handwriting (*m*); but proving that he is abroad is not sufficient (*n*); and even where his death can be proved, this evidence is admissible only within a year after the making of the entry, if the books be those of a "tradesman or handicraftsman," and produced for the purpose of establishing a debt against one of his cus-

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(*e*) *Doe* v. *Durnford*, 2 M. & Sel. 62.

(*f*) Tr. per Pais, 370: Rosc. 93: see *per cur.*, *Doe Spilsbury* v. *Burdett*, 6 N. & M. 259: but see Fortesc. 43.

(*g*) See 1 Atk. 446: see Arch. Pl. & Ev. 382.

(*h*) Peake, Ev. 234, 235.

(*i*) Rosc. 100.

(*k*) *Cooper* v. *Marsden*, 1 Esp. 1.

(*l*) *Calvert* v. *Archbishop of Canterbury*, 2 Id. 646: *Barry* v. *Bebbington*, 4 T. R. 514: and see *Roe* v. *Rawlings*, 7 East, 279: *Higham* v. *Ridgway*, 10 Id. 109: *Doe* v. *Robson*, 15 Id. 32.

(*m*) *Pitman* v. *Maddox*, 2 Salk. 690; 1 L. Raym. 732, *S. C.*: *Price* v. *Torrington*, 1 Salk. 285; 2 L. Raym. 873, *C. S.*

(*n*) *Cooper* v. *Marsden*, 1 Esp. 1: and see *Digby* v. *Steadman*, Id. 328: Bull. N. P. 282.

tomers (*o*); which has been holden to extend to entries in a banker's books (*p*). But a tradesman's books, or other books of accounts, if produced at a trial, may be good evidence against the owner (*q*), or between other parties (*r*), after the year. Entries made by a deceased collector of rates, charging himself with the receipt of money, and made by him in the public books of his office, are admissible against his surety to prove the receipt (*s*); and so with respect to the entries of a clerk (*t*). Entries in the land-tax collector's books, stating A. B. to be rated for a particular house, and his payment of the sum rated, are evidence to shew that A. B. was occupier of the premises at the time (*u*).

Notice to produce Papers, &c.

Notice to produce Papers, &c.] If the adverse party be in possession of any written instrument, which would be evidence for you, if produced, you may serve either him or his attorney or agent (*x*) with a notice to produce it at the trial (*y*).

Form of.

The notice must specify the instrument with a particularity sufficient to inform the opposite party which he is called on to produce (*z*). A notice to produce "all and every letters written by the plaintiff to the defendant, relating to the matters in dispute in the action," is sufficient to let in secondary evidence of a particular letter, although it do not specify the date of such letter (*a*).

Time of Service.

The notice must be served a reasonable time before the trial, so as to enable the party served to make an effectual search, and produce the same at the proper time (*b*). Service of a notice on the opposite attorney even on the evening previous to the trial is in general sufficient, if the document to be produced is then in the hands of the attorney, otherwise not (*c*). If a party himself be abroad, a notice served on the 13th December, between five and six in the afternoon, upon his attorney, to produce documents at the trial, which is to take place on the 15th December, is sufficient (*d*). A notice to produce an agreement served upon the defendant's attorney at five o'clock on the commission day of the assizes, was held too late, the attorney having left home for the assize town, which was nine miles distant from his office, and the opposite party refusing to furnish him with a conveyance (*e*). And it has been held, that a notice to produce served on the wife of the defendant's attorney at his lodgings, in the evening of the day before the trial, is too short (*f*); and at the assizes a notice to produce served in the

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(*o*) 7 J. 1, c. 12.

(*p*) *Sikes* v. *Marshall*, 2 Esp. 705.

(*q*) Tr. per Pais, 348.

(*r*) *Higham* v. *Ridgway*, 10 East, 109.

(*s*) *Goss* v. *Watlington*, 3 B. & B. 132; 6 Moore, 355, *S. C.*: see *M'Gahey* v. *Alston*, 2 M. & W. 211: *Middleton* v. *Melton*, 10 B. & C. 317: see cases &c. in *Glendow* v. *Atkin*, 1 C. & M. 410. The party must be dead. (*Stephen* v. *Gwenap*, 2 M. & M. 120).

(*t*) *Whitnash* v. *George*, 8 B. & C. 556.

(*u*) *Doe* v. *Cartwright*, R. & M. 62.

(*x*) See *Cates* v. *Winter*, 3 T. R. 306: *Houseman* v. *Roberts*, 5 C. & P. 394.

(*y*) Peake, Ev. 109: *Attorney-General* v. *Le Merchant*, 2 T. R. 201, n.: see *Baldney* v. *Ritchie*, 1 Stark. 338: *Harvey* v. *Morgan*, 2 Id. 17: *Graham* v. *Dyster*, Id. 21; 6 M. & Sel. 1 *S. C.*: *Sideways* v. *Dyson*, 2 Stark. 49: and see form of notice, Chit. Forms, 54.

(*z*) See *France* v. *Lucy*, R. & M., C. N. P. 341: *Jones* v. *Edwards*, M'C. & Y. 139.

(*a*) *Jacob* v. *Lees*, 2 M. & Rob. 33.

(*b*) Chit. Sum. Prac. 178.

(*c*) See *per Gurney*, B., in *Atkins* v *Meredith*, 4 Dowl. 659: *Byrne* v. *Harvey*, 2 M. & Rob. 89.

(*d*) *Bryan* v. *Wagstaff*, 2 C. & P. 126.

(*e*) *George* v. *Thompson*, 4 Dowl. 656.

(*f*) *Doe* v. *Grey*, 1 Stark. 283: *Sims* v. *Kitchen*, 5 Esp. 46: and see *Houseman* v. *Roberts*, 5 C. & P. 394: *Byrne* v. *Harvey*, 2 M. & Rob. 89.

assize town is in general too late (*g*). So is a notice served in the morning of the day of trial before the sheriff (*h*).

When unnecessary.

There is no occasion to give a notice to produce a mere notice; for the copy of a notice is itself deemed an original, and may be given in evidence, with proof of service, without notice to produce the counterpart delivered (*i*). So, it seems, secondary evidence may be given of a notice of the dishonour of a bill, without a notice to produce it (*j*). So the demand of the copy of a warrant, in an action against a constable, may be proved by a copy without giving notice to produce the original (*k*). The copy of an attorney's bill has also been holden to be sufficient evidence, without notice to produce the original delivered (*l*); but the bill in such a case can be proved only by such copy or counterpart, and not from the attorney's books (*m*). Also it has been holden, that in trover for the certificate of a ship's registry, the certificate may be proved by the production of the registry from which it was copied, though no notice was given to produce the certificate itself (*n*). So, in trover for a bond, the plaintiff will be allowed to give parol evidence of it, to support the general description of the instrument in the declaration, without giving notice to produce the original (*o*).

Consequence of Want of.

If the instrument required be in court at the time of the trial, and no notice was given to produce it, the court would not, it seems, allow secondary evidence of it, even if the party in whose possession it is, refuse to have it given in evidence (*p*).

Time for producing in pursuance of.

The time for producing documents, &c., pursuant to this notice, is not until the opposite party has entered on his case (*q*).

Proof after Notice to produce.

It is optional with the party, upon whom the notice has been served, to produce the instrument required, or not. If he do not, then, upon proving the service of the notice, you will be permitted to prove the contents of the instrument by a copy or other secondary evidence, in the same manner as if it had been destroyed or lost (*r*). It has been holden also, that when such secondary evidence is received, it is not necessary to prove the execution of the original; but this may be doubted. (*See ante*, 227). But if the instrument be produced, you must prove it in the regular way (*s*), (except where the party producing it claims a beneficial interest under it (*t*),) and a judge, upon summons, will probably grant you an order previously for an inspection, in order that you may be aware of the evidence necessary to prove the execution (*u*).

(*g*) *Bryan* v. *Wagstaff*, 2 C. & P. 127; 5 B. & C. 314, *S. C.*: *R.* v. *Ellicombe*, 1 M. & Rob. 260: *Hargest* v. *Fothergill*, 5 C. & P. 303, n.

(*h*) *Phillips* v. *Meredith*, 2 Jurist, 48.

(*i*) *Colling* v. *Treweek*, 6 B. & C. 398: *Gotlieb* v. *Danvers*, 2 Esp. 455: *Surtees* v. *Hubbard*, 4 Id. 203.

(*j*) *Ackland* v. *Pearce*, 2 Camp. 599: *Roberts* v. *Bradshaw*, 1 Stark. 28: *Kine* v. *Beaumont*, 3 B. & B. 288; 7 Moore, 112, *S. C.*

(*k*) *Jory* v. *Orchard*, 2 B. & P. 39.

(*l*) *Colling* v. *Treweek*, 6 B. & C. 398: *Anderson* v. *May*, 2 B. & P. 237; 3 Esp. 167, *S. C.*

(*m*) *Philipson* v. *Chase*, 2 Camp. 110.

(*n*) *Bucher* v. *Jarratt*, 3 B. & P. 143.

(*o*) *How* v. *Hall*, 14 East, 274: *Scott* v. *Jones*, 4 Taunt. 865: see *Cowan* v. *Abrahams*, 1 Esp. 50: *Colling* v. *Treweek*, 6 B. & C. 398.

(*p*) Rosc. 5: see *Roe* v. *Harvey*, 4 Bur. 2484.

(*q*) *Graham* v. *Dyster*, 2 Stark. 22; 1 M. & Sel. 1, *S. C.*: *Sideways* v. *Dyson*, 2 Stark. 49.

(*r*) See *Graham* v. *Dyster*, 2 Stark. 21; 6 M. & Sel. 1, *S. C.*: *Sideways* v. *Dyson*, 2 Stark. 49: *Grove* v. *Ware*, Id 174: *Gorton* v. *Dyson*, 1 B. & B. 219; 3 Moore, 558,

(*s*) *Wetherston* v. *Edgington*, 2 Camp. 94: *Gordon* v. *Secretan*, 8 East, 548, 549: *Johnson* v. *Lewellin*, 6 Esp. 101: but see *Pearce* v. *Hooner*, 3 Taunt. 60: *R.* v. *Inhabitants of Middlezoy*, 2 T. R. 41.

(*t*) *Carr* v. *Burdiss*, 1 C., M. & R. 782: see *Doe* v. *Wainwright*, 5 A. & E. 520; 1 Nev. & P. 8.

(*u*) See *King* v. *King*, 4 Taunt. 666.

Ship's Articles.

There is an exception to this rule in the case of ship's articles, when they come out of the hands of the adverse party upon notice, in an action by a seaman for wages; the articles being then evidence of themselves, by stat. 5 & 6 *W.* 4, *c.* 19, s. 3 (*v*).

Compelling Production of Books, Papers, &c. at Trial.

There are many cases, also, where the court, under circumstances, will compel a party, by rule, to produce books, papers, &c., at the trial (*w*). In an action upon a policy of insurance, a judge at chambers has made a general order on the assured to produce upon affidavit all papers in his possession relating to the cause (*x*). (*See further as to this, post, Vol. II. Book IV. Part I. Ch.* 14).

5. *Witnesses, compelling Attendance of, &c.*

As to your witnesses: ascertain exactly what each of them can prove, and take a memorandum of their evidence, in order to insert it accurately in your brief (*y*).

Subpœna.

Process against Witnesses.] If you are not certain that your witnesses will attend at the trial voluntarily, and give evidence, you must subpœna them; for it has been holden, that even a person actually present at the trial may, in a civil cause, refuse to be sworn as a witness, unless he have been duly subpœnaed (*z*). In ordinary cases the common subpœna is sufficient process to compel the attendance of your witness. *Engross it on plain parchment* (*a*); *you may include the names of four witnesses in one writ* (*b*). *Take it, together with a præcipe* (*c*), *to one of the masters and get it signed. Take it to the sealer of the writs and get it sealed. Then make out a copy of the subpœna* (*d*) *for each witness, and serve it upon him personally, at the same time shewing him the writ* (*e*), *and paying or tendering to him* 1*s. in town causes, if he live within the weekly bills of mortality; or his reasonable expenses if he live at a greater distance, or the action is to be tried at the assizes* (*vide post*, 236, 237). The witness should be served a reasonable time before the trial (*f*); a service in London at two o'clock in the afternoon, for a witness to attend the sittings at Westminster on the same afternoon, is too short (*g*); but if he be in court at Westminster or London at the time of the trial, and live within the

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(*v*) See *Johnson* v. *Lewellin*, 6 Esp. 101: *Bowman* v. *Manzzelman*, 2 Camp. 315. For other exceptions, see *ante*, 226, *et seq.*

(*w*) *Roe* v. *Harvey*, 4 Bur. 2189: *Geery* v. *Hopkins*, 2 L. Raym. 851; 7 Mod. 129, *S. C.*: *Goater* v. *Nunnely*, 2 Str. 1130.

(*x*) *Goldschmidt* v. *Marryat*, 1 Camp. 562: and see *Clifford* v. *Taylor*, 1 Taunt. 167.

(*y*) See, as to the competency of witnesses, Rosc. Ev. 103, &c.; as to the credit of witnesses, Id. 129, &c.: as to when you will not be allowed the expense of a witness to prove a public record, &c., or a public or private document, see *ante*, 213.

(*z*) *Bowles* v. *Johnson*, 1 W. Bl. 37; 2 Bac. Abr., Evidence (D).

(*a*) See the form, Chit. Forms, 55: and see Holt, C. N. P. 526.

(*b*) *Doe* v. *Andrews*, Cowp. 846.

(*c*) See the form, Chit. Forms, 54.

(*d*) The name of a witness, although not in the original subpœna, may be inserted therein at any time, if he have been regularly served with a copy; (*Holt*, C. N. P. 526); *sed quære.*

(*e*) *Thorpe* v. *Gisbourne*, 11 Moore, 55; 3 Bing. 223, *S. C*: *Wadsworth* v. *Marshall*, 1 C. & M. 87: *Jacob* v. *Hungate*, 3 Dowl. 456.

(*f*) *Hammond* v. *Stewart*, 1 Str. 510. It must be served before the time mentioned in it for the witnesses' attendance, otherwise no attachment will be granted. (*Alexander* v. *Dixon*, 1 Bing. 366). Where, however, the subpœna required the attendance of the witness on the 31st March, and so on from day to day till the cause should be tried, and it was served on the 2nd April, with notice that sufficient time remained for witness to repair to the place of trial, and the trial took place on the 6th, when the plaintiff was nonsuited for want of the witness's evidence, it was held, that the witness was liable to an action. (*Davies* v. *Lovell*, 7 Dowl. 178, *S. C.*)

(*g*) *Hammond* v. *Stewart*, 1 Str. 510: *Sims* v. *Kitchen*, 5 Esp. 46, Tidd, 806.

bills of mortality (*h*), it will be sufficient if you serve the copy of the subpœna on him then (*i*). On trials at the assizes, the copy must be served before the commission day on parties living away from the assize town (*k*). The service should be personal, and the original subpœna must be shewn; for otherwise, if he disobey the subpœna, he cannot be proceeded against by attachment (*l*). If the cause be made a *remanet*, the subpœna must be re-sealed, and a copy of the subpœna again served (*m*).

Subpœna duces tecum.

If a person who is not a party to the cause, or a defendant who has suffered judgment by default (*n*) have in his possession any written instrument, &c., which could be evidence for you at the trial, instead of the common subpœna, *you must serve him with a subpœna duces tecum, commanding him to bring it with him and produce it at the trial* (*o*). *Let it be signed, sealed, and a copy served, in the same manner as the common subpœna.* Upon being served with a copy of this subpœna, he must attend at the trial with the instrument required, and produce it in evidence, unless he have some lawful or reasonable excuse for withholding it; of the validity of which excuse the court, and not the witness, is to judge (*p*). It is no excuse that the legal custody of the instrument belongs to another, if it be in the actual possession of the witness (*q*); but if it tend to criminate himself (*r*), or his client, (if the witness be an attorney (*s*),) or if it be his title-deed (*t*), the court will not compel him to produce it. If the witness, instead of bringing the papers, &c., required, deliver them to the opposite party, by whom they are withheld, the court will allow secondary evidence of the contents of them to be given, without a notice to produce the originals (*u*). A witness producing papers under a *subpœna duces tecum* need not be sworn unless he be examined (*x*).

Habeas Corpus ad testificandum where Witness is in custody.

If the witness be in custody at the time of the trial, the only way of bringing him into court to give evidence is by *habeas corpus ad testificandum*. This writ is obtained upon motion in court, or application to a judge at chambers, founded upon an affidavit, stating that he is a material witness, and willing to attend (*y*). The court will thereupon make a rule, or the judge grant his fiat for the writ. *Engross the writ on plain parchment* (*y*). *Take the writ and affidavit to a judge's chambers, and he will indorse his name upon the writ* (*z*). *It must be*

(*h*) See *Bowles* v. *Johnson*, 1 W. Bl. 36.

(*i*) *Trist* v. *Johnson*, 1 M. & R. 259.

(*k*) *Doe* v. *Andrews*, Cowp. 845.

(*l*) *Smalt* v. *Whitmill*, 2 Str. 1054: *Gurden* v. *Cresswell*, 5 Dowl. 461; 2 M. & W. 319, *S. C.*: *Wadsworth* v. *Marshall*, 1 C. & M. 87: *R.* v. *Sloman*, 1 Dowl. 618: *Jacob* v. *Hungate*, 3 Id. 456.

(*m*) *Anon.*, 23rd June, 1792, MS., B.: *Sydenham*, v. *Bond*, 2 Tidd, 855.

(*n*) One of several defendants, who has suffered judgment by default, may, it seems, be served with *subpœna duces tecum* to produce documents in his custody, and the court have, consequently, refused to make an order on such a defendant to produce. (*Colley* v. *Smith*, 6 Dowl. 399).

(*o*) See the form, Chit. Forms; and of the *præcipe*, Id.

(*p*) *Amey* v. *Long*, 9 East, 473: and see *Pearson* v. *Fletcher*, 5 Esp. 90.

(*q*) Ib.: *Amey* v. *Long*, 1 Camp. 14, 180, n.; 6 Esp. 116. *S. C.*: *Corsen* v. *Dubois*, Holt, 239: see *Roberts* v. *Simpson*, 2 Stark. 203.

(*r*) See *Harris* v. *Hill*, 3 Stark. 140; 1 D. & R., N. P. C. 17, *S. C.*: *Ditcher* v. *Kenrick*, 1 C. & P. 161; 1 Esp. 105, 263.

(*s*) *Roe* v. *Harvey*, 4 Bur. 2489.

(*t*) *Pickering* v. *Noyes*, 1 B. & C. 263; 2 D. & R. 386, *S. C.*: *R.* v. *Upper Boddington*, 8 Id. 726: *Doe Carter* v. *James*, 2 M. & Rob. 47: *Doe Bowdler* v. *Owen*, 8 C. & P. 110. *Quære*, can secondary evidence of the deed be given on refusal to produce? (Id. 111: and see *Mills* v. *Oddy*, 6 C. & P. 728, and the cases in the note).

(*u*) *Leeds* v. *Cook*, 4 Esp. 256.

(*x*) *Davis* v. *Dale*, 1 M. & M. 514: *Perry* v. *Gibson*, 1 A. & E. 48; 3 N. & M. 462, *S. C.*: *Summers* v. *Moseley*, 4 Tyr. 158.

(*y*) See the form, Chit. Forms, 57.

(*z*) *R.* v. *Roddam*, Cowp. 672.

directed to the officer in whose custody the witness is. Then take the writ together with the præcipe (*a*) *to one of the masters, and get it signed. Get it sealed by the sealer of the writs. Then leave it with the officer to whom it is directed; pay or tender to him his reasonable charges for bringing up the witness, and he will bring him into court on the day of trial, according to the exigency of the writ.* The rule for bringing up a defendant from criminal custody, on a *habeas corpus ad testificandum*, must, it seems, be applied for to the Court of Queen's Bench, and it is *nisi* only in the first instance (*b*). A prisoner in execution may now be brought up in this manner to give evidence (*c*), although it was formerly holden otherwise (*d*). So, a sailor on board a queen's ship may be brought up by this writ, if he have been previously subpœnaed, and be willing to attend (*e*). But the court will not grant this writ to bring up a prisoner of war; the proper way of proceeding in that case is by application to the Secretary of State (*f*). So, where the application appeared to be a mere contrivance to remove a prisoner in execution, the court refused to grant it (*g*). Also, by stat. 44 *G.* 3, *c.* 102, a judge of this court may award a writ of *habeas corpus* to bring up a prisoner from any gaol or prison in the United Kingdom, for the purpose of giving evidence in any court of record in England. This writ of *habeas corpus ad testificandum* may be obtained to bring up the body of a confined lunatic, to give evidence in a cause, upon an affidavit, shewing that he is not a dangerous lunatic, and that he is in a fit state to be brought up (*h*).

Privilege of Witnesses from Arrest.

Privilege of Witnesses from Arrest.] A person subpœnaed as a witness enjoys a privilege from arrest whilst attending the court not only on the day mentioned in the subpœna, but also on every day of the same sittings or assizes, until the cause is tried; he is also privileged in like manner, during a reasonable time before and after the trial, whilst coming to or returning from the place where the sittings or assizes are held (*i*). This privilege also extends to witnesses, although not subpœnaed (*k*).

If a witness, under these circumstances, be arrested, the court or the judge at *Nisi Prius* will, upon application, order him to be discharged (*l*). A judge at chambers would also make such order.

Penalty for not obeying Subpœna.

Penalty for not obeying the Subpœna, &c.] There are three ways of proceeding against a person who refuses or neglects to attend a trial, after being regularly served with a subpœna for that purpose: by attachment; by action on the stat. 5 *El.* *c.* 9; and by action at common law.

Attachment for.

The court will grant an attachment against a witness for not

(*a*) See the forms, Chit. Forms, 57.

(*b*) *In re Pilgrim*, 3 Ad. & El. 485, *S.C.*: *nom. Rex* v. *Pilgrim*, 4 Dowl. 89: see *per cur.*, *Leigh* v. *Sherry*, 2 Moore, 23.

(*c*) *Geery* v. *Hopkins*, 2 L. Raym. 851; 7 Mod. 129, *S. C.*: *R.* v. *Burbage*, 3 Bur. 1440.

(*d*) *Burdus* v. *Shorter*, Barnes, 222; Comb. 17, 48.

(*e*) *R.* v. *Roddam*, Cowp. 672.

(*f*) *Furly* v. *Newnham*, Doug. 420.

(*g*) *R.* v. *Burbage*, 3 Bur. 1440.

(*h*) See Com. Dig. Testm. A. 1.

(*i*) *Fennell* v. *Tait*, 1 C., M. & R. 584.

(*k*) See *Meekins* v. *Smith*, 1 H. Bl. 636.

(*l*) Peake, Ev. 202: and see *Ex p. Tillotson*, 1 Stark. 470.

attending at a trial, when duly served with a subpœna for that purpose (*m*), and he was called in court on it (*n*), whether the cause were called on or not (*o*), provided a copy of the subpœna were served a reasonable time before the trial (*p*), and that the witness were personally served with it (*q*), and the original was at the same time shewn him (*ante*, 232), and that his reasonable expenses (*r*), when he is entitled to them, were paid or tendered to him at the time of service (*s*), and that there have been no unreasonable delay in applying for the attachment (*t*). The affidavit for the attachment must distinctly shew all that is requisite to bring the party into contempt (*u*), *ex. gr.* that he is a material witness, &c. (*x*). An affidavit, stating that the witness was called three times in open court, is sufficient, without alleging that he was called upon the subpœna (*y*). It is not indispensably necessary, that when the witness is called on his subpœna, the officer of the court should hold the writ in his hand; it is sufficient that the writ should be exhibited in court, and the officer call him three times (*z*). If it clearly appears that the subpœna was served merely for the purpose of vexation and annoyance to the witness, and that his presence would have been of no use to the party subpœnaing him, the court will refuse an attachment against him (*a*). Illness is a sufficient excuse for his not attending (*b*). So is leave of absence given by the attorney of the party who has subpœnaed him (*c*).

Action of Debt for, under 5 El. c. 9.

Also, by stat. 5 *El. c.* 9, *s.* 12, if a person being regularly subpœnaed as witness, and having his expenses tendered to him, and not having any reasonable or lawful impediment, do not appear according to the tenor of the process, he shall forfeit 10*l.*, and shall pay such damages to the party grieved as to the court out of which the process was awarded shall seem meet. These damages must be assessed by the court at Westminster, and not by the jury or judge at *Nisi Prius;* and an action of debt will lie afterwards on such assessment (*d*).

Action on the Case for.

Or instead of this action on the statute, the party injured may have an action on the case against the witness for his non-attendance (*e*), or for his not producing papers required of him by a *subpœna duces tecum* (*f*). An action will

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(*m*) *Hammond* v. *Stewart*, 1 Str. 105: *Wyatt* v. *Wingford*, 2 Id. 80; 2 L. Raym. 1521, *S. C.*: *Doe Jupp* v. *Andrews*, Cowp. 843: *Pearson* v. *Iles*, 2 Doug. 556: see *Blandford* v. *De Tastet*, 5 Taunt. 260; 1 Marsh. 42, *S. C.*: *Holme* v. *Smith*, 6 Id. 9; 1 Marsh. 410, *S. C.*

(*n*) *R.* v. *Stretch*, 3 Dowl. 368, *cor. Patteson.* J.: *Re Jacobs*, 1 H. & W. 123; but see *R.* v. *Stretch*, 4 Dowl. 30, *per cur.*

(*o*) *Barrow* v. *Humphreys*, 3 B. & Ald. 598, *semb.*

(*p*) *Ante*, 252: *Hammond* v. *Stewart*, 1 Str. 510: *Holme* v. *Smith*, 6 Taunt. 9; 1 Marsh. 410, *S. C.*; see 1 Bing. 366.

(*q*) *Smalt* v. *Whitmill*, 2 Str. 1054: *Wakefield's case*, Hardw. 313.

(*r*) *Dixon* v *Lee*, 3 Dowl. 259. They should be calculated according to the witness's station in life, and the circumstances under which he is placed. No expenses need be tendered to a witness in town in a town cause (*post*, 236). It seems to be sufficient that his expenses are paid by the opposite party who has previously subpœnaed him. (*Betteley* v. *M'Leod*, 5 Dowl. 481; 3 Bing. N. C. 405, *S. C.*)

(*s*) *Chapman* v. *Pointon*, 2 Str. 1150: *Fuller* v. *Prentice*, 1 H. Bl. 48: *Bowles* v. *Johnson*, 1 W. Bl. 36.

(*t*) Tidd, 723: *Rex* v. *Stretch*, 4 Dowl. 30.

(*u*) See *Garden* v. *Cresswell*, 2 M. & W. 319; 5 Dowl. 461, *S. C.*

(*x*) *Finley* v. *Porter*, 5 Dowl. 744.

(*y*) *Dixon* v. *Lee*, 1 C., M. & R. 645; 3 Dowl. 259, *S. C.*: *Rex* v. *Stretch*, 4 Dowl. 30; *sed vide* 3 Id. 368: *Re Jacobs*, 1 H. & W. 123.

(*z*) *R.* v. *Fenn*, 3 Dowl. 546.

(*a*) *Dicas* v. *Lawson*, 3 Dowl. 427.

(*b*) *Re Jacobs*, 1 H. & W. 123.

(*c*) *Farrah* v. *Keat*, 6 Dowl. 470.

(*d*) *Pearson* v. *Iles*, 2 Doug. 556, 561.

(*e*) *Pearson* v. *Iles*, 2 Doug. 556: see *Mullett* v. *Hunt*, 1 C. & M. 752.

(*f*) *Amey* v. *Long*, 9 East, 473; 1 Camp. 14, 180, a, *S. C.*

lie, although, in consequence of the witnesses' absence the cause were not called on, or the jury sworn (*g*).

Witnesses' Expenses.

Witnesses' Expenses.] If the witness live within the bills of mortality, and be required to attend at Westminster or in London, a shilling only is usually given or tendered to him, at the time he is served with a copy of the subpœna, and even this is not necessary (*h*); but if he live at a greater distance, or if required to attend at the assizes, his reasonable expenses of going and returning, and also during his necessary stay at the place of trial (*i*), calculated according to his situation in life, and the distance of his residence from the place of trial (*k*), must be paid or tendered to him. And the master, (who is in general the sole judge of what witnesses, or for what loss of time witnesses should be allowed (*l*),) in taxing costs, will allow these expenses, even where foreign witnesses are brought from abroad, and return to their country after the trial (*m*), or even although the witness were also subpœnaed and paid by the other party (*n*), and, in some cases, although not called at the trial (*o*); but the master, in taxing the costs of witnesses on a certain scale, cannot allow more than is actually paid for their travelling expenses; and if he did, the court would review the taxation (*p*). Where a seafaring man remained in this country in order to give evidence, it was holden that the master was justified in allowing a subsistence for him, from the service of the subpœna until the trial (*q*). So, although the evidence of particular witnesses be not in strictness admissible, yet if there were reasonable ground for believing it to be admissible, the master should allow the expenses of such witnesses (*r*). But the master will not allow for any contingent losses the witness may suffer by obeying the subpœna (*s*), unless the witness be of such a profession, that, from the nature of his avocations, he cannot find a substitute; in which case the master will allow a reasonable compensation for his loss of time (*t*). Thus he will allow payment for loss of time to physicians, surgeons, and attornies (*u*); but

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(*g*) *Mulleti* v. *Hunt*, 1 C. & M 752: *Hopper* v. *Smith*, overruling M. & M. 115: *Bland* v. *Swafford*, Peake, 60.

(*h*) 1 Sellon, 454: *Jacob* v. *Hungate*, 3 Dowl. 456. *Quære*, if he need *live* there?

(*i*) *Fuller* v. *Prentice*, 1 H. Bl. 49. In a recent case, where a witness *subpœnaed* at *Camberwell* to attend a trial in *London*, on the part of a plaintiff, having admitted that he had received a guinea with a subpœna from the opposite party, consented to receive 1*s*. with the plaintiff's subpœna: held, a sufficient payment to render him liable to an action for not obeying the plaintiff's subpœna. (*Betteley* v. *M'Leod*, 3 Bing. N. C. 405; 5 Dowl. 481, *S. C.*)

(*k*) See 5 El. c. 9.

(*l*) *Skelton* v. *Steward*, 1 Dowl. 411: *Platt* v. *Greene*, 2 Id. 216: *Doe Smith* v. *Webber*, 4 N. & M. 381; 2 Ad. & E. 448; 1 H. & W. 10, *S. C.* A plaintiff is bound to have his witnesses in attendance from the commencement of the assizes, and may, therefore, have the costs of their attendance previous to the trial. (*Cosgrave* v. *Evans*, 2 Dowl. 443: *Thomas* v. *Saunders*, 3 N. & M. 572).

(*m*) *Thelluson* v. *Staples*, 2 Doug. 438: see *Hagedorn* v. *Allnutt*, 3 Taunt. 379: *Cotton* v. *Witt*, 4 Id. 55: *Schimmel* v. *Lousada*, Id. 695: *Sturdy* v. *Andrews*, Id. 697: *Tremain* v. *Barrett*, 6 Taunt. 88; 1 Marsh. 463, *S. C.*: *Lonergan* v. *Royal Exchange Assurance Company*, 7 Bing. 725, 729.

(*n*) *Benson* v. *Schneider*, 7 Taunt. 337; 1 Moore, 21, 76, *S. C.*

(*o*) *Adamson* v. *Noel*, 2 Chit. 200: *Bagnall* v. *Underwood*, 11 Price, 511.

(*p*) *Radcliffe* v. *Hall*, 3 Dowl. 802.

(*q*) *Berry* v. *Pratt*, 2 D. & R. 424; 1 B. & C. 276, *S. C.*: and see *Mount* v. *Larkins*, 8 Bing. 195; 1 M. & Scott, 357; 1 Dowl. 262, *S. C.*: *Temperly* v. *Scott*, 1 M. & Scott, 601; 8 Bing. 392, *S. C.*

(*r*) *Rushworth* v. *Wilson*, 1 B. & C. 267: *Mutchinson* v. *Allcock*, 1 D. & R. 165: and see *Andrews* v. *Thornton*, 8 Bing. 431: but see *Skelton* v. *Steward*, 1 Dowl. 411.

(*s*) *Moor* v. *Adam*, 5 M. & Sel. 156: and see *Willis* v. *Peckham*, 1 B. & B. 515; 4 Moore, 300, *S. C.*

(*t*) MS., M. 1814.

(*u*) *Per* *Tindal*, C. J., *Park*, J., and *Gazelee*, J., *Lonergan* v. *Royal Exchange Assurance Company*, 7 Bing. 729, and *per cur.*, *Moore* v. *Adam*, 5 M. & S. 156; but

Witnesses' Expenses.

not in general to any other professional or scientific men (*x*); or to merchants (*y*), masters of vessels (*z*), brokers (*a*), or the like; nor will he allow the expenses of scientific experiments, although necessarily made for the purpose of affording evidence in the cause (*b*), or the expense of sending a person to find the subscribing witness to a deed (*c*), or the like. An attorney who is a party to a suit is not entitled to charge a guinea a day for attending the trial, though he acts as his own attorney, unless it appears that it was necessary that he should attend in person (*d*). The master may allow for loss of time to a foreign witness (*e*); but since the 1 *W.* 4, *c.* 22, *post*, 238, 239, this is not usual (*f*). The expenses thus allowable upon taxation must, it seems, be actually paid to the witnesses before the master will allow them (*g*). If, by an alteration in the state of the pleadings after notice of trial, certain witnesses are rendered unnecessary, the party who subpœnaed them must make reasonable efforts to prevent their attendance, or their expenses ought not to be allowed (*h*); also, as we have already seen, the expense of a witness called only to prove the handwriting to an execution of any written instrument stated in the pleadings shall not be allowed, unless the opposite party, upon summons before a judge, shall refuse to admit it, or unless the judge indorse on the summons, that he does not think it reasonable to require such admission (*i*).

Tender of, and Remedy for Witnesses' Expenses.

These expenses must be either paid or tendered to the witness, and the sum tendered must be sufficient, otherwise he is not bound to attend (*k*); and if the witness be a married woman, the money should be tendered to her, and not to her husband (*l*). The tender must also be made at the time of serving the *subpœna;* for where a witness, who was subpœnaed, but to whom his expenses were not tendered, attended at the trial, but refused to be sworn, although his expenses were then tendered to him, the court refused to grant an attachment against him (*m*). If a witness attend at the trial, and refuse to give evidence unless his expenses are paid, and he is thereupon not examined, yet he may still maintain *assumpsit* for these expenses against the party who subpœnaed him (*n*); but not against the attorney (*o*).

6. *Examination of Witnesses on Interrogatories.*

In India by 3 G. 3, c. 63.

Statutes, as to, and Cases within them.] By 13 *G.* 3, *c.* 63,

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an attorney cannot, any more than another witness, maintain an action against the party who subpœnaed him, for compensation for loss of time, even on an express promise. (*Collins* v. *Godefroy*, 1 B. & Ad. 950; 1 Dowl. 326, *S. C.*)

(*x*) *Severn* v. *Olive*, 3 B. & B. 72; 6 Moore, 235, *S. C.*

(*y*) *Moor* v. *Adam*, 5 M. & Sel. 156.

(*z*) *White* v. *Brazier*, 3 Dowl 499.

(*a*) *Lopez* v. *De Tastet*, 3 B. & B. 292; 7 Moore, 120, *S. C.*

(*b*) *Severn* v. *Olive*, 3 B. & B. 72.

(*c*) *Laing* v. *Bowes*, 3 M. & Sel. 89.

(*d*) *Leaver* v. *Whalley*, 2 Dowl, 80.

(*e*) *Lonergan* v. *Royal Exchange Assurance Company*, 7 Bing. 725, 729; 1 Dowl. 223, *S C.*

(*f*) *M'Alpine* v. *Coles*, 2 Dowl. 299; 3 Tyr. 871, *S. C.*

(*g*) See *Lopez* v. *De Tastet*, 3 B. & B. 292; 7 Moore, 120, *S. C.*

(*h*) *Allport* v, *Baldwin*, 2 Dowl. 599.

(*i*) R. H., 2 W. 4, r. 7: and see as to the admission of other documents, R. H., 4 W. 4, r. 20; and *ante*, p. 213.

(*k*) *Chapman* v. *Pointon*, 2 Str. 1150.

(*l*) Cro. El. 122: W. Jon. 430.

(*m*) *Bowles* v. *Jones*, 1 W. Bl. 36: *Horne* v. *Smith*, 6 Taunt. 9: *Fuller* v. *Prentice*, 1 H. Bl. 49: *Ashton* v. *Hay*, 2 Chit. 201. Perhaps it would be enough to make the tender a reasonable time before the trial, though after service of the subpœna.

(*n*) *Hallett* v. *Mears*, 13 East, 15.

(*o*) *Robins* v. *Bridge*, 6 Dowl. 140. As to the right of the officer of the petty bag office to recover his fees for attending on a trial with documents, &c., see *Fendall* v. *Sidney*, Q. B., T. 1839.

s. 45, if a suit be commenced in any of the courts of Westminster, for *a cause of action which arose in India*, the court may award a writ in the nature of a *mandamus* or commission, for the examination of witnesses in that country; and upon the examination being returned, it shall be allowed and read as evidence at the trial (*p*).

In India and the Colonies, under 1 W. 4, c. 22, s. 1.

The powers and provisions of this act are extended by the 1 *W.* 4, *c.* 22, *s.* 1, to all colonies, islands, plantations, and places under the king's dominions in foreign parts, and to the judges of the courts therein; and that section, reciting "that great difficulties and delays are often experienced, and sometimes failure of justice takes place in actions depending in courts of law, by reason of the want of a competent power and authority in the said courts to order and enforce the examination of witnesses, when the same may be required before the trial of a cause; and that by the 13 *G.* 3, *c.* 63, *s.* 44, intituled 'An Act for the establishing certain regulations for the better management of the affairs of the East India Company, as well in India as in Europe,' certain powers are given and provisions made for the examination of witnesses in India, in the cases therein mentioned; and that it is expedient to extend such powers and provisions;" therefore enacts, "that all and every the powers, authorities, provisions, and matters contained in the said recited act, relating to the examination of witnesses in India, shall be and the same are hereby extended to all colonies, islands, plantations, and places under the dominion of his majesty in foreign parts (*q*), and to the judges of the several courts therein, and to all actions depending in any of his majesty's courts of law at Westminster, in what place or county soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the court to the judges whereof the writ or commission may be directed, or elsewhere, when it shall appear that the examination of witnesses under a writ or commission issued in pursuance of the authority hereby given will be necessary or *conducive to the due administration of justice* in the matter wherein such writ shall be applied for." Though the cause of action arose elsewhere than in India, the court have power to issue a *mandamus* or commission into that country under this act of 1 *W.* 4, *c.* 22 (*r*).

Compelling Attendance of Witnesses.

By sect. 2, "when any writ or commission shall issue under the authority of the said recited act, (13 *G.* 3, *c.* 63), or of the power hereinbefore given by this act, the judge or judges to whom the same shall be directed shall have the like *power to compel and enforce the attendance and examination of witnesses*, as the court whereof they are judges does or may possess for that purpose in suits or causes depending in such court."

Costs.

By sect. 3, "the *costs* of every *writ* or *commission* to be issued under the authority of the said recited act, or of the power hereinbefore given by this act, in any action at law depending in either of the said courts at Westminster, and of the *proceedings* thereon, shall be in the discretion of the court issuing the same." Before this enactment, the party who applied for

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(*p*) See *R.* v. *Jones*, 8 East, 31: *Francisco* v. *Gilmore*, 1 B. & B. 177. *Grillard* v. *Hogue*, 1 B. & P. 519; 4 Moore, 313, *S. C.* See form of affidavit for rule, Chit. Forms, 64; of the rule, Id.; and of the mandamus, Id.

(*q*) Scotland is not so. (See *Wainwright* v. *Bland*, 1 Gale, 103; 3 Dowl. 653, *S. C.*)

(*r*) *Bain* v. *De Vetry*, 3 Dowl. 516; 1 Gale, 52, *S. C.*

a commission under 13 *G.* 3, *c.* 63, *s.* 45, had always to pay the costs of it, unless the contrary were specially mentioned in the rule; and this was held as well in regard to witnesses examined abroad as in this country (*s*).

As to the costs of a commission issued under section 4, see *post*, 245.

Examination in England and Wales and places not in India or the Colonies, under 1 W. 4, c. 22, s. 4.

In other cases, not within the above provisions, it is enacted by the 1 *W.* 4, *c.* 22, *s.* 4, "that it shall be lawful to and for each of the said courts at Westminster, and also the Court of Common Pleas of the county palatine of Lancaster, and the Court of Pleas of the county palatine of Durham, and the several judges thereof, in every action depending in such court (*t*), upon the application of any of the parties to such suit, to order the examination on oath, upon interrogatories or *otherwise*, before the master or prothonotary of the said court, or other person or persons to be named in such order, of any witnesses *within the jurisdiction of the court* where the action shall be depending; or to order a *commission* to issue for the examination of witnesses on oath, at any place or places *out of such jurisdiction*, by interrogatories or otherwise; and by the same or any subsequent order or orders to give all such directions touching the time, place, and manner of such examination, as well within the jurisdiction of the court wherein the action shall be depending as without, and all other matters and circumstances connected with such examinations, as may appear reasonable and just." This clause, it will be observed, extends to the courts of the counties palatine of Lancaster and Durham; but the eleventh section provides, "that no order shall be made in pursuance of this act by a single judge of the Court of Pleas of the said county palatine of Durham, who shall not also be a judge of one of the said courts at Westminster." A witness may be ordered to be examined upon interrogatories under this act, on the trial of an issue directed by the Court of Chancery (*u*). If a witness be in Scotland or Ireland, or, it seems, anywhere out of the jurisdiction of the court, he must be examined on a commission, and not under a *mandamus* (*x*). The court, in a recent case, granted a commission for the examination of a witness residing in Dublin, in an action for criminal conversation (*y*); also where the witness was in France (*z*).

In case of Ill Health, &c., of Witnesses.

It has been doubted whether pregnancy or imminent delivery be a cause for the examination of a witness under this act: and,

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(*s*) See Tidd, Suppl. 159: *Stephens* v. *Crichton*, 2 East, 259: *Taylor* v. *Royal Exchange Company*, 8 Id. 393: see *Muller* v. *Hartshorne*, 3 B. & P. 556. Where the plaintiff had applied for and obtained a writ of *mandamus*, under the 13 G. 3, c. 63, s. 44, for the examination of witnesses in India, and the writ and depositions were returned to this country, but the defendants did not join in the application for the writ, nor examine or cross-examine witnesses under it, and the plaintiffs obtained a verdict: it was held that they were not entitled to the costs of attending the writ, or of the office-copies of the depositions. (*Fairlie* v. *Parker*, 1 Moo. & P. 438: *Savage* v. *Binney*, 2 Dowl. 643). Where the defendant obtained depositions from India under the act, the plaintiff was held entitled to copies at his own expense; (*Davis* v. *Nicholson*, or *Davidson* v. *Nichol*, 7 Bing. 358; 5 Moo. & P. 185; 1 Dowl. 220, *S. C.*); and if the plaintiff gained the cause, he was held entitled to the costs of cross-examining those witnesses. (*Whytt* v. *M'Intosh*, 8 B. & C. 317; 2 Man. & Ry. 133, *S. C.*)

(*t*) See *Bourdeaux* v. *Rowe*, 1 Bing. N. C. 721; 1 Hodges, 93, *S. C.*

(*u*) *Bourdeaux* v. *Rowe*, 1 Bing. N. C. 721; 1 Scott, 608; 1 Hodges, 93, *S. C.*

(*x*) *Wainwright* v. *Bland*, 3 Dowl. 653; 1 Gale, 103, *S. C.*

(*y*) *Norton* v *Lamb*, 5 Dowl. 181: *Norton* v. *Lord Melbourne*, 3 Bing. N. C. 67; 3 Scott, 398, *S. C.*

(*z*) *Duckett* v. *Williams*, 1 Dowl. 291; 1 C. & J. 510; 1 Tyr. 502, *S. C.*

at all events, if it were such a cause, the affidavits of competent persons should be produced, shewing that the delivery would probably happen about the time fixed for the trial of the cause (*a*). The court permitted the examination to take place on payment of costs, upon an affidavit of the medical attendant of a witness, the affidavit stating that the witness was in a precarious state, and could not attend the trial without great danger (*b*).

The fact of the plaintiff not proceeding promptly in a cause is no answer to an application for examining on interrogatories a material witness who is going abroad (*c*).

Practical Directions where Witness is within the Jurisdiction.

Practical Directions as to Interrogatories when the Witness is within the Jurisdiction.] If the witness be *within the jurisdiction of the court*, then, in pursuance of the above statute, *s.* 4, you may either apply to the court, if in term time, or to a judge at chambers, for the desired rule or order. If you apply to the court, *then deliver a brief to counsel, accompanied with an affidavit*, stating the witness to be material and necessary, that you cannot safely proceed to trial without him, and that he is going abroad, or about to die, or that he is so ill or infirm that it is likely he will not be able to attend the trial, or that both parties consent to the intended examination, and the examination being read in evidence on the trial. *At the time of the application you must*, in general, in this case, where the examination is to take place within the jurisdiction of the court, *be prepared with the name of the person before whom you intend the examination to take place* (*d*). Where, however, on applying for a rule *nisi*, the names of the examiners were not mentioned in the affidavit, *Coleridge*, J., held, that the examiners might be named at the time of shewing cause (*e*). If the application appears to be made for the purposes of delay (*f*), or it be delayed with a sinister intention to prevent the opposite party cross-examining the witness, as if it be on purpose delayed till a few days before the departure of the witness abroad, the court will refuse it altogether (*g*), or impose terms on the party applying for it, and in one case the court made the defendant bring the money sought to be recovered into court (*h*). *The rule obtained on the application will be only a rule nisi in the first instance: serve a copy of it on the opposite attorney.* If you apply to a judge at chambers, *then take out a summons and serve it on the opposite attorney, and attend the summons as in ordinary cases: the judge may require an affidavit in support of the application.* If the rule or order be granted, it will be for the examination of the witness on oath upon interrogatories, or sometimes *vivâ voce*, or both (*i*), or otherwise, as the court or judge think fit, before one of the masters, or a barrister, or some other person named therein.

(*a*) *Abraham* v. *Newton*, 8 Bing. 274; 1 M. & Scott, 384; 1 Dowl. 266, *S. C.*

(*b*) *Pond* v. *Dimes*, 3 M. & Scott, 161; 2 Dowl. 730, *S. C.* The affidavit of a medical man must be produced. (*Davies* v. *Lowndes*, 7 Dowl. 101).

(*c*) *Weekes* v. *Pall*, 6 Dowl. 462; 5 Scott, 713, *S. C.*

(*d*) *Doe Thorn* v. *Phillips*, 1 Dowl. 56.

(*e*) *Fearon* v. *White*, 5 Dowl. 713.

(*f*) *Lloyd* v. *Key*, 3 Dowl. 253.

(*g*) See *Pirie* v. *Iron*, 8 Bing. 143; 1 M. & Scott, 223; 1 Dowl. 252, *S. C.* See the form of the affidavit and rule and order, Chit. Forms, 57, 58, 59.

(*h*) *Dalton* v. *Lloyd*, 1 Gale, 102.

(*i*) See *Duckett* v. *Williams*, 1 Tyr. 502; 1 C. & M. 348: *Pole* v. *Rogers*, 4 Scott, 479; 3 Bing. N. C. 780: *post*, 243.

The court or judge will, by the rule or order, in general command the attendance of the witness for the purpose of being examined, and also the production of any writings or other documents, which the party obtaining such rule or order may require (*k*); the same should be specified in the rule or order, as you would specify them in a *subpœna duces tecum*. If this be omitted in the first order, you may obtain a further rule or order, inserting such command. If the witness be ill, or if any other cause make it convenient or necessary so to do, his attendance may be directed to be made at his own place of abode or elsewhere. *Upon the rule being granted, it should be drawn up with one of the masters, and serve two copies of it, one on the opposite attorney, and the other personally on the witness. Get an appointment, signed by the person or persons, or one of them, appointed to take the examination, of the time and place of attendance for the witness to be examined, and serve it on the witness on or after the service of the rule or order. Serve a copy or notice of such an appointment on the opposite attorney.* The witness will be "entitled to the like conduct money, and payment for expenses and loss of time, as upon attendance at a trial" (*l*); and they must be paid or tendered to him on the service of the appointment (*ante*, 237). *If the examination is not to be a* vivâ voce *one, then prepare your interrogatories and get them signed by counsel* (*m*); (the questions therein must not be leading questions, otherwise the answers thereto could not, if objected to by the opposite party (*n*), be read at the trial); *engross them on parchment, and serve a copy of them on the opposite attorney:* such service had, perhaps, better be made on the service of the appointment for the witness's attendance. *The opposite attorney may also draw up interrogatories by way of cross-examination, but this is rarely advisable.* If the examination is to be *vivâ voce*, then there is no occasion for any written interrogatories. *Take the witness, or he will attend at the time and place appointed, to the master or judge's clerk, or person appointed by the rule or order to examine him.* If he be in custody, a writ of *habeas corpus ad testificandum* may be procured from the court as in other cases (*o*).

(*k*) 1 W. 4, c. 22, s. 5, which enacts, "That when any rule or order shall be made for the examination of witnesses *within the jurisdiction of the court* wherein the action shall be depending by authority of this act, it shall be lawful for the court, or any judge thereof, in and by the first rule or order to be made in the matter, or any subsequent rule or order, to command the attendance of any person to be named in such rule or order for the purpose of being examined, or the production of any writings or other documents to be mentioned in such rule or order, and to direct the attendance of any such person to be at his own place of abode, or elsewhere, if necessary or convenient so to do; and the *wilful disobedience* of any such rule or order shall be deemed a contempt of court, and proceedings may be thereupon had by attachment, (the judge's order being made a rule of court before or at the time of the application for an attachment), if in addition to the service of the rule or order, an appointment of the time and place of attendance in obedience thereto, signed by the person or persons appointed to take the examination, or by one or more of such persons, shall be also served together with or after the service of such rule or order: Provided always, that every person whose attendance shall be so required, shall be entitled to the like conduct money, and payment for *expenses and loss of time*, as upon attendance at a trial: Provided also, that no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compellable to produce at a trial of the cause."

(*l*) 1 W. 4, c. 22, s. 5, *supra:* and see *ante*, 236.

(*m*) See a form, Chit. Forms, 62.

(*n*) See *Hutchinson* v. *Bernard*, 2 M. & Rob. 1. The objection cannot be made by the party who put them. (id.)

(*o*) *Ante*, 233: 1 W. 4, c. 22, s. 6, which enacts "That it shall be lawful for any sheriff, gaoler, or other officer, having the custody of any prisoner, to take such prisoner for examination under the authority of this act, by virtue of a writ of *habeas corpus* to be issued for that purpose, Mode of conducting Examination.

The master or judge's clerk, or person appointed to take the examination, must examine the witness on oath, or on his affirmation if a quaker. He, or the judge of the court in which the action is pending, may swear the witness. If the witness swear falsely, he will be guilty of perjury (*p*). His examination should be conducted by the same rules as the examination of a witness on a trial at *Nisi Prius*. He need not produce any document that he would not be compellable to produce at a trial of the cause (*q*). The master, or person appointed to examine the witness, should certify the examination and depositions under his hand. He must make, if need be, a special report to the court, touching the examination, and the conduct or absence of any witness or other person therein or relating thereto; and the court may act against the witness as in other cases of contempt (*r*). If the witness wilfully disobey the rule or order which commands his attendance, &c., and he has been served with an appointment of the time and place for his examination, signed by the party to examine him, and his expenses have been tendered him, he will be guilty of a contempt of court, and he may be proceeded against as usual by an attachment, (*ante*, 234), the judge's order being made a rule of court before or at the time of the application for the attachment (*s*).

Practical Directions as to Commission to examine Witnesses out of Jurisdiction.

Practical Directions as to Commission to examine Witnesses out of the Jurisdiction.] If the witness be *out of the jurisdiction of the court*, (and this whether he be within the Queen's dominions or not (*t*),) instead of the motion or summons above mentioned, you should then, in pursuance of the above statute, apply to the court, in term time, or to a judge at chambers, to grant a rule or order for a *commission* to be issued to the judge or judges of the court in whose jurisdiction the witness is, or to commissioners to be appointed and approved of by the parties, for the examination of the witness on oath by interrogatories or otherwise. A *mandamus* to examine a witness cannot be issued to Scotland or Ireland; it must be a commission (*u*).

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which writ shall and may be issued by any court or judge under such circumstances and in such manner as such court or judge may now by law issue the writ, commonly called a writ of *habeas corpus ad testificandum*."

(*p*) 1 W. 4, c. 22, s. 7, which enacts, "That it shall be lawful for all and every person authorized to take the examination of witnesses by any rule, order, writ, or commission made or issued in pursuance of this act, and he and they are hereby authorized and required to take all such examinations upon the oath of the witnesses, or affirmation, in cases where affirmation is allowed by law instead of oath, to be administered by the person so authorized, or by any judge of the court wherein the action shall be depending; and if, upon such oath or affirmation, any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall and may be indicted and prosecuted for such offence in the county wherein such evidence shall be given, or in the county of Middlesex, if the evidence be given out of England."

(*q*) 1 W. 4, c. 22, s. 5: *ante*, 241, n. (*k*).

(*r*) 1 W. 4, c. 22, s. 8, which enacts, "That it shall and may be lawful for the master, prothonotary, or any other persons to be named in any such rule or order as aforesaid for taking any examination in pursuance thereof, and he and they are hereby required to make, if need be, a special report to the court touching such examination, and the conduct or absence of any witness or other person thereon or relating thereto; and the court is hereby authorized to institute such proceedings, and make such order and orders upon such report, as justice may require, and as may be instituted and made in any case of contempt of the court."

(*s*) 1 W. 4, c. 23, s. 5: *ante*, 241, n. (*k*).

(*t*) *Duckett* v. *Williams*, 1 C. & J. 510; 1 Tyr. 502; 1 Dowl. 291, *S. C.*: *Reynard* v. *Cope*, 1 Tyr. 505 a.

(*u*) *Wainwright* v. *Bland*, 1 Gale, 103; 3 Dowl. 653, *S. C.*: *Norton* v *Lamb*, 5 Dowl. 181: *Norton* v. *Lord Melbourne*, 3 Bing. N. C. 67; 3 Scott, 398, *S. C.*

The application should be made as early as possible after issue joined (*v*).

Application for.

Rule for Commission on Application to the Court.

If you apply to the court, *then deliver a brief to counsel, accompanied with an affidavit of the facts, stating that the witness is out of the jurisdiction of the court* (*x*), *and shewing that he is a material witness, and such other facts as will satisfy the court of the necessity for issuing the writ.* Where an affidavit in support of an application for a commission to examine witnesses abroad, stated that the facts alleged in the pleadings took place in the presence of the witnesses, that they were resident abroad, and that their evidence was material and necessary, the court held it to be sufficient; and that the affidavit need not state that the evidence was admissible, or that the application was *bonâ fide*, and not for delay; and also that no affidavit of merits was necessary: and the court, in granting such an application, refused to impose terms upon the party applying (*y*). Where a rule *nisi* was obtained for a commission to examine witnesses in *Jamaica*, founded upon an affidavit, stating that there were several persons residing in the island, but whose names were unknown to the deponent, who were cognizant of the facts on which the issue was joined, the court discharged the rule, on the ground that the affidavit must either specify the witnesses by name or otherwise describe them (*z*). In a later case, however, *Williams*, J., held, that a commission to examine witnesses may be issued to examine other witnesses, who may be found, as well as those named in moving for the commission (*a*). And at all events it is enough to give the witnesses a certain description without naming them (*b*). Where, on application for a rule *nisi*, the names of the intended examiners were not mentioned in the affidavit, *Coleridge*, J., held, that they might be named at the time of shewing cause (*c*). *The rule obtained hereon is a rule nisi* (*d*), *a copy of which should be served on the opposite attorney or agent. If no sufficient cause be shewn, the rule will be made absolute of course. Draw up the rule with one of the masters, and serve a copy of it on the opposite attorney or agent.*

Order for at Chambers.

If you apply to a judge at chambers, *then take out a summons and serve it on the opposite attorney, and attend the same, and obtain an order thereon, and serve it as in other cases.*

Terms of Rule or Order.

The rule or order will be for a commission to issue for the examination of the witness on oath, by interrogatories or *vivâ voce*, or otherwise, as the court or judge may direct. The usual course is to order the examination upon written interrogatories, but a power is frequently added to enable the opposite party to cross-examine the witnesses *vivâ voce*, and for the other to add additional questions to his interrogatories; the examinations and answers to be afterwards reduced into writing, and returned with the commission to one of the masters (*e*). By the same or any subsequent order, the court or judge may give such directions as they may think fit,

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(*v*) *Brydges* v. *Fisher*, 4 M. & Scott, 458.

(*x*) See *Lloyd* v. *Key*, 3 Dowl. 253. See the forms, Chit. Forms, 57, 58.

(*y*) *Baddeley* v. *Gilmore*, 1 M. & W. 55; 1 T. & G. 369; 1 Gale, 410, *S. C.*

(*z*) *Gunter* v. *M'Kear*, 1 T. & G. 245; 1 M. & W. 201; 1 Gale, 440; 4 Dowl. 722. *S. C.*

(*a*) *Anon.* Bail Court, E. 1839; 3 Jur. 385.

(*b*) *Rickards* v. *E. I. Co.*, T. T. 1839, B. C.; 3 Jurist, 822, *Coleridge*, J.

(*c*) *Fearon* v. *White*, 5 Dowl. 713.

(*d*) *Doe* v. *Pattison*, 3 Dowl. 35.

(*e*) *Duckett* v. *Williams*, 1 Tyr. 502; 1 C. & Jer. 510; 1 Dowl. 291: *Pole* v. *Rogers*, 3 Bing. N. C. 780; 4 Scott, 479.

touching the time, place, and manner of the examination, and other matters connected with it (*f*). Where it appeared questionable whether the application was not made to delay plaintiff, the court required the defendant to bring the money into court (*g*). The court refused to make it a part of the rule to call upon the plaintiff to produce a bill of exchange in his possession at the time of executing the commission (*h*). The rule or order is generally only drawn up as a stay of proceedings for a limited time, and not as an absolute stay (*i*). In general, also, a time should be limited for the taking of the examinations (*k*). In an action on an insurance, a rule having been obtained for a commission to examine witnesses abroad on interrogatories, three weeks were given as the limited time for taking the examinations; and the time turning out to be insufficient, it was afterwards enlarged (*l*). Where the defendant had obtained a rule for issuing a commission to take interrogatories in France, Lord *Tenterden* said, that it would be limiting the commission too much to make it a part of the order that it should be returned in three weeks; and observed, that if it were not returned in proper time, the plaintiff might apply that the cause should proceed (*m*).

Interrogatories for.

If the examination is not to be *vivâ voce*, *get your interrogatories prepared as directed*, (*ante*, 241), *and let them be signed by counsel* (*n*); *engross them on parchment and serve a copy of them on the opposite attorney. The opposite attorney may also, if it be thought advisable, draw up interrogatories by way of cross-examination, which he will deliver to you.* If the examination is to be *vivâ voce*, then there will be no written interrogatories.

Commission, how sued out and conducted.

Prepare and sue out the commission (*o*) *directed to the judges or commissioners, according to the rule or order; get it signed by one of the masters, and sealed by the sealer of the writs: and annex the interrogatories and cross-interrogatories* (*if any*) *to it. After which the same should be forwarded with full instructions to an agent, to be delivered to the judges or commissioners, the time and place of examination being appointed, and notices thereof given, as directed by the commission.* The commissioners to whom the commission is directed (if in India or the colonies) have the like power to compel and enforce the attendance and examination of witnesses, as the court whereof they are judges possesses for that purpose in suits or causes depending in such court, and they will act accordingly in their mode of requiring the attendance of the witness, at the same time following the directions of the commission. They will give the agents of both parties notice of the time and place of examination. *Take the witness, or he will attend at the time and place appointed.* The commissioners to whom the commission is directed must examine the witness on oath, or on his affirmation if a quaker. They may swear the witness. If he swear falsely, he will be guilty of perjury (*p*). His examination should be conducted by the same rules as the examination of witnesses on a trial at

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(*f*) 1 W. 4, c. 22, s. 4: *ante*, 240.

(*g*) *Dalton* v. *Lloyd*, 1 Gale, 102: *Sparkes* v. *Barrett*, 5 Scott, 402. See *Ingram* v. *Bligh*, 2 Jurist, 1044: where a rule to set aside a judge's order for a commission obtained on the ground of delay was discharged on condition of the defendant' bringing part of the money into court.

(*h*) *Cunliffe* v. *Whitehead*, 3 Dowl. 634: and see *Baddeley* v. *Gilmore*, 1 M. & W. 55: 1 Gale, 410, *S. C.*

(*i*) *Forbes* v. *Wells*, 3 Dowl. 318: *Ward* v. *Grime*, Id.

(*k*) See *Sparkes* v. *Barrett*, 5 Scott, 402.

(*l*) *Shorey* v. *Shebelli*, 1 Tyr. 505 a.

(*m*) *Reynard* v. *Co e*, 5 Tyr 505 a.

(*n*) See a form, Chit. Forms, 62.

(*o*) See a form, Chit. Forms, 61.

(*p*) 1 W. 4, c. 22, s. 7: *ante*, 242, n. (*p*).

Nisi Prius. They should afterwards return the commission and interrogatories with the depositions, according to the mode directed by the commission, (*q*) *certified under their seals* (*r*), *and either party will be entitled to a copy thereof.* The original examinations should be returned, and not merely a copy. And it seems that the answer should be returned in English (*s*).

Costs of Interrogatories.

Costs of Interrogatories, &c.] By 1 *W.* 4, *c.* 22, *s.* 9, "the costs of every *rule* or *order* to be made for the examination of witnesses under any commission or otherwise, by virtue of this act, and of the *proceedings thereupon*, shall, (except in the case hereinbefore provided for), *be costs in the cause*, unless otherwise directed, either by the judge making such rule or order, or by the judge before whom the cause may be tried, or by the court" (*t*). Before this enactment, the party succeeding in the action was not entitled to the costs of examining his witnesses on interrogatories, or taking office-copies of depositions; but the party whose witnesses were examined paid his own expenses, unless it were otherwise expressly mentioned in the rule (*u*); and this was held as well with regard to witnesses examined abroad as in this country (*v*). Since this enactment the costs of executing a commission in a foreign land are costs in the cause, unless some special ground be laid for ordering otherwise (*w*). It is a question for the discretion of the master, in each particular case, whether the expenses of bringing witnesses from abroad should be allowed on taxation, or only the costs of the commission; and the above act of 1 *W.* 4, *c.* 22, has made no alteration in this respect (*x*). And the costs of a commission to examine a witness abroad are not allowed to the party who obtains the commission, although successful in the action, where the examination is more peculiarly for his benefit (*y*). But in order to review a taxation by the master for disallowing the expenses of a detention of a foreign witness in this country, it should be shewn that the master did not exercise his discretion on the subject after special grounds for the allowance had been laid before him (*z*). As to the costs of a commission to India, or the colonies, under section 1, see *ante*, 238.

Reading Examinations in Evidence at Trial.

Reading Examinations in Evidence at Trial.] The 1 *W.* 4, *c.* 22, *s.* 10, enacts "that no examination or deposition to be taken by virtue of this act shall be read in evidence at any trial, without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the judge that the examinant or deponent is beyond the jurisdiction of the court, or dead, or unable, from permanent sickness or other permanent infirmity, to attend the trial; in all or any of which cases, the examinations and depositions certified under the hands of the commissioners, masters, prothonotary, or other person taking the same, shall and may, without proof of the signature to such certificate, be received and read in

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(*q*) See *Clay* v. *Stephenson*, 2 Nev. & P. 189.

(*r*) *Atkins* v. *Palmer*, 4 B. & Ald. 377: *Duncan* v. *Scott*, 1 Camp. 101.

(*s*) See *Clay* v. *Stephenson*, 2 Nev. & P. 189.

(*t*) See the note as to costs, *ante*, 239.

(*u*) *Stephens* v. *Crichton*, 2 East, 259.

(*v*) *Taylor* v. *Royal Exch. Company*, 8 East, 393.

(*w*) *Prince* v. *Samo*, 4 Dowl. 5: and see *Clay* v. *Stephens*, N. & M. 318; 3 A. & E. 307; 1 H. & W. 409, *S. C.*

(*x*) *M'Alpine* v. *Poles*, 1 C. & M. 239; 3 Tyr. 871; 2 Dowl. 299, *S. C.*

(*y*) *Bridges* (or *Brydges* v. *Fisher*, 1 Bing. N. C. 510; 1 Scott, 485; 1 Hodges, 36, *S. C.*: *quære.*

(*z*) *White* v. *Mayor*, 5 Tyr. 487.

evidence, saving all just exceptions." You should, therefore, in general be prepared at the trial to prove the absence, sickness, &c., of the witness. Before this statute, where a witness was examined before a judge upon interrogatories, it was holden that his depositions could not be read whilst he continued in England (*a*). But when he had actually sailed on his voyage, the depositions were allowed to be read, although the vessel in which he sailed was, at the time of the trial, driven back into port by contrary winds (*b*). The whole of the answers, both to the interrogatories and cross-interrogatories, must be read as part of the party's case who is desirous of making use of any of them (*c*). A witness for the defendant was examined on a commission granted under the above statute of 1 *W.* 4, and on his cross-examination a paper, signed by him, was produced to him, and a portion of his cross-examination and re-examination relating to it, founded on it; the paper was annexed to the deposition: it was held that this paper was not to be read as part of the cross-examination of the witness, but that if the counsel wished it to be read, it must be read as his evidence, so as to entitle the defendant's counsel to observe upon it in a special reply (*d*). It has been holden that witnesses examined under a judge's order, in expectation of their going abroad, are examined as much for one side as the other, and either party may use their evidence at the trial, if it be shewn that the witnesses are abroad; but this must be proved; and the statement in their depositions that they are going abroad is not sufficient for this purpose (*e*).

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Sect. 7.

The Nisi Prius Record.

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When, and how Sealed and Passed, 247.
Variance between Record and Issue, 248.
When Amended, 249.

What, and how made up. *What, and Form of.*] The *Nisi Prius* record is in the nature of a commission to the judges at *Nisi Prius* for the trial of the cause (*f*). *It is made up by the attorney*, and *must be written on one or more skins of parchment* (*according to the length of the issue*). The judge may refuse to try the cause if the record is grossly imperfect (*g*). And if at the trial it appears on the record, that on any one of the issues tendered, issue has not been joined, the jury must be discharged, unless both parties will consent to an amendment (*h*).

Form of. The following is the form prescribed by the rule of *H. T.*, 4 *W.* 4, to be adopted in all the courts, *mutatis mutandis*, or to the like effect, a power being given to the court or a judge to amend it in case of a non-compliance therewith.

(*a*) *Anon.*, 2 Salk. 601.

(*b*) *Fansick* v. *Agar*, 6 Esp. 92: and see *Ward* v. *Wells*, 1 Taunt. 461: *Falconer* v. *Hanson*, 1 Camp. 172.

(*c*) *Temperley* v *Scott*, 5 C. & P. 341.

(*d*) *Stephens* v. *Foster*, 6 C. & P. 280.

(*e*) *Proctor* v. *Lainson*, 7 C. & P. 629.

(*f*) Tidd, New Prac. 475.

(*g*) See *R.* v. *Tremaine*, 8 D. & R. 590: see *Bent* v. *Benyon*, 6 C. &. P. 217.

(*h*) *Bent* v. *Benyon*, 6 C. & P. 217.

[" *The placita* (*i*) *are to be omitted.—Copy the issue to the end of the award of the venire, and proceed as follows*:]

" Afterwards, on the [*teste of distringas or habeas corpora*] day of ——, in the year ——, the jury between the parties aforesaid is respited here until the [*return day of distringas or habeas corpora*], day of —— (*) unless —— shall first come on the [*first day of sittings or commission day of assizes*] day of —— at ——, according to the form of the statute in such case made and provided (*) for default of the jurors, because none of them did appear; therefore let the sheriff have the bodies of the said jurors accordingly (*k*)."

When the trial is to be at the bar of the court, the above *Nisi Prius* clause between the asterisks, from the word "*unless*," to the word "*provided*" inclusive, must be omitted; and the *jurata* will then stand thus: " *The jury between the parties aforesaid is respited before our lady the queen at Westminster, until the —— day of ——, for default of the jurors, because none of them did appear: therefore*," &c., as above.

When the action is to be tried in the county palatine of Lancaster, or of Durham, there is no *jurata* entered on the record of *Nisi Prius*, but it concludes with the award of the *mittimus*, as in the issue, *ante*, 199 (*l*).

Take care that the declaration and other pleadings be entered under the date of the month and year when they were respectively pleaded, unless otherwise specially ordered by the court or a judge (*m*).

When and how Sealed and Passed.

When and how the Nisi Prius Record is sealed and passed.] *After engrossing the record of Nisi Prius as above-directed, take it to one of the masters, who will examine, seal, and pass the same* (*n*).

In Lancaster or Durham.

If the cause is to be tried in the county palatine of Lancaster, or of Durham, *after getting the Nisi Prius record sealed and passed as above mentioned, engross a mittimus on a plain piece of parchment* (*o*), *and get it signed and sealed. Send it, together with the record, to the attorney in the country, who will sue out the jury process and get it returned.*

When to be Sealed in Town Causes.

In town causes the record of *Nisi Prius* must be sealed on or before the day appointed by the chief justice in the sittings paper for the trial (*p*). It must be sealed in time to have the cause entered with the marshal. (*See the next Section*).

When in Country Causes.

In country causes the record cannot be sealed after three weeks from the end of the term (*q*), unless a judge's order be obtained for that purpose. This order, however, is now granted of course; and upon paying one of the masters his

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(*i*) See as to these, Gilb. C. P. 80; 2 Saund. 5th ed. 253, (1).

(*k*) See the forms, Chit. Forms, 66.

(*l*) See forms, Chit. Forms, 48,66.

(*m*) R. H., 2 W. 4, r. 2, s. 1: *ante*, 145.

(*n*) In proceedings in actions removed from inferior courts &c., this *incipitur* is in a different form. (See *post*, Vol. II. Book IV. Part I. Ch. 4). By rule of M. T., 5 A. r. 1, K. B., "no record of Nisi Prius shall be sealed or passed at the Nisi Prius Office before the issue is fairly entered on record, or an *incipitur* thereof; and such entry, with the record of Nisi Prius, first brought to and signed by the secondary;" and such entry of the issue, or an *incipitur*, was always usual and necessary in all the courts. (And see R. E., 5 W. & M., C. P.) But by the recent rule of H. T., 4 W. 4, r. 15, "the *entry of proceedings on the record for trial*, or *on the judgment roll*, (*according to the nature of the case*), shall be taken to be, and shall be, in fact, the first entry of the proceedings in the cause, or of any part thereof, upon record; and no fees shall be payable in respect of any *prior entry* made or supposed to be made on *any roll* or *record* whatever."

(*o*) See form, Chit. Forms, 66.

(*p*) R. E., 7 G. 1 Q. B.

(*q*) R. T., 31 C. 2, Q. B.

fee for it, he will seal the record at any time before the assizes, and obtain the order afterwards at his leisure (*r*).

Repassing when Cause stands over unnecessary.

Formerly, when the cause stood over from one sitting to another, you must, (before the sitting to which the cause stood over), in the Queen's Bench, have got the marshal to alter the *jurata*. You also got the *distringas* from him; altered it and got it re-sealed; and got the record of *Nisi Prius* also re-sealed (*s*), otherwise the cause could not be tried, and the marshal was prohibited from inserting the cause in the daily list for trial (*t*). In the Common Pleas, if the cause were not tried the same term a new *placita* must have been added to the record of *Nisi Prius* of the term it was intended to be tried, and in that case the record must have been re-sealed and paid for again to the clerk of the treasury, and there must have been a new *venire* and *habeas corpora;* but this was unnecessary if the cause were tried in the same term. But now, by *R. H.*, 4 *W.* 4, *r.* 18, "it shall not be necessary to *repass* any *Nisi Prius* record which shall have been once passed, and upon which the fees of passing shall have been paid; and if it shall be necessary to *amend* the day of the *teste* and *return* of the *distringas* or *habeas corpora*, or of the *clause* of *Nisi Prius*, the same *may be done by the order of a judge obtained on an application ex parte.*"

Amending Distringas, &c.

Re-sealing.

It will be seen that this rule does not alter the necessity previously existing for re-sealing the record in causes which stand over from one sitting or assizes to another, and such re-sealing must be made before the sittings or assizes to which the cause stands over, or in default thereof the cause cannot be tried (*u*). Also, in such causes the amendment mentioned in the rule must be made. Where notice of trial has been given on a writ of trial before the sheriff, which is afterwards countermanded, it is not necessary to re-seal the record, unless the alteration is made to a day after the return of the writ (*x*).

Costs of Passing.

A plaintiff has no right to enter and pass his record immediately after issue joined and notice of trial given, so as to make the defendant pay the costs of it; but it is in the discretion of the master to allow such costs, or not, as he thinks fit (*y*).

Fees of.

It may be here observed, that by the rule of *H. T.*, 4 *W.* 4, *r.* 16, "no *fees* shall be charged in respect of more than *one issue* by any of the officers of the court, or of any judge at the assizes, or any other officer, in any action of *assumpsit*, or in any action of debt on simple contract, or in any action on the case."

Variance between Record and Issue.

Variance between Record and Issue.] Any variance between the record and the issue should be objected to at the time of the trial; for the court will not in general set aside a verdict for such a cause (*z*); particularly if it be not shewn that the record disagrees with the prior proceedings (*a*). Where the

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(*r*) R. T., 31 C. 2, Q. B. a.

(*s*) R. E., 33 G. 3, r. 1, Q. B.

(*t*) Id.: R. M., 6 G. 4: see *Crowder* v. *Rooke*, 2 Wils. 144, C. P.

(*u*) R. M., 6 G. 4: R. E., 33 G. 3, r. 1, K. B.: *Crowder* v. *Rooke*, 2 Wils. 144, C. P.: and see *Chandler* v. *Beswald*, 5 Dowl. 311.

(*x*) *Chandler* v. *Beswald*, 5 Dowl. 310; 2 M. & W. 205, *S. C.*

(*y*) *Keen* v. *Smith*, 2 M. & W. 85; 5 Dowl. 286, *S. C.*

(*z*) *Leeman* v. *Allen*, 2 Wils. 160: see *Shorter* v. *Helbut*, Barnes, 476: *Cooper* v. *Spencer*, 1 Str. 641: *Brook* v. *Finch*, 6 Dowl. 313: *sed vide Drummond* v. *Burt*, 2 M. & M. 136.

(*a*) *Doe Cotterill* v. *Wylde*, 2 B. & Ald. 472: *Jones* v. *Tatham*, 8 Taunt. 634.

Nisi Prius record varied from the issue, but agreed with the declaration delivered, the court held the variance to be immaterial (*b*). As to variances between the issue and the writ of trial before the sheriff, see *post*, *Book I. Part I. Chap.* 4, *Sect.* 3.

When Amended.

When Amended.] The practice as to allowing the amendment of the *Nisi Prius* record shall be fully considered, *post*, *Vol. II. Book IV. Part I. Ch.* 28. As to amendment of clause of *nisi prius* and *distringas*, where the cause stands over, see *ante*, 248. We have seen, *ante*, 246, that the recent rule of *H. T.*, 4 *W.* 4, allows the court or a judge to amend the *Nisi Prius* record, in case of a non-compliance with the form prescribed by that rule. By the 9 *G.* 4, *c.* 15, and 3 *&* 4 *W.* 4, *c.* 10, *s.* 42, *s.* 23, *post*, 280, certain variances between matters stated in the record and those proved in evidence may be amended at the trial by leave of the judge.

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Sect. 8.

The Jury Process.

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How returned in Common Jury Cases, 252.
How in Special Jury Cases, 253.
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Jury Process for Trial at Bar.

What it is.] The two writs, by virtue of which a jury for a trial at bar are summoned in the Court of Queen's Bench and in the Exchequer, are the *venire facias* and the *distringas*. In the Common Pleas, they are the *venire facias* and *habeas corpora juratorum*. The *venire facias* merely commands the sheriff that he *cause to come* before the queen at Westminster, on a day therein mentioned, (being a day previous to the intended trial of the cause), twelve free and lawful men, &c., to make a certain jury of the country between the parties. Upon the jurors (supposed to be summoned by virtue of this writ) making default at the return of it, the *distringas* (or, in the Common Pleas, the *habeas corpora*) is supposed to issue. The writ of *distringas* commands the sheriff to *distrain* the jurors, already returned on the *venire*, by their goods, so that he may have their bodies before the queen at Westminster, on a day therein mentioned, to make a certain jury between the parties, &c. The *habeas corpora* commands the sheriff to have the *bodies* of the jurors before the queen's justices at Westminster, on a day therein mentioned, to make that jury. In practice, however, the *venire* and *distringas*, or the *venire* and *habeas corpora*, are sued out at the same time; and, upon being delivered to the sheriff or his agent, he immediately returns them, and causes the jurors to be summoned. The jurors must afterwards appear at the place of trial, according to the exigency of the writ and summons.

(*b*) *Shepley* v. *Marsh*, 2 Str. 1131.

This is the jury process, when the trial is intended to be *at bar*. It is the same, however, when the trial is intended to be at *Nisi Prius*, excepting that the *venire*, in this *latter* case, may be made returnable forthwith, and the *distringas* is made returnable before the queen or the barons of the Exchequer, or the *habeas corpora* before the queen's justices at Westminster, on the return day next after the time at which the cause is intended to be tried, *unless before* that time the chief justice or the judges of assize should come on a certain day therein mentioned to the place intended for trial; and which of course is always the case; and the sheriff accordingly will summon the jury to attend at the time and place mentioned in this clause of *Nisi Prius*.

For trial at Nisi Prius.

Venire. Direction of.

Venire.] The *venire* must be directed according to the award of it on the roll; that is, if the *venire* have been awarded to the sheriff, or to the coroner, or elisors, the *venire* must be directed accordingly to the sheriff, or coroner, or elisors respectively.

Form of.

It shall direct the sheriff "to return twelve good and lawful men of the body of his county, qualified according to law;" and the rest of the writ shall proceed in the accustomed form (*c*).

Must agree with Award on the Roll.

In substance, also, the *venire* must correspond with the award of it on the roll. Thus, if the award be general, to make a jury between the parties of the plea or action, whatever it may be, the writ must also be general; or if the award be special,—as to try issues in fact, and assess damages upon issues in law (*d*),—or to try issues as to defendants who have pleaded, and to assess damages against defendants who have allowed judgment to go by default,—the writ must also be special (*e*).

Teste and Return of.

Before the recent act of 3 & 4 *W.* 4, *c.* 67, *s.* 2, the *venire* must have been *tested* and *returned* in *term* time only, and it used to be tested on the first day of the term in or after which the cause was to be tried, and was made returnable on some day in term before the trial, being a general return day, or day certain, according to the previous proceedings; or if it were a country cause, then the *venire* by original was made returnable on the last general return day, or if by bill, on the last day of the term before the assizes. But now, by that act, except in trials at bar, "the writ of *venire facias juratores* may be tested on the day on which the same shall be issued, and be made returnable *forthwith* (*f*). This enactment was passed, as it should seem from the recitals therein to avoid the incongruity in the *venire facias* being tested in the preceding term, in an action commenced and tried in the vacation *after* that term. It will be observed that the act does not imperatively require that the *venire* shall be tested

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(*c*) 6 G. 4, c. 50, s. 13. See the form, Chit. Forms, 68.

(*d*) A *venire tam quam*, is necessary, even when the issue of fact and law arise out of the same count. (*Codrington* v. *Lloyd*, 1 P. & D. 157).

(*e*) See the forms, Chit. Forms, 66, 67.

(*f*) By the 4 & 5 W. 4, c. 62, s. 33, for improving the practice in the Common Pleas at Lancaster, every writ of *venire facias juratores* issued out of the same court shall bear date on the day next preceding the first commiss on day of each assizes, unless such commission day shall be on a Monday, and then on the Saturday preceding; and every writ of *habeas corpora juratorum* shall bear date on the day of the return of the writ of *venire facias juratores*."

in vacation, or returnable forthwith; and that the old teste and return may be adopted. It should seem also that although the act says that the return may be "forthwith," yet that a particular day ought to be named in the writ (*g*). It is not necessary, in any case, that there should be fifteen days between the teste and the return (*h*).

Continuance of, unnecessary.

If this writ be awarded, and the cause be not tried for several terms, new *venires* are supposed to have been issued from term to term, and the cause continued by *vicecomes non misit breve;* and which continuances were formerly finally entered on the roll, and should have been so before the trial, if it were necessary to suggest an intervening death or other matter. In fact, however, the *venire* seldom, if ever, issues till the term when the cause is to be tried (*i*), and now the entry of continuances is no longer requisite (*k*).

Defects in.

As to what defects in the *venire* are aided or amendable, see *post, Vol. II. Book IV. Ch.* 28.

Distringas or Habeas Corpora.

Distringas or Habeas Corpora.] The *distringas*, or *habeas corpora*, must be directed in the same manner as the *venire*. It must also correspond with the *venire* in substance; and be general or special, as the *venire* is general or special.

Teste, and Return-day of.

The *distringas*, in actions by *original*, where that process was used for the commencement of a personal action, was tested on the *quarto die post* of the return of the *venire*, and, in causes at *Nisi Prius*, must have been returnable on the first general return after the trial, wheresoever &c. In actions by *bill*, when that process was used for the commencement of a personal action, it was tested on the return day of the *venire;* and, in causes at *Nisi Prius*, was returnable on the first particular return or day certain in the term after the trial. And now, in *actions commenced by the new process* prescribed by the 2 *W*. 4, *c*. 39, the *distringas*, except in trials at bar, "may be tested in term or vacation on a day subsequent to the teste of the *venire*" (*l*). And it is returnable on a day in term after the sittings at which the trial takes place, or if at assizes, generally on the first day of the term after the trial. In a trial at bar, the *distringas* is made returnable on the day on which the trial is to be had. It is not necessary, in any case, that there should be fifteen days between the teste and return (*m*). The *habeas corpora* is tested and returnable in the same manner as a *distringas*.

Defects in.

As to what defects in the *distringas* are aided or amendable, see *post, Vol. II. Book IV. Ch.* 28.

How, and by whom, sued out.

How, and by whom, sued out.] The *venire* and *distringas* (or the *venire* and *habeas corpora* in the Common Pleas) are sued out together; and must in all cases (except in replevin, or when the defendant proceeds to trial by proviso) be sued out by the plaintiff, even in cases where the defendant has moved for a special jury.

(*g*) See *Williams* v. *Calverley*, 14 Leg. Obs. 13. The form of the issue, as prescribed by the courts, names a particular day for the return in the award of the *venire.*

(*h*) 13 C. 2, st. 2, c. 2, s. 6.

(*i*) Gilb. C. P. 83: Tidd, 778.

(*k*) R. H., 4 W. 4, r. 2, s. 2: *ante*, 200.

(*l*) 3 & 4 W. 4, c. 67, s. 2.

(*m*) 13 C. 2, st. 2, c. 2, s. 6.

In Q. B. and Exchequer.

They are sued out thus in the Court of Queen's Bench and in the Exchequer :—*Get a blank venire and distringas at the stationer's* (*n*), *and fill them up. Get them sealed*; *they do not require* signing. *In Middlesex, take the distringas to the sheriff's office, and get it returned; and annex it and the panel to the Nisi Prius record; the venire is not used, and is sued out merely for the purpose of having it allowed in costs* (*o*). *In London, you get the distringas returned at the secondary's office, in Coleman-street.* In country causes, *you get the venire returned by the sheriff's deputy in town, and the distringas by the under-sheriff in the country; and annex them both, together with the panel, to the Nisi Prius record, and send them to the plaintiff's attorney in the country.* The jury process must be sent to the sheriff, in the case of common jurors ten days, and in the case of special jurors three days at the least before the commission day at the assizes (*p*). If it be intended, however, to try the cause by a special jury, or to have a view, there are some previous steps necessary, which shall be mentioned *post*, 256, 257.

In C. P.

In the Common Pleas the *venire* and *distringas* are sued out thus :—*Get blank writs of venire facias and habeas corpora juratorum at the stationer's, and fill them up; get them signed by one of the masters, and sealed.* In causes to be tried in London or Middlesex, *take the venire and habeas corpora to the secondary's office in London, or to the sheriff's office in Red Lion-square, respectively, and get them returned; and annex the writ and the panel to the record.* In causes to be tried at the assizes, *get the venire returned by the under-sheriff's agent in town, and the habeas corpora by the under-sheriff in the country, and annex it to the Nisi Prius record, and send them to the plaintiff's attorney in the country. The venire and panel are filed in town.*

Re-sealing where Cause stands over.

If the cause stand over from one sitting to another, the *distringas*, or *habeas corpora*, must be re-sealed previously to the sitting to which it stands over; otherwise the marshal must not insert it in the daily lists of causes for trial, and the cause cannot be tried. (*See ante*, 248).

How returned in Common Jury Cases.

How returned in Common Jury Cases.] The stat. 6 *G.* 4, *c.* 50, directs the mode in which the jurors, in common jury cases, are to be chosen, summoned, and returned. And by sect. 15, the sheriff or other person to whom the *venire facias* is directed, shall, upon his return thereto, annex to it a panel containing the names alphabetically, and the additions and places of abode, of not less than forty-eight nor more than seventy-two persons qualified to serve on juries; but the judge of assize or *Nisi Prius* may, by order under his hand, direct a greater or lesser number of persons than that above mentioned to be returned and summoned, if he shall so think fit. And by sect. 22, the justices of assize may direct the sheriff to return two sets of jurors, not exceeding 144 in all, the one to attend for a certain number of days at the beginning of the assizes, the other for the residue of the assizes, and the sheriff shall summon them accordingly. Also, by sect. 15, upon the

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(*n*) See *Taylor* v. *Lake*, 1 Str. 575.

(*o*) 1 Sellon, 427.

(*p*) *Charlton* v. *Burfitt*, 1 Moo. & Sc. 450.

return of the *distringas* or *habeas corpora*, the sheriff shall annex it to a panel, containing the same names as were returned in the panel to the *venire*, with their additions and places of abode; and the persons named in these panels, and none other, shall be summoned to serve on juries at the then next assizes or sessions of *Nisi Prius* for the county named in such writs of *venire* and *distringas*, or *habeas corpora*. On error *coram nobis*, the court reversed the judgment, because there was no return of the *distringas* by the sheriff or other officer, nor any panel of the jurors therein named, returned and annexed thereto, such defect not being cured by the 21 *Jac.* 1, *c.* 13 (*q*). But where one panel only was annexed to the writs of *venire facias* and *distringas juratores*, the Court of Exchequer held it to be no ground of error (*r*).

Special Jury, Right to, in general.

Special Jury (*s*), *how struck, and Process for returned, &c.*] The court at all times might, with the consent of parties, order the master to nominate and strike a special jury; and in trials at bar might do so upon the application of either of the parties, without the consent of the other (*t*). And now, upon the motion of either the plaintiff or defendant in any cause pending in any of the courts at Westminster or the counties palatine, such court shall order a special jury to be struck before the proper officer, in the same manner as they have usually ordered the same; and the jury so struck shall be the jury to be returned for the trial of the issue (*u*).

Motion for, by Plaintiff or Defendant in Replevin.

The manner of procuring this special jury on behalf of the plaintiff or of the defendant in replevin, is thus: *Get counsel's signature to the motion paper; take it to one of the masters, and draw up the rule* (*x*). In trials at bar it should be observed, the motion for such trial includes this motion for the special jury; and not being motion, of course it must be made by counsel in court (*y*).

Motion for, by Defendant or Plaintiff in Replevin.

The manner of procuring this special jury on behalf of the defendant or of the plaintiff in replevin is now regulated by the rule of all the courts of *H. T.*, 1 *V. r.* 3, which orders, "That no rule for a special jury be granted on behalf of any defendant or plaintiff in replevin, except on an affidavit either stating that no notice of trial has been given, or if it has been given, then stating the day for which such notice has been given; and, in the latter case, no such rule is to be granted, unless such application is made for it more than six days before that day, provided that a judge may, on summons, order a rule for a special jury to be drawn up at any time" (*z*).

(*q*) *Rogers* v. *Smith*, 1 A. & E. 772; 3 N. & M. 760, *S. C.*: and see the cases and law there collected: also see *post*, Vol. II. Book IV. Part I. Ch. 28, as to what defects of this sort in jury process are aided.

(*r*) *Green* v. *Smith*, 5 Dowl. 174; 1 M. & W. 740, *S. C.*

(*s*) As to a "good jury" in executing a writ of inquiry, see Vol. II. Book II. Part IV. Ch. 4.

(*t*) See R., 8 W. 3, r. 2.

(*u*) 6 G. 4, c. 50, s. 30.

(*x*) See the form, Chit. Forms, 71.

(*y*) See *post*, Ch. 3, Sect. 1.

(*z*) Before the above rule of H. T., 1 V. r. 3, obtaining a rule for a special jury was a frequent mode of delay adopted by defendants, as they could in general gain a term by it. When this was evidently the case, and the cause was not such as would require a special jury, the chief justice, (but not the full court), upon motion, would frequently order the action to be tried at one of the sittings in term. (*Maltby* v. *Moses*, 1 Chit. Rep. 489: *Johnson* v. *Gas Company*, 7 Taunt. 390: *Roberts* v. *Bradshaw*, 1 Stark. 31: *Briggs* v. *Dixon*, 4 Moore, 414, 470: *Thorne* v. *Marquis of Londonderry*, 8 Bing. 26; 1 Moo. & Sc. 62, *S. C.*: see *Joseph* v. *Perry*, 3 Dowl. 699: *Bull* v. *Pinkus*, 5 Scott, 617). Or the court would, on an application for that

Marking Cause at as Special Jury, &c.

Having obtained the rule, *get an appointment from one of the masters on it; and serve a copy of the rule and appointment upon the opposite attorney, and also upon the under-sheriff, or in London upon the secondary.* In London and Middlesex, at the sittings *after* term, this must be done, and the cause *marked* in the marshal's book as a special jury cause, on or before the day preceding the adjournment day in Middlesex and London respectively (*a*). In a case before the above rule of *H. T.*, 1 *V. r.* 3, where it was served at six o'clock in the evening preceding the day fixed for the trial, (which was at one of the sittings in *term*), and the plaintiff treated it as a nullity, and had the cause tried by a common jury, the court held that he had done rightly, saying that, to make a rule for a special jury a *supersedeas* to common jury process, it must be served early enough to enable the other party, by using ordinary diligence in the usual course of business, to insure the attendance of a special jury (*b*). If the defendant's attorney do not serve it, and mark the cause as a special jury cause within due time, the cause may be tried by a common jury, and the defendant lose the benefit of his rule.

Mode of proceeding to strike Special Jury.

At the time appointed, attend at the master's office, when the sub-sheriff will also attend with the juror's book, and the special jurors' list, and numbers written on pieces of parchment or card corresponding with the names in such list: the master then puts the numbers into a box, and, having shaken them together, draws out forty-eight of them one after another, and, as each number is drawn, refers to the corresponding number in the special jurors' list, and reads aloud the name designated by such number. At the time of reading each name, either party or his attorney may object to such person named as being incapacitated from serving on the jury; and if he prove the same to the satisfaction of the master, such name shall be set aside and another number drawn instead thereof, which may in like manner be challenged; and so on, until forty-eight names shall be chosen. If the whole of the forty-eight names cannot be obtained in this way, the master may nominate the remainder in the manner he has heretofore done (*c*). Or, by consent of the parties, the jury altogether may be nominated in the manner hitherto adopted (*d*). And if the cause of action have arisen in a county of a city or town, (other than London), the jury must be nominated in the manner hitherto adopted (*e*). *The master's clerk will furnish each party with a list of the names of the forty-eight jurors, their additions, and places of abode. When you are ready to strike the special jury, get another appointment from the master, and serve a copy of the rule, with the second appointment, on the opposite attorney or agent. Attend at the time appointed, and the master*

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purpose, supported by affidavit of the circumstances, discharge the rule for a special jury, unless the defendant consented that the plaintiff, if he got a verdict, should have judgment of the term. (*Craddock* v. *Davis*, 1 Chit. Rep. 176: *Bloxam* v. *Brown*, 4 Taunt. 470: *Doe* v. *Lorimer*, 1 Chit. Rep. 236: *Stanbury* v. *Gillett*, 9 Bing. 319; 2 Moo. & Sc. 397, *S. C.*) In a recent case, the court refused to discharge the rule for a special jury, on the ground that the defendant had obtained it in June, 1831, and up to the Michaelmas term following, had omitted to strike the jury, although the cause stood for trial in July. (*Andrews* v. *Thornton*, 8 Bing. 64; 1 Moo. & Sc. 39). The abuse made of a special jury for purposes of delay has been materially prevented by the above rule of court of H. T., 1 V.

(*a*) R. H., 44 G. 3: R. T., 30 G. 3: R. T., 52 G. 3.

(*b*) *Gunn* v. *Honeyman*, 2 B. & Ald. 400; 1 Chit. Rep. 234, *S. C.*: and see *Johnson* v. *Blackwall*, 6 C. & P. 236.

(*c*) 6 G. 4, c. 50, s. 32.

(*d*) Id. s. 33.

(*e*) Id. s. 36.

Change of Sheriffs.

will strike out twelve names for each party, at their desire, beginning with the plaintiff; or, if either the attornies or agents do not attend, the master shall proceed ex parte, and strike out twelve names for the party absent (*f*). *The master's clerk will then make out lists of the twenty-four names remaining, and give them to the attornies.* It is no objection that there has been a change of sheriffs after the forty-eight were nominated, and before the parties attended the master to strike the jury (*g*).

Special Jury Process.

Sheriff's Expenses of executing.

Let the plaintiff's attorney or agent make out a special distringas, (or, in the Common Pleas, a special habeas corpora), containing the twenty-four names in the list (*h*), *and get it sealed and returned as before directed.* By rule *T. T.*, 5 *G.* 4, *Q. B* (*i*). if the *distringas* be directed to the sheriff of Middlesex, the notice for summoning the jury and the *distringas* must be left at the sheriff's office before seven o'clock in the evening next but one before the day on which the jury shall be required to attend, (Sunday not included); and notices for countermanding the summoning of special juries shall be before twelve o'clock at noon of the day next preceding that for which the jury was to have been summoned. By stat. 6 *G.* 4, *c.* 50, *s.* 25, in all counties &c., except in London and Middlesex, the special jurors shall be summoned three days at least before the day on which they are required to attend; and consequently the *distringas* (or *habeas corpora*) must be left at the sheriff's office in sufficient time to have the jurors summoned accordingly. The sheriff, before stat. 1 *V. c.* 55, was not allowed extra expenses of summoning special jurors, on account of their residing at a distance from each other; and the court, in one case, ordered the sheriff to refund the money received on this account, although he had actually expended it all (*k*). Since that statute this might be otherwise (*l*).

Proceedings where special Jurors make Default.

If none of the special jurors mentioned in the *distringas* (or *habeas corpora*) appear in court, the cause cannot be tried, unless, perhaps, by consent. Where, besides the special jury panel, there was also a common jury panel returned, and as none of the special jurors appeared, the plaintiff proposed to have the cause tried by a common jury, which was allowed by the judge, notwithstanding the defendant's protesting against it, and a verdict was found for the plaintiff; the court set aside the verdict, although it appeared that the defendant had made defence at the trial (*m*). But if the defendant has not summoned the special jurors in time, the cause will be tried by a common jury (*n*). So, if any of the jurors appear, either party may then pray a *tales*, and the cause must then proceed (*o*). If, however, the cause go off for default of special jurors, no new jury can in general be struck, and the cause must be tried by the jury first appointed (*p*).

Certificate for Costs of Special Jury.

The party, however, upon whose application it is struck, shall bear all the expenses occasioned by the trial of the cause

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(*f*) See R. T., 8 W. 3, r. 2: *Anon.*, 1 Salk. 405; Cowp. 412.

(*g*) *R.* v. *Hart*, Cowp. 412.

(*h*) See the form, Chit. Forms, 70.

(*i*) 3 B. & C. 177; 4 D. & R. 336.

(*k*) *Lane* v. *Sewell*, 1 Chit. Rep. 175. See R. T., 8 W. 3, r. 3, a.

(*l*) See the table of fees allowed under that act, Appendix at end of Vol. II.

(*m*) *Holt* v. *Meddowcroft*, 4 M. & Sel. 467.

(*n*) *Archer* v. *Bamford*, 1 C. & P. 64.

(*o*) *Snook* v. *Southwood*, R. & M., C. N. P. 429: *vide post*, 267.

(*p*) *R.* v. *Perry*, 5 T. R. 453: but see *Mayor of Doncaster* v. *Coe*, 3 Taunt. 404.

by such special jury, and shall not be allowed, upon taxation of costs, any more or other costs than he would have been entitled to if the cause had been tried by a common jury, unless the judge shall immediately after the verdict certify, upon the back of the record, that it was a proper cause to be tried by a special jury (*q*). Where such certificate was applied for the day after the trial, the court held that the application was made too late (*r*). Where no certificate is granted, the practice is to allow the party only the costs actually paid to the attending jury in court (*s*). If a case be not gone into at the trial, the judge will not certify that it was a fit cause to be tried by a special jury, merely because the declaration is for penalties to a large amount, and because persons of considerable rank are called on their subpœnas (*t*). Where the case turned solely on a question of law, and there was no fact in dispute between the parties, *Abbott*, C. J., refused to certify for a special jury (*u*). An action for libel in a newspaper would, it seems, be considered as a proper case to be tried by a special jury, if there were special pleas of justification, but not, perhaps, if "not guilty" only was pleaded (*x*). The statute does not, it seems, extend to a case where the record is withdrawn, but only where the cause has been tried (*y*). Nor, before the 3 & 4 *W.* 4, *c.* 42, did it extend to a case where the plaintiff was *nonsuited* (*z*); but now, by that act, sect. 35, the defendant will be entitled to those costs in cases where the plaintiff is nonsuited, as well as where a verdict is found against him.

View, how obtained, and in what Cases.

Deposit for Expenses of.

View, how obtained, and in what Cases.] By stat. 6 *G.* 4, *c.* 50, *s.* 23, the *distringas* or *habeas corpora* may order that the sheriff shall have six or more of the jurors returned to try the cause, (who shall be consented to by the parties, or nominated by the sheriff in case the parties cannot agree), at the place in question, some convenient time before the trial, and that the place in question shall be then and there shewn to them by two persons to be named in the writ, and appointed by the court. And the sheriff shall afterwards, by a special return upon the *distringas* or *habeas corpora*, certify that the view has been had, according to the command of the said writ, and shall specify the names of the viewers. The court or a judge may also, if they think fit, require by the rule that the party applying for it shall deposit in the hands of the under-sheriff a certain sum of money, for payment of the expenses of the view. And by a rule of the Court of Queen's Bench, made since this statute (*a*), it is ordered that, "upon every application for a view, there shall be an affidavit stating the place at which the view is to be made and the distance thereof from the office of the under-sheriff; that the sum to be deposited shall be 10*l.* in case of a common jury, and 16*l.* in case of a special jury,

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(*q*) 6 G. 4, c. 50, s. 34; and see 24 G. 2, c. 18, s. 1. Before this enactment, it was holden that the fees for striking a special jury should be paid by the party applying for it, but that the expenses of the trial should abide the event of the suit. (Sayer, Costs, 181: 2 Str. 1080: Barnes, 123: Tidd, 9th ed. 792).

(*r*) *Waggett* v. *Shaw*, 3 Camp. 316.

(*s*) *Cursum* v. *Durham*, 2 Chit. Rep. 154: *Calvert* v. *Gordon*, 3 Man. & Ry. 124, 128.

(*t*) *Orme* v. *Crockford*, 1 C. & P. 537.

(*u*) *Wemyss* v. *Greenwood*, 2 C. & P. 483.

(*x*) *Roberts* v. *Brown*, 6 C. & P. 767.

(*y*) *Clements* v. *George*, 11 Moore, 510.

(*z*) *Wood* v. *Grimwood*, 10 B. & C. 689; 5 M. & R. 622, *S. C.*

(*a*) R. T., 7 G. 4: 5 B. & C. 795: 8 D. & R. 757.

if such distance do not exceed five miles; and 15*l.* in case of a common jury, and 21*l.* in case of a special jury, if it be above five miles; and if such sum shall be more than sufficient to pay the expenses of the view, the surplus shall be forthwith returned to the attorney of the party who obtained the view; and if such sum shall not be sufficient to pay such expenses, the deficiency shall forthwith be paid by such attorney to the under-sheriff: and it is further ordered, that the under-sheriff shall pay and shall account for the money so deposited according to the scale set down in the rule." The court will disallow the costs of a view, unless the names of the shewers are inserted in the writ of view, as directed by the 23rd section of the above act (*b*).

Rule for.

By rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 63, "the rule for a view may, in all cases, be drawn up by the officer of the court on the application of the party, without affidavit or motion for that purpose" (*c*). And in all cases it is made part of the rule or order, that, if no view be had, or if had by less than the number of jurors mentioned in the rule, &c., the trial shall nevertheless proceed, without any objection being made on that account, or on account of any defect in the return of the *distringas* or *habeas corpora;* that no evidence shall be given on either side, at the time of taking the view; and, in ordinary cases, that the expenses of taking it shall be equally borne by both parties (*d*).

Jurors, how called at Trial.

At the trial the jurors who have taken the view are called first, and as many as appear form part of the jury. The number of the jury is then filled up in the ordinary way.

Practical Directions.

Draw up a præcipe or memorandum of the rule you want. Get from the opposite attorney a memorandum of the name and place of abode of his shewer; and take it, together with a similar memorandum of your own shewer, and also of the time and place of meeting, &c., to one of the masters, and draw up the rule. If the opposite party will not name a shewer, the master will, on an appointment being obtained for that purpose, name one ex parte. Serve a copy of the rule on the opposite attorney. Leave the original rule at the sheriff's office, together with a list of the jury, if special, and he will summon them; or, if common, he will summon such as he may think fit (*e*). *Deposit with him the expenses of the view, if ordered, according to the above rule of court of T. T.*, 7 *G.* 4.

Venire de novo before Verdict on Trial at N. P.

Venire de novo before Verdict.] If a plaintiff, or a defendant in *replevin*, having sued out a *venire*, and a *distringas* or *habeas corpora* with a clause of *Nisi Prius*, shall not afterwards proceed to trial, he may (excepting in cases where a view is directed) have a new *venire*, commanding the sheriff that he cause to come anew twelve good and lawful men of the body

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(*b*) *Taylor* v. *Thompson*, 7 Bing. 403; 5 Moo. & P. 255; 1 Dowl. 218, *S. C.*

(*c*) Before this rule in the C. P., it was said, that a rule for a view was never granted without an affidavit in any case, except in an action of waste. (*Anon.*, Barnes, 467: and see *Redferne* v. *Smith*, 9 Moore, 497; 2 Bing. 262, *S. C.*)

(*d*) See form of the rule in common jury cases, Chit. Forms, 72: in special jury cases, Id. 72: and see 1 Bur. 253.

(*e*) See also the forms of *distringas*, where a view is to be had, Chit. Forms, 73, 74. See also the form of a *mittimus* to a county palatine, where a view is to be had, Id. 67.

of his county, qualified according to law, &c., so proceeding as in the ordinary writ; and the plaintiff may thereupon sue out a *distringas* or *habeas corpora*, and proceed to trial, as if no former *venire* had issued; and so, *toties quoties*, as the case shall require (*f*). In the same manner, if the plaintiff do not go to trial on the *venire* first sued out, the defendant may sue out a *venire de novo*, if he wish to proceed to trial by proviso (*g*).

At Bar.

This statute, however, does not extend to a trial at bar. In this case, therefore, the party must proceed as at common law, namely, by suing out an *alias* and *pluries distringas*, or *habeas corpora;* and the *alias* or *pluries distringas* is not to issue until after the former writ and panel have been delivered to the master, in order that the issues forfeited may be estreated (*h*).

Venire de novo after Verdict.

As to a *venire de novo* after verdict, see *Vol. II. Book IV. Part I. Ch.* 27.

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Sect. 9.

Entry of the Cause for Trial.

Cause for Trial at Bar, how and when entered.

At Bar.] When the trial is to be at bar, the cause is in this court entered with one of the masters; and the day appointed for it must be entered in his book previously to notice of trial being given (*i*). *Leave the record with him; leave him also a draft of the issue, and he will make out four copies of it for the judges, and have them delivered.* In the Common Pleas, in all cases to be tried at bar, the rule by which the trial at bar is granted, specifies the day on which it is to be had. And by *R. H.*, 9 *A.*, the attorney for the plaintiff, in all such cases, shall, before the *essoign* day of the term in which the cause is to be tried, give notice to the chief prothonotary or his secondary (now one of the masters) of the day on which the cause is to be tried, that the same may be put down in the court book provided for that purpose, otherwise the cause shall not be tried that term. *Leave and furnish each of the judges with a copy of the issue upon brief paper, four days at least before the time appointed for the trial* (*k*).

At Nisi Prius in Town, how entered.

At Nisi Prius in Town.] *Take the record, with the distringas (or, in the Common Pleas, the habeas corpora) and panel annexed, to the marshal's office, and enter the cause for trial.* By rule of all the courts of *H. T.*, 1 *W.* 4, *r.* 6, "*a copy of the particulars of the demand, also particulars (if any) of the defendant's set-off, shall be annexed by the plaintiff's attorney to every record, at the time it is entered with the judge's marshal.*" Where the plaintiff annexed to the record particulars varying from

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(*f*) 6 G. 4, c. 50, s. 50. See form of *venire de novo*, Chit. Forms, 69.

(*g*) 6 G. 4, c. 50, s. 50.

(*h*) R. H., 15 C. 2, r. 2.

(*i*) 2 Lil. Pr. R. 608. See R. G., H. T., 2 W. 4, r. 1, s. 60, which orders, that, "notice of a trial at bar shall be given to the proper officer of the court before giving notice of trial to the party."

(*k*) R. M., 3 G. 2.

those delivered to the defendant, and there being no evidence of the particulars delivered, the court granted a new trial without costs, but refused to nonsuit the plaintiff because the defendant was not in a condition to raise the question at the trial, and the point was not reserved (*l*). There is no occasion for the opposite party to prove the delivery of the particulars when thus annexed to the record (*m*).

When entered.

Causes intended to be tried in London or Middlesex, at any of the sittings in term, must be entered with the marshal two days previously to the sittings; otherwise the marshal, at the request of the defendant or his attorney, may enter a *ne recipiatur* (*n*). Causes intended to be tried at the sittings after term must be entered, and the records delivered to the marshal, at the times following: *viz.* the causes in Middlesex, the first day of the sitting after term in Middlesex; and the causes for London, two days before the adjournment-day in London (*o*). Where the cause is to be tried at the sittings after term, a *ne recipiatur* cannot be entered until after proclamation made by order of the chief justice for bringing in the records; and then, if the record be not brought in, the defendant's attorney may enter a *ne recipiatur* (*p*). But, although, regularly, before a cause is entered for trial, the record of *Nisi Prius* should be brought into the marshal's office, this is not observed in practice; and causes are frequently set down for trial, and afterwards settled, before the record is carried in (*q*).

Marking, &c., Special Jury Cause.

Also, in special jury causes in London and Middlesex, the rule for the special jury must be served, and the cause marked as a special jury cause in the marshal's book, on or before the day preceding the adjournment-day in Middlesex or London respectively: otherwise the cause cannot be tried (*r*).

Entry of Town Remanet.

When the cause is made a remanet, get the marshal to alter the jurata, and alter the distringas or habeas corpora in conformity with it: get the record and distringas or habeas corpora re-sealed; annex the distringas or habeas corpora to the record, and leave it with the marshal. Apply to a judge for an order to amend the return of the distringas or habeas corpora, and of the clause of Nisi Prius, which order may be obtained on an ex parte application (*s*). *Take the order to the marshal, who will accordingly alter the jurata, and alter the distringas or habeas corpora in conformity with it. The marshal will enter the cause in the list of remanets.* This should be done as often as the cause is made a *remanet*, otherwise the cause cannot be tried.

At the Assizes, how entered.

At the Assizes.] *When you have passed the record, as directed ante,* 247, *get the venire returned by the sheriff's deputy, or under-sheriff's agent in town; and send the record, venire, and distringas, or venire and habeas corpora, to the attorney in the country. Let him get the distringas or habeas corpora returned by the under-sheriff; and having annexed the venire, distringas, (or, in C. P. the venire, habeas corpora), and panel to the record, let him take them to the judge's lodgings, and enter the cause with the marshal.*

(*l*) *Morgan* v. *Harris*, 2 C. & J. 461.

(*m*) *Macarthy* v. *Smith*, 1 Moo. & Sc. 227; 8 Bing. 145; 1 Dowl. 253, *S. C.*

(*n*) R. H., 15 & 16 C. 2, r. 2, Q. B.: R. H., 32 G. 3, C. P.

(*o*) R. H., 34 G. 3, r. 2, Q. B.: R. H., 8 G. 1: R. E., 1: G. 2, C. P.

(*p*) R. M., 4 A. *a.*

(*q*) *Cope* v. *Holt*, 1 D. & R. 181.

(*r*) R. H., 44 G. 3, Q. B.: R. T., 52 G. 3, C. P.: *ante*, 254.

(*s*) *Ante*, 248.

The writ and record must be entered together, otherwise the marshal shall not receive them (*t*). *Annex the particulars of demand or set-off, if any, to the record at the time of entering, as in the case of a trial in town* (*u*). The records of *Nisi Prius* in the Exchequer no longer require a commission to accompany them (*x*).

When.

The record must be entered with the marshal before the first sitting of the court after the commission-day (*y*); except in the counties of York and Norfolk, and in the city of Norwich: and in the county of York, on or before the second day after the commission-day (*z*), unless otherwise ordered by the judge; and in the county of Norfolk and city of Norwich, before the sitting of the court on the day after the commission-day (*a*). The judge sitting at *Nisi Prius*, however, may, in his discretion, and under particular circumstances, allow his marshal to receive a record and enter the cause for trial after the time limited by these rules. But he will seldom allow it; and this although *ne recipiatur* has been entered by the defendant (*b*). The marshal shall order a list of the causes so entered to be fixed up in some public place in the *Nisi Prius* Court (*z*).

Entry of an Assizes Remanet.

If the cause be made a *remanet* at the assizes, *get the record, &c., from the associate; alter the jurata, and sue out a venire de novo and distringas,* (*or, in the Common Pleas, a venire de novo and habeas corpora*), *as mentioned ante,* 257, *and proceed as in ordinary cases, giving a fresh notice of trial, and entering your cause again with the marshal at the next assizes.* If there have been a view, however, you cannot sue out a *venire de novo*, but must sue out an *alias distringas*, or, in the Common Pleas, an *alias habeas corpora.*

Entry in Lancaster and Durham.

If the cause is to be tried in the county palatine of Lancaster or of Durham, *get the record examined, sealed, and passed, as directed ante,* 247. *Write out a mittimus on a plain piece of parchment* (*c*), *and get it signed and sealed. Send it, together with the record, to the attorney in the country, who will sue out the jury process, and get it returned. The cause is then entered with the marshal, as in ordinary cases.*

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Sect. 10.

The Brief.

The Brief.

The only thing particularly to be observed in framing the brief is, that every matter in it be stated accurately, and with as much conciseness as is consistent with perspicuity (*d*). *Write your brief in a fair engrossing hand on brief paper, on one side only of each sheet. Deliver it to counsel.*

(*t*) R. T., 10 & 11 G. 2.

(*u*) *Ante*, 258.

(*x*) 2 & 3 V. c. 22.

(*y*) R. H., 14 G. 2: see *Skeye* v. *Voice*, 3 Camp. 365

(*z*) R. H., 14 G. 2.

(*a*) R. H., 32 G. 3.

(*b*) *Doe Sayer* v. *Rees*, D. & R., C. N. P. 6.

(*c*) See the form, Chit. Forms, 66. The like where a jury are to have a view. (Id. 67).

(*d*) See a short form, Chit. Forms, 75.

CHAPTER IV.

PROCEEDINGS FROM THE TRIAL TO THE VERDICT INCLUSIVE.

TRIALS, by the country, are either at bar or *Nisi Prius*, or before the sheriff or judge of a court of record, in pursuance of the 3 & 4 *W.* 4, *c.* 42, where the debt sought to be recovered is indorsed on the writ of summons, and does not exceed 20*l.* We shall therefore consider these proceedings under the following heads, *viz.*—

Sect. 1. *Trials at Bar*—261 *to* 264.
Sect. 2. *Trials at Nisi Prius*—264 *to* 290.
Sect. 3. *Trials before the Sheriff, under the* 3 & 4 *W.* 4, *c.* 42—297 *to* 299.

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Sect. 1.

Trial at Bar.

In what Cases granted, 261.
When, and how moved for, 262.
Notice of Trial at, 263.
Jury at, 263.
The Trial at, 264.

Tiral at Bar, in what Case granted.

In what Cases granted.] A trial at bar cannot at present be had without the leave of the court, even although the parties consent to it. And it is entirely discretionary with the court to grant it or not (*a*), unless the crown be actually and immediately interested, in which case the Attorney-General may demand a trial at bar, as of right (*b*). Also, if a judge of either bench, or a master in Chancery, be a party, the court will grant a trial at bar, as of course, without an affidavit (*c*); and it is said that the court will not deny a trial at bar where a barrister or an officer of the court is a party (*d*). In other cases, very sufficient reasons must be stated by affidavit to induce the court to grant a trial at bar; for, not only is it very expensive to the parties, but it materially delays the other business of the court (*e*). The court, therefore, will in general require, as grounds for granting it, that the matter in dispute be of considerable value, that the inquiry is likely to be of great length, and that difficulties are expected to arise in the course of it (*f*). But neither the length of a cause, nor

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(*a*) *R.* v. *Burgesses of Carmarthen*, Say. 79: *R.* v. *Amery*, 1 T. R. 365.

(*b*) *R.* v. *Hales*, 2 Str. 816: *Reg.* v. *Banks, Sir Jacob*, 2 Salk. 652; 2 L. Raym. 1082, *S. C.*: and see *R.* v. *Foley*, 1 Str. 52: *Rowe* v. *Brenton*, 8 B. & C. 737; 3 M. & R. 133, *S. C* A trial at bar will be granted on the *ex officio* application of the Attorney-General, where the interest of the King as Duke of Lancaster may come in question. (*Brown* v. *Lord Grenville*, 1 H. & W. 270).

(*c*) *Morton* v. *Hopkins*, 1 Sid. 407.

(*d*) *Astrey's case*, 2 Salk. 651; 6 Mod. 123, *S. C.*

(*e*) *R.* v. *Burgesses of Carmarthen*, Say. 79.

(*f*) *Holmes* v. *Brown*, 2 Doug. 437: and see *Sandwich's case*, 2 Salk. 648: *Preston* v. *Lingen*, 1 Str. 479: *Lord Rivers* v. *Pratt*, 1 B. & B. 265, 3 Moore, 582, *S. C.*

the value of the matter in question, are of themselves sufficient grounds for granting a trial at bar; there must also be a probability of difficulty arising in the course of the inquiry (*h*); and, in order to obtain such a trial upon the ground of difficulty, it is not sufficient to state generally in the affidavit that the cause is expected to be difficult, but the particular difficulty expected to arise must be stated, in order that the court may judge whether it be a sufficient ground for granting such a trial or not (*h*).

In what Cases not grantable.

There are some cases, however, in which a trial at bar cannot be had: as where the venue is laid in London, for the citizens are exempted from serving on juries out of the city by their charter (*i*); or perhaps in a county palatine: it being doubted whether this court have the power to compel the attendance of the inhabitants upon a jury at Westminster (*k*). Yet, even in these cases, if the jurors consent to waive their privilege, a trial may be had at bar, if the court deem the matter in dispute a fit subject for such a trial (*l*).

Terms imposed on Applicant for.

As it is entirely discretionary with the court to grant a trial at bar or not, they may consequently impose what terms they please upon the party applying, as the condition of their granting it; and where such an application was made on the part of a defendant, and it was stated, upon shewing cause, that the plaintiff was poor, and one of his witnesses likely to die before the term, the court granted a trial at bar, upon the terms of the defendant's consenting that the plaintiff's witness might be examined upon interrogatories, that the cause should be tried by a Middlesex jury, and that *Nisi Prius* costs should be accepted if the defendant succeeded; but that he should pay bar costs if the plaintiff had a verdict (*m*). The poverty, however, of the party applying for a trial at bar is no objection to the granting of it; and the court have granted it upon the application of a plaintiff who sued *in formâ pauperis* (*n*).

When, and how moved for, &c.

When and how moved for, &c.] A trial at bar is never granted before issue joined (*o*), except in ejectment (*p*); nor in an issuable term (*q*), unless the crown be concerned in interest (*r*) or under very particular and pressing circumstances (*s*). It must be moved for in the term previous to that in which the cause is intended to be tried, unless the action be for lands in Middlesex (*t*); and it cannot be moved for on the last paper day of the term, unless moved for on the part of the crown (*u*). The motion is for a rule *nisi* only (*x*); and in ordinary cases must be supported by an affidavit stating the value of the matter in question, the difficulties likely to arise in the cause,

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(*h*) R. v. *Burgesses of Carmarthen*, Say. 79; Andr. 271.

(*i*) *Anon.*, 2 Salk. 644: *Castell* v. *Bambridge*, 1 Str. 856.

(*k*) *Gally* v. *Clegg*, Say. 47: and see *R.* v. *Amery*, 1 T. R. 366.

(*l*) *Lockyer* v. *East India Company*, 2 Wils. 136.

(*m*) *Holmes* v. *Brown*, 2 Doug. 437.

(*n*) *Sherwin* v. *Clarges*, 12 Mod. 318.

(*o*) *Boro' of Christchurch case*, 2 Str. 696.

(*p*) *Anon.*, Say. 155.

(*q*) R. M., 4 A. c.: Fitzg. 267: 1 H. Bl. 211.

(*r*) R. M., 4 A. c.

(*s*) See *R.* v. *Foley*, 1 Str. 52.

(*t*) *Turner* v. *Barnaby*, 2 Salk. 649; Ca. Pr. C. B. 66.

(*u*) *Lord Bellamont's case*, 2 Salk. 625.

(*x*) See form of rule absolute, Chit. Forms, 76.

and shewing that the inquiry is likely to be of considerable length.

Notice of.

Notice of Trial, &c.] The judges may appoint any day for the trial they think fit (*y*). There must be fifteen days' notice of trial (*z*); and previously to its being given, in the Court of Queen's Bench, *draw up the rule for the trial at bar with one of the masters, and serve a copy of it on the opposite attorney. Get the master to enter in his book the day appointed for the trial. Leave with him, at the same time, a draft of the issue, that he may make out copies of it for the judges, as mentioned ante*, 258. In the Common Pleas it was formerly a rule, that the plaintiff's attorney must, before the *essoign* day of the term in which the cause was appointed to be tried at bar, give notice to the chief prothonotary, or his secondary, of the day of trial, that the same might be put down in the court book provided for that purpose; and in case of neglect, the cause could not have been tried that term without motion, and special direction of the court (*a*). And now, by general rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 1, *s.* 60, "notice of a trial at bar shall be given to the proper officer of the court before giving notice of trial to the party."

Countermand of.

You may countermand your notice of trial, as in other cases; but the cause cannot afterwards be tried without a new rule being obtained for that purpose (*b*); and it is said that a second rule cannot be made between the same parties in the same term (*c*).

The Jury.

The Jury.] The action is tried by a jury of the county in which the venue is laid, in the same manner as it would have been if tried at *Nisi Prius*, unless the parties consent to the contrary (*d*). The jury is almost invariably special; and the rule for the special jury forms a part of the rule for the trial at bar. When a trial at bar is granted in a penal action, upon motion of the Attorney-General, it must be noted on the back of the *distringas* (*e*).

Tales.

If, when the trial is called on, a sufficient number of jurors do not attend, the trial must be adjourned, and a *decem* or *octo tales* awarded as at common law (*f*); for the stat. 6 *G.* 4, *c.* 50, *s.* 37, which allows the *tales de circumstantibus*, is expressly confined to trials at *Nisi Prius* and the assizes. And, in one case, the court ordered the *decem tales* returnable on the day but one following, there being jurors sufficient in town to make a jury; otherwise the trial must have been put off for two terms (*g*). But before an *alias* or *pluries distringas* with a *tales*, for the trial of an issue at bar, can be sued out, the preceding writ of *distringas*, with a panel of the names of the jurors annexed, must be delivered to the master, in order that the issues forfeited by the jurors for their non-appearance may be duly estreated (*h*).

(*y*) 11 G. 4 & 1 W. 4, c. 70, s. 1.

(*z*) *Turner* v. *Barnaby*, 2 Salk. 649. See form of notice, Chit. Forms, 76.

(*a*) R. H., 9 Ann. r. 1, C P.: and see Tidd, Prac. 9th ed. 750; Tidd, New Prac. 458.

(*b*) R. M., 4 A. c.

(*c*) Fitzg. 267.

(*d*) See *Pierse* v. *Lord Fauconberg*, 1 Bur. 292: *Holmes* v. *Brown*, 2 Doug. 437.

(*e*) 18 El. c. 5, s. 2.

(*f*) See *Denn* v. *Cadogan*, 1 Bur. 273; 2 Saund. 349 a.

(*g*) *Denn* v. *Cadogan*, 1 Bur. 273.

(*h*) R. H., 15 C. 2.

The Trial.

The Trial.] The judges may appoint any day for the trial they think fit: and the time so appointed, if in vacation, shall, for the purpose of such trial, be deemed as part of the preceding term (*i*). On a trial at bar the master calls over and swears the jury, reads the record and written evidence, marks all deeds and papers given in evidence, and has the custody of them afterwards until called for, and records the verdict (*k*). The trial is had in the Court at Westminster, and the jury (from the county into which the *venire* was awarded) are obliged to attend there, at their peril, upon the return of the *distringas* or *habeas corpora*. The chief justice (or, in his absence, the senior judge) sums up the evidence (*l*); and if any question of law arise, either collaterally or as forming a part of the case, each of the judges delivers his opinion upon it *seriatim* (*l*). A bill of exceptions lies upon the reception of improper evidence on a trial at bar (*m*), and each of the presiding judges may, on the trial, make such observations to the jury upon the whole case, by way of direction, as he considers to be requisite (*n*). In all other respects, the trial at bar is the same as a trial at *Nisi Prius;* and if either party be dissatisfied with the verdict, he may move for a new trial, as in other cases (*o*).

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Sect. 2.

Trial at Nisi Prius.

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Order of Trial of Causes.

Order of Trial of Causes.] At *Nisi Prius*, every cause shall be tried in the order in which it has been entered, without preference or delay (*p*); unless it be made out to the satisfaction of the judge, in open court, that it is impracticable or inconvenient so to do; who, thereupon, may make such order

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(*i*) 11 G. 4 & 1 W. 4, c. 70, s. 7.

(*k*) Tidd, 9th ed. 751: see 1 H. Bl. 212, n.

(*l*) See 12 St. Tr. 426.

(*m*) *Rowe* v. *Brenton*, 3 M. & R. 206; 8 B. & C. 737, *S. C.*

(*n*) *Rowe* v. *Brenton*, 3 M. & R. 364.

(*o*) *Bright* v. *Eynon*, 1 Bur. 395; 2 L. Ken. 53, *S. C.*

(*p*) See *R.* v. *Hulse*, R. & M., C. N. P. 20.

for the trial of the cause so put off, as to him shall seem just (*q*).

Special Jury Causes.

In town causes, the special jury causes are always deferred until the sittings after term, after the common jury causes have been disposed of, unless the causes be undefended: in which case, one or more days are sometimes appointed by the chief justice, in term, for the trial of them (*r*).

Of Remanets.

Remanets are generally taken before fresh causes, unless cause be shewn to the contrary.

Cause Lists.

At the sittings at *Nisi Prius* for Middlesex and London, there are *written lists of the causes*, usually thirty or forty, to be tried each day, affixed on the outside of the court; and the fact of a cause being in such list is deemed notice to the attornies concerned in it, that it may be tried at any time during the day (*s*). It seems the court in banc has no jurisdiction over the cause list at *Nisi Prius* (*t*).

Advancing and deferring Causes.

Where it appeared that the defendant intended to obtain an injunction to prevent the trial of a cause, and the plaintiff applied to the judge at *Nisi Prius* to try the cause out of its order, for the purpose of anticipating the injunction, the application was refused; and it was said to have been laid down as a rule by Lord Mansfield, that, although he would not wait for proceedings in equity, he would on no account take a cause out of its course at *Nisi Prius*, for the purpose of defeating them. The same rule has also been observed by Lords *Kenyon* and *Ellenborough* (*u*). Nor will the judge take a cause earlier, out of its turn, so as to secure a trial in the same sittings, on the ground that the defendant has died pending such sittings, so as to prevent an abatement of the suit (*x*); nor will the judge try a cause out of its turn, to allow an agreement to be sent to the stamp-office, to get it properly stamped (*y*). But when the 9 *G.* 4, *c.* 14, was coming into operation on the 1st January, 1829, after which parol evidence of a promise to take the case out of the Statute of Limitations would be inadmissible, the court tried the cause in December, out of its turn, and the plaintiff obtained a verdict, when he must otherwise have failed (*z*). In undefended causes, after the jury have been sworn, and the cause has been in part heard, and it has been discovered, pending the trial, that a material witness, who had recently been subpœnaed, is unexpectedly absent, Lord Tenterden has frequently, as a favour, suspended the continuance of the trial until the witness has been fetched; and has taken other causes in the meantime, or has discharged the jury, so as to enable the plaintiff to try the cause on another day (*z*).

Illegal and Frivolous Causes.

The judge is not, it seems, bound to try, or at least may defer till the other causes are tried, a cause founded on an illegal wager; as on the event of a boxing-match, dog-fight, cricket-match, or the like (*a*): also, it appears to be dis-

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(*q*) R. H., 14 G. 2: and notice M., 17 G. 2: and see, as to putting off the trial, Vol. II. Book IV. Part I. Ch. 20.

(*r*) See *Roberts* v. *Bradshaw*, 1 Stark. 31.

(*s*) *Fourdrinier* v. *Bradbury*, 3 B. & Ald. 328.

(*t*) *Jacob* v. *Rule*, 1 Dowl. 349.

(*u*) *Goldschmidt* v. *Marryat*, 1 Camp. 559; see also *R.* v. *Houlditch*, 1 Stark. 63.

(*x*) *Izard* v. *Milner*, 4 C. & P. 285.

(*y*) *Dudley* v. *Robins*, 3 C. & P. 26.

(*z*) Chit. Sum. Prac. 180.

(*a*) *Thornton* v. *Thackray*, 2 Y. & J. 166: *Egerton* v. *Furzman*, R. & M., C. N. P. 213; 1 C. & P. 613, *S. C.*: *Kennedy* v.

cretionary in a judge whether he will try an idle or frivolous cause; but if he suffers it to be tried, and the plaintiff recover a legal verdict, such verdict cannot be disturbed (*b*).

Trial where Issue not joined.

If, to any one of the issues tendered, it appears on the record that issue has not been joined, the jury must be discharged, unless both parties will consent to an amendment (*c*).

Withdrawing Record.

Withdrawing Record.] If the cause be coming on, and you are not prepared to proceed with the trial, you may *withdraw the record*. This however can be done only by the party who entered the cause with the marshal, by the plaintiff in ordinary cases, or by the defendant if he have carried down the record by proviso, and entered it for trial. The record, however, cannot be withdrawn by counsel, who is merely retained in the cause, but to whom a brief has not been delivered (*d*). And where the record is thus withdrawn, and afterwards re-entered and tried, and the plaintiff has a verdict, the master will not allow in taxation the costs of the second entry and attendance of witnesses, &c., thereupon (*e*). The counsel for the plaintiff has a right, upon his cause being called on, to request the swearing of the jury to be suspended until a necessary witness has been called upon his subpœna, and it has been ascertained whether he be present; and upon finding he is absent, the counsel may then withdraw the record, and thus avoid a nonsuit, which, if the jury had been first sworn, he must have submitted to (*f*).

Re-entry of Record.

Re-entry of Record.] Where the plaintiff, at the assizes, is compelled to withdraw the record on account of the non-arrival of his witnesses at the time the cause is called on, the judge will allow the cause to be re-entered on the arrival of the witnesses, unless it be shewn by affidavit that the defendant's witnesses have been dismissed (*g*). Where the clerks of the plaintiff's attorney, on entering and bringing in the record on the 21st Nov., were told (as they understood) that the adjournment day in London would be December 8th, and it was, in fact, December 6th, but it was not fixed till after the end of Michaelmas term, (25th Nov.), and the plaintiff was nonsuited on the 7th Dec., no one appearing for him; Lord *Denman* (on 8th Dec.) dismissed a summons to have the cause restored, observing, that the parties should not have been satisfied with information received at so early a period (*h*).

Attendance of the Parties at Trial.

Attendance at Trial.] If the record be not withdrawn, the attornies for the plaintiff and defendant should take care to be in court, to have their counsel in court, and their evidence and witnesses in readiness when the cause is called on (*i*); otherwise, if the plaintiff's attorney and witnesses be not in attendance, the plaintiff will be nonsuited, or the court will order the cause to be struck out of the list, and the plaintiff will have to

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Gad, 3 C. & P. 376: 1 M. & M. 225, *S. C.*: *Walpole* v. *Saunders*, 7 D. & R. 130.

(*b*) *Robinson* v. *Mearns*, 6 D. & R. 26.

(*c*) See *Bent* v. *Benyon*, 6 C. & P. 217.

(*d*) *Abitbol* v. *Benedetto*, 2 Camp. 487; 3 Taunt. 225, *S. C.*: *Doe Drake* v. *Brown*, 5 C. & P. 315.

(*e*) *Gadd* v. *Bennett*, MS., E. 1829. As to the motion for costs of the day, see *post*, Vol. II. Book IV. Part I. Ch. 23.

(*f*) *Hopper* v. *Smith*, 1 M. & M. 115.

(*g*) *Lean* v. *Smith*, 2 M. & Rob. 126, *Bosanquet*, J.

(*h*) *Hall* v. *Milligan*, 8 C. & P. 314.

(*i*) *Vide ante*, 264, 265.

pay the costs of the day: or if the defendant's attorney and witness be not in attendance, the defendant will lose the benefit of his defence, and the plaintiff will most probably obtain a verdict (*k*).

When the cause is called on, the record, or an abstract of it made out by the judge's marshal, is handed to the judge, in order that he may know the issues the jury have to try.

Jury how Called and Sworn.

Jury, how Called and Sworn.] By stat. 6 *G.* 4, *c.* 50, *s.* 26, the under-sheriff is to cause the name, addition, and place of abode of each person summoned and impannelled to serve on the jury, to be written on distinct pieces of parchment or card, and to be given to the associate, prothonotary, or secondary, to be put into a box to be provided for that purpose. And, by the same section, when the cause is called on, such associate, &c., shall draw out twelve of these pieces of parchment or card, one after another; and if any of the jurors, whose names are so drawn, do not appear, or if challenged, and the challenge be allowed, then other names shall be drawn, until twelve jurors shall appear, and, after all causes of challenge allowed, shall remain as fair and indifferent; and these twelve persons being sworn, and their names being marked in the pannel, shall be the jury to try the cause; and their names shall be kept apart until they return their verdict, and shall then be returned to the box. But where a jury are once drawn, they may afterwards (if not objected to) be sworn in other causes, without being re-drawn; and if any be challenged or withdrawn by consent, the court may order them to be set aside, and other names drawn in their stead (*l*).

Viewers.

Where a view, however, has been had, the jurors who took it are to be called first, and as many of them as appear shall be sworn, and then their names shall be drawn as above directed, in order to make up the remainder of the jury (*m*). And where two sets of jurors are returned, as mentioned *ante*, 252, and a view has been had in any case, the judge shall order the trial to be had during the attendance of that set of jurors in which the viewers, or the major part of them, are included (*n*).

Challenges.

Challenges.] When the jury come to the book to be sworn, either party may challenge them. As to the cause of challenge, the mode of challenging, and the manner in which the challenge is tried and decided, see *post*, 305 *to* 309.

Tales.

Tales.] If a sufficient number of jurors do not appear, or if, after challenge, a sufficient number do not remain to make a jury, then, upon a request of the plaintiff or defendant, the justices may command the sheriff to name and appoint so many of such other able men of the said county, then present, as shall make up a full jury; and the sheriff shall thereupon return such men, duly qualified, as shall be present or can be found to serve on such jury, and shall add and annex their names to the former pannel (*o*). But if neither of the par-

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(*k*) See, as to obtaining a new trial on the ground of absence of counsel or attorney, *post*, Vol. II. Book IV. Part I. Ch. 27.

(*l*) 6 G. 4, c. 50, s. 22.

(*m*) Id. s. 24.

(*n*) Id. s. 22.

(*o*) Id. s. 37.

ties will pray a *tales*, the cause must go off for want of jurors (*p*).

A *tales*, however, is seldom necessary, except in special jury causes; and then the number of jurors wanted must be made up by drawing names of common jurors out of the box, if a sufficient number of common jurors can be found (*q*); if not, the *tales*, if prayed, must be made up in the manner above directed. It has been in one case ruled, that in a special jury cause the plaintiff cannot have a *tales* without the consent of the defendant (*r*); but according to a more recent decision he can (*s*).

Opening of Pleadings and Right to Begin and Reply.

Opening of Pleadings, and Right to Begin and Reply (*t*)]. The junior counsel for the plaintiff opens the pleadings, that is, states shortly the substance of them to the jury, and the points upon which issue has been joined; after which, if the *onus probandi*, or proof of the issue, rest upon plaintiff, as where the general issue or common plea in denial of the contract or wrong stated in the declaration is pleaded, the *senior* or leading counsel states his case to the jury; and after calling and examining witnesses in support of it, the counsel for the defendant are heard; and if they call any witnesses, the plaintiff's counsel have the general reply (*u*). It may be laid down as a general rule, that the party who has to maintain the *affirmative* of the issue must begin to give the evidence. Where there are special pleadings, or where a special defence is not intended to be given in evidence under the general issue, it may perhaps be more accurate to say that the party who has added the *similiter* shall begin. If both parties, however, have added the *similiter* to different sets of pleadings in the same cause, then the plaintiff usually begins, and proves those issues which are essential to his case (*v*); and then the defendant does the same; and afterwards the plaintiff is entitled to go into evidence to controvert the defendant's affirmative proofs, after which the defendant's counsel is entitled to a reply upon such evidence in support of his own affirmatives, and the plaintiff's counsel to a general reply (*w*). The fact of defendant being under an obligation to admit the plaintiff's case will not preclude the plaintiff from his right to begin (*x*). In general, if the affirmative of the issue lies on the defendant, and there is not a judgment by default as to part (*y*), he is to begin (*z*). Thus, he is to begin in an action for *trespass quare clausum fregit*, or for injuring *personal property*, where there is a plea of justification only (*a*). Where, to a declaration in trespass, the defendant pleaded, as to coming with force and arms, and whatever else was against the peace of our lord the king, "not guilty," and, as to the residue of the trespasses, a right of way, *Bayley*, J., held that the defendant should begin, because the

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(*p*) *Jenkins* v. *Purcel*, 1 Str. 707; 2 Saund. 349, n. 1.

(*q*) 6 G. 4, c. 50, s. 37.

(*r*) *British Museum* v. *White*, 3 C. & P. 289.

(*s*) *Gatliff* v. *Browne*, 2 M. & Rob. 100, *per Tindal*, C. J.: and see *Snook* v. *Southwood*, 1 R. & M., 429.

(*t*) See as to the right to reply on objections taken during the trial, *post*, 278.

(*u*) *Thwaites* v. *Sainsbury*, 5 C. & P. 69.

(*v*) *Jackson* v. *Hesketh*, 2 Stark. Rep. 521.

(*w*) 1 Stark. Evid. 382, 1st ed.; Tidd, New Prac. 502.

(*x*) See *Thwaites* v. *Sainsbury*, 5 C. & P. 69: *Tuberville* v. *Patrick*, 4 Id. 537.

(*y*) *Wood* v. *Rug*, 1 M. & Rob. 271.

(*z*) *Per* Lord *Tenterden*, *Cotton* v. *James*, 1 M. & M. 275; 3 Car. & P. 511.

(*a*) *Cotton* v. *James*, 1 M. & M. 273; 3 C. & P. 505, *S. C.*: *Fish* v. *Travers*, 3 C. & P. 578: *Bedell* v. *Russell*, 1 R. & M., C. N. P. 293: *Morris* v. *Nugent*, 7 C. & P. 572.

first part of the plea was not a general issue, and did not throw the necessity of any proof upon the plaintiff (*b*). So in *trespass quare clausum fregit*, where *liberum tenementum* alone was pleaded, the defendant was holden entitled to begin (*c*). And in trespass for taking goods, where the defendant, without pleading the general issue, pleaded that the house was within and parcel of the parish of M., and that he, being a constable, took the goods under a warrant of distress for parochial rates; the replication stated that the house was not within or parcel of the parish of M. The plaintiff's counsel claimed the right to begin, as they had to prove the demand of the perusal and copy of the warrant; this the defendant's counsel offered to admit; and the court held that the defendant had the right to begin (*d*). But the judges have resolved, "that in cases of *slander*, *libel*, and other actions for *personal* injuries, where the plaintiff seeks to recover actual damages of an unascertained amount, he is entitled to begin, although the affirmative of the issue may in point of form be with the defendant" (*e*). In other cases, however, the mere fact of the plaintiff having to prove the amount of his damages does not entitle him to begin (*f*). And where the substantial question to be tried was the existence of a custom affirmed by the defendant, *Tindal*, C. J., ruled that the defendant should begin, though the plaintiff alleged that he sought to recover real damages (*g*). Where a special defence is intended to be given in evidence under the general issue, that party shall begin who would have been entitled to do so if the defence had been specially pleaded. Thus, in *ejectment*, where the lessor of the plaintiff claims by a title which is admitted by the defendant, but the defendant claims under a title destructive of that of the lessor of the plaintiff—as where the lessor of the plaintiff claims as heir-at-law, and the defendant as devisee under a will which is impeached by the plaintiff (*h*); or where the lessor of the plaintiff claims under a will, and the defendant under a subsequent codicil, which is impeached by the plaintiff (*i*), the defendant is entitled to begin (*k*). So, in ejectment by lessors claiming under several descents from a particular ancestor, where the defendant admits all the descents except the first, and claims under a will of this ancestor, the defendant is entitled to begin (*l*). But where, in ejectment, each party claimed as heir-at-law, and the real question was as to the legitimacy of the defendant, who was clearly heir, if legitimate, and proposed to admit that, unless he were legitimate, the lessor of the plaintiff was the heir-at-law; it was holden that this admission did not give him the right of beginning (*m*): and the defendant has no right to the general reply unless he admits the whole *primâ facie* case of the lessor of the

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(*b*) *Hodges* v. *Holder*, 3 Camp. 366: *Jackson* v. *Hesketh*, 2 Stark. 518.

(*c*) *Pearson* v. *Coles*, 1 M. & Rob. 206.

(*d*) *Burrell* v. *Nicholson*, 6 C. & P. 202; 1 M. & Rob. 304, *S. C.*

(*e*) *Carter* v. *Jones*, 6 C. & P. 64; 1 M. & Rob. 211, *S. C.*: and see *Atkinson* v. *Warne*, 6 C. & P. 687: *Harrison* v. *Gould*, 7 Id. 580: *Silk* v. *Humfrey*, Id. 14: *Burrell* v. *Nicholson*, 6 Id. 202; 1 M. & Rob. 304, *S. C.*

(*f*) *Cooper* v. *Wakley*, 1 Moo. & M. 248: *Bedell* v. *Russell*, 1 Ry. & M. 293.

(*g*) *Bastard* v. *Smith*, 2 M. & Rob. 129.

(*h*) *Goodtitle* v. *Braham*, 4 T. R. 497: *Jackson* v. *Hesketh*, 2 Stark. Rep. 519: but see *Doe* v. *Wilson*, 6 C. & P. 301.

(*i*) *Doe* v. *Corbett*, 3 Camp. 368.

(*k*) See *Robey* v. *Howard*, 2 Stark. 555.

(*l*) *Doe Woollaston* v. *Barnes*, 1 M. & Rob. 386.

(*m*) *Doe Warren* v. *Bray*, 1 M. & M. 166.

Book I.
Part I.

Right to Begin and Reply.

plaintiff (*n*). In *replevin*, also, any issue in which the affirmative is on the plaintiff entitles him to begin (*o*): thus, where the defendant avowed for rent, the plaintiff pleaded in bar an agreement to set off another sum against the rent, and issue was taken on that plea: the plaintiff was held entitled to begin, the affirmative being on him (*p*). So, where, in replevin, there was a cognizance for rent in arrear, to which there were two pleas, the one stating that a certain agreement had been entered into between the landlord and tenant, and the tenant was subsequently induced by the landlord to enter into another agreement, which second agreement was the demise in the cognizance mentioned, and that this latter agreement had been abandoned by mutual consent, before any rent became due, and the other plea was similar, except that it averred that the tenant was induced to enter into the second agreement by fraud; and there was a replication to the first plea, denying the abandonment, and to the other, denying the fraud: it was holden that, on these pleadings, the plaintiff had the right to begin (*q*). In *assumpsit*, for an unworkmanlike execution of a contract, where the defendant pleaded that the work was properly done, it was holden that the plaintiff was entitled to begin (*r*). In *covenant* for not repairing, &c., if the defendant plead affirmative pleas he is in general entitled to begin (*s*). In considering, however, which party ought to begin, it is not so much the form of the issue which is to be considered as the substance and effect of it; and the judge will consider what is the substantial fact to be made out, and on whom it lies to make it out (*t*). And accordingly, where, in an action of *covenant* to repair, the breach was, that the defendant did not repair, but suffered the premises to be ruinous, &c., and the defendant pleaded that he did repair, and did not suffer the premises to become ruinous, &c., it was ruled by Lord *Abinger* that on this issue the plaintiff must begin (*t*). Where, in *assumpsit* for work and labour, the defendant pleaded that the "promise was made to the plaintiff and J. S., and not to the plaintiff alone;" and the replication was that "the promise was made to the plaintiff alone, and not to the plaintiff and J. S.;" it was ruled that on this issue the plaintiff ought to begin (*u*). So, in *assumpsit*, where the declaration stated that the defendant agreed to build houses according to a specification, and assigned for breach that he did not build according to the specification, and the defendant pleaded that he did so build, the court held that on this issue the plaintiff must begin, and prove that the defendant did not build according to the specification (*x*). So, in an action on a life policy, where the declaration alleged that the person insured was in good health, and the defendant pleaded that he was in bad health, concluding to the country; it was held, that the plaintiff had the right to begin (*y*). When the general

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(*n*) *Doe Pile* v. *Wilson*, 6 C. & P. 301; 1 M. & Rob. 323, *S. C.*

(*o*) *James* v. *Salter*, 1 M. & Rob. 501.

(*p*) *Curtis* v. *Wheeler*, 4 C. & P. 196; 1 M. & M. 493, *S. C.*

(*q*) *Williams* v. *Thomas*, 4 C. & P. 234.

(*r*) *Amos* v. *Hughes*, 1 M. & Rob. 464: and see *Mills* v. *Barber*, 1 M. & W. 427.

(*s*) *Lewis* v. *Wells*, 7 C. & P. 221: and see *Reeve* v. *Underhill*, 6 Id. 773.

(*t*) *Soward* v. *Leggatt*, 7 C. & P. 613: Tidd, New Prac. 504.

(*u*) *Davies* v. *Evans*, 6 C. & P. 619.

(*x*) *Smith* v. *Davies*, 7 C. & P. 307: and see *Shilcock* v. *Passman*, Id. 289: *Scott* v. *Lewis*, Id. 347.

(*y*) *Rawlins* v. *Desborough*, 8 C. & P. 321.

Right to Begin and Reply.

issue, or common plea in denial, is not pleaded, but issue is joined on a *collateral* fact, as the execution of a release in *assumpsit* or *debt*, the fact of payment in *assumpsit* (*z*), or *debt* on bills of exchange (*a*), or for money lent (*b*), or on a plea of *solvit ad diem* in *debt* on bond (*c*), the proof of which rests on the defendant, his counsel begin after the pleadings are opened, and have the general reply. So, in action by the indorsee of a bill of exchange against the acceptor, where the defendant pleaded, first, that the bill was accepted for a debt from which he was discharged under the Insolvent Debtors' Act, of which the plaintiff, at the time of the indorsement, had notice; and secondly, that the bill was accepted to induce the drawer not to oppose the discharge of the defendant under that act, of which the plaintiff, at the time of the indorsement, had also notice; and the plaintiff, in his replication, denied the notice stated in each of the pleas: it was ruled, on these issues, the defendant must begin, and that the *onus* of proving that the plaintiff had notice was on the defendant (*d*). Again, where a party gave a cheque for the amount of a deposit on a sale by auction, which sale was void, and in an action on the cheque he pleaded that there was no consideration for it, and the plaintiff replied that there was consideration, it was ruled that on this issue the defendant must begin (*e*). So, in an action on a bill of exchange by the indorsee against the acceptor, where the defendant pleaded that it was an accommodation bill, and that a blank acceptance had been filled up and applied in discharge of this and other bills, and the plaintiff replied, that the defendant broke his promise without such cause as in that plea alleged, the court held that on these pleadings the defendant was entitled to begin (*f*). On a plea in abatement for non-joinder, the defendant's counsel was formerly considered as in general entitled to begin (*g*), but it has since been settled to be otherwise unless the damages are admitted (*h*). It should seem, that, if the defendant on the trial will admit the plaintiff's case, he will be entitled to begin, but then he must admit the whole case (*i*).

Where, upon a question whether the plaintiff or defendant has a right to begin, the judge at *Nisi Prius* has decided manifestly wrong, the court will grant a new trial (*k*).

Statement of Counsel.

Statement of the Case, &c., by Counsel.] The senior counsel for the party who has the right to begin, after the opening of the pleadings by the junior counsel, states the facts and circumstances of the case to the jury, the substance of the evidence he has to adduce, and its effects in proving the case stated, and he remarks upon any point of law, on which, together with the matters of fact, the jury will have to found their verdict (*l*).

He also states the matter of defence, and evidence by

(*z*) *Coxhead* v. *Huish*, 7 C. & P. 63.

(*a*) *Smart* v. *Rayner*, 6 C. & P. 721.

(*b*) *Richardson* v. *Fell*, 4 Dowl. 10.

(*c*) *Sandford* v. *Hunt*, 1 C. & P. 118.

(*d*) *Warner* v. *Haines*, 6 C. & P. 666.

(*e*) *Mills* v. *Oddy*, 6 C. & P. 728.

(*f*) *Faith* v. *M'Intyre*, 7 C. & P. 44; and see further, Tidd, New Prac. 502.

(*g*) *Fowler* v. *Coster*, 1 M. & M. 241: 3 C. & P. 463, *S. C.*

(*h*) *Morris* v. *Lotan*, 1 M. & Rob. 233.

(*i*) *Doe* v. *Tucker*, 1 M. & M. 536: *ante*, 269.

(*k*) *Huckman* v. *Fernie*, 3 M. & W. 505.

(*l*) See *Plunkett* v. *Cobbett*, 5 Esp. 136; 2 Selw. N. P. 142, *S. C.*

which he can disprove it (*m*). But the plaintiff's counsel, when he begins, is at liberty, whether the defence be known or not, either at once to enter into the whole of his case, or to make out a *primâ facie* case only, and to reserve his answer to the defendant's case for the reply; but he cannot answer part of the defendant's case in his opening, and part in the reply (*n*).

The court will not in general allow counsel to prove any other case than that stated to the jury; therefore, where counsel, in his address to the jury, confined himself to a case upon a bill of exchange, the court would not afterwards allow him to prove a case under the money counts (*o*).

Bonâ fide Comments of Counsel not Actionable.

Counsel are privileged in commenting fairly and *bonâ fide* on the circumstances of the case, and in making observations not only on the parties concerned, but also on the conduct of their agents in bringing the cause into court. Therefore it has been holden that no action would lie against a barrister for saying, in the course of his address to the jury, that the plaintiff's attorney was "a fraudulent and wicked attorney," the words having reference to the attorney's having brought the action for a sum of money to which he knew that his client was not entitled (*p*).

Examination of Witnesses.

Examination of Witnesses.] After the senior counsel has thus stated the case, the witnesses to prove it are next called and examined in their order: the first is examined by the counsel next in rank to the senior; the second by the junior, if there be three counsel engaged on that side; the third by the senior; each barrister examining a witness in the order of his precedence. Whilst a witness, however, is under the examination of a junior counsel, the leading counsel may interpose, take the witness into his own hands, and finish the examination; but after one counsel has brought his examination to a close, no other counsel on the same side can put a question to the witness (*q*).

Where Parties defend separately.

Where there are several defendants who appear by separate attornies, and have separate counsel, if their defences be different or distinct from each other, the counsel of each has a right to address the jury, and examine witnesses; but if they rely on the same ground of defence, only one counsel can be heard to address the jury, and one counsel only can examine each witness upon the part of all the defendants, in the same manner as if they had appeared and defended jointly (*r*). So, in ejectment, if a landlord and tenant defend by different attornies and have different counsel, but it appear that the tenant claims no title but what he derives from the landlord,

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(*m*) See *Delauney* v. *Mitchell*, 1 Stark. 439: *Rees* v. *Smith*, 2 Id. 31.

(*n*) *Williams* v. *Davies*, 1 C. & M. 464; 3 Tyr. 383; 1 Dowl. 647, *S. C.*: *Browne* v. *Murray*, R. & M. 254: *Sylvester* v. *Hale*, Id. 255, n.; 1 Stark. Ev 383; Rosc. 174: overruling *Rees* v. *Smith*, 2 Stark. Rep. 31; R. & M. 255, n. *S. C.*

(*o*) *Paterson* v. *Zachariah*, 1 Stark. Rep. 72: *post*, 278: but see *Murray* v. *Butler*, 3 Esp. 105: *Penson* v. *Lee*, 2 B. & P. 331, 333, *semb. contrà.*

(*p*) *Hodgson* v. *Scarlett*, 1 B. & Ald. 232.

(*q*) *Doe* v. *Roe*, 2 Camp. 280.

(*r*) *Chippendale* v. *Masson*, 4 Camp. 174: *Sparkes* v. *Barrett*, 8 C. & P. 442: and see *Massey* v. *Goyder*, 4 C. & P. 162: *Doe Fox* v. *Bromley*, 6 D. & R. 292. From the case of *Ridgway* v. *Phillips*, (3 Dowl. 154; 1 C., M. & R. 415, *S. C.*), it would seem to be immaterial whether or not the defences are the same; *Parke*, B., seems to have disapproved of the decisions at *Nisi Prius.* And see *King* v. *Williamson*, 3 Stark. 162; 1 D. & R. 35, *S. C.*

the judge, at the trial, will only allow one counsel to address the jury for the defence; but the party's counsel who does not address the jury, will be at liberty to cross-examine, and also to call witnesses (*s*). In an action of false imprisonment, where the defendants had pleaded a joint plea of "not guilty," the judge would not allow the counsel of each defendant either to cross-examine the witnesses or to address the jury separately (*t*). And where two defendants appear and plead by the same attorney, but, at the trial, counsel appear for one defendant only, and the other defendant appears in person, the counsel only will be allowed to address the jury; but the defendant who has no counsel, may cross-examine the witnesses (*u*).

Before the jury are sworn, the counsel for the plaintiff may, on the case being called on, have a witness called on his subpœna (*x*).

Leading Questions.

In the direct examination of a witness, he must not, in general, be asked *leading questions* (*y*). Yet, where a witness swears to a certain fact, and another is called for the purpose of contradicting him, the latter may be asked directly whether that fact ever took place (*z*). So, if the witness appear evidently to be hostile to the party who has called him, the counsel may put leading questions to him, in the same manner as in cross-examination, having first obtained the permission of the court to do so (*a*).

Time for objecting to Competency of Witness.

If it be intended to object to any witness on the ground of incompetency, it is better, perhaps, to do so before he is examined in chief: and if he can be examined as to it, to examine him on the *voir dire*. Formerly the objection must have been made before the witness was *sworn* in chief; but it may now be made at any time during the trial (*b*). After the witness has left the box, there is an end of all questions as to his competency (*c*).

Questions as to Incompetency from Interest.

If the supposed incompetency arise from interest, the witness may be examined respecting it (*d*). If he acknowledge that he was once interested, he will be allowed afterwards to prove that his interest has determined, without producing the instrument by which his interest was so determined (*e*); but if his interest have been proved by other witnesses, the instrument which has determined it must be produced. And, in general, where a release is necessary to give competency to a witness, it must be produced and proved (*f*). Where, however, a bankrupt, called as a witness for his assignees, stated on the *voir dire*, that he had obtained his certificate and had released his assignees, *Park*, J., ruled that his release could

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(*s*) *Doe Hogg* v. *Tindale*, 3 C. & P. 565; 1 M. & M. 314, *S. C.*

(*t*) *Scale* v. *Evans*, 7 C. & P. 593.

(*u*) *Perring* v. *Tucker*, 4 C. & P. 70; 1 M. & M. 391, *S. C.*: and see *Massey* v *Goyder*, 4 C. & P. 162, n. (*a*).

(*x*) *Hopper* v. *Smith*, 1 M. & M. 115: *ante*, 266.

(*y*) Peake, Ev. 196: Rosc. 126: and see *Nicholls* v. *Dowding*, 1 Stark. 81.

(*z*) *Courteen* v. *Touse*, 1 Camp. 43.

(*a*) Peake, Ev. 198: *Clarke* v. *Saffery*, R. & M., C. N. P. 126: and see more particularly upon this subject, Arch. Sum. C. L. 110, 111; Rosc. 127.

(*b*) *Stone* v. *Blackburn*, 1 Fsp. 37; Peake, Ev. 195: *Turner* v. *Pearte*, 1 T. R. 717.

(*c*) *Beaching* v. *Gower*, Holt, C. N. P. 314.

(*d*) See 1 Esp. 409: 46 G. 3, c. 37, s. 1.

(*e*) Peake, Ev. 196: *Butchers' Company* v. *Jones*, 1 Esp. 160, 164: and see *Howell* v. *Lock*, 2 Camp. 14: *Butler* v. *Carver*, 2 Stark. 433.

(*f*) See Rosc. 107. *Quære*, whether one stamp is sufficient on a release to two witnesses? (See *Spicer* v. *Burgess*, 1 C., M. & R. 129; 4 Tyr. 589, *S. C.*)

not be called for (*g*); and in a late case, where the witness stated that his release was in court, *Coleridge*, J., ruled that the other side might inspect it to ascertain its validity, but his lordship said, that had the release not been in court, the declaration of the witness, that he was released, would have been sufficient (*h*). A witness objected to at a trial, on the ground of interest, and held by the judge to be incompetent without a release, was, to save time, allowed to be examined, on the undertaking of the attorney that he should be released afterwards; the attorney, however subsequently refused to do so, and a verdict having passed for the plaintiff, the court refused, on that ground, to grant a new trial (*i*).

Questions as to Incompetency from Crime.

If the supposed incompetency arise from the witness having been convicted of any crime, you must prove the record of the conviction (*k*). As to cross-examining the witness himself upon the subject of any offence imputed to him, there seems to be a difference of opinion among the judges upon this point: some hold that you cannot ask a question of a witness, the answer to which in the affirmative would subject him to punishment; others, that you may ask the question, but that the witness is not bound to answer it; and others, it is believed, include in the rule, not only questions, the answers to which might subject the witness to punishment, but also all those where the witness by his answer might be obliged to allege his own infamy or turpitude, although they might not subject him to punishment. In *Rex* v. *Holding & Wade*, O. B. June, 1821, *Bayley*, J., held that a witness may be asked a question, the answer to which may subject him to punishment, but he is not compellable to answer (*l*); all other questions, for the purpose of impeaching a witness's character, not only may be put, but must be answered. If the witness be examined as to the offence imputed to him, and deny it, such denial is conclusive, and you cannot afterwards call witnesses to offer other evidence to contradict him (*m*). Or if general evidence be given of the bad character of the witness, the opposite party may cross-examine the witnesses as to the grounds of their opinions, if he think it prudent to do so; or he may call witnesses to speak to the general good conduct of the witness, or contradict any particular facts the other witnesses may have disclosed in their cross-examination (*n*).

Questions impeaching his Character.

Indorsing Name of Interested Witness on Record, under 3 & 4 W. 4, c. 42.

By the 3 & 4 *W.* 4, *c.* 42, *s.* 26, "in order to render the rejection of witnesses on the ground of interest less frequent," it is enacted, "that if any witness shall be objected to as incompetent, on the ground that the verdict or judgment in the action on which it shall be proposed to examine him would be admissible in evidence for or against him, such witness shall nevertheless be examined; but in that case a verdict or judgment in that action in favour of the party on whose behalf he shall have been examined, shall not be admissible in evidence for him, or any one claiming under him, nor shall a verdict or judgment against the party on

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(*g*) *Carlisle* v. *Eady*, 1 C. & P. 284.

(*h*) *Quarterman* v. *Cox*, 8 C. & P. 97.

(*i*) *Heming* v. *English*, 1 C., M. & R. 568; 3 Dowl. 155.

(*k*) Bull. N. P. 292: *R.* v. *Inhabitants of Bastell Carcinion*, 8 East, 77; Arch. Pl. & Ev. 389: see *Cooke* v. *Maxwell*, 2 Stark. 183: *Sharp* v. *Scoging*, Holt, C. N. P. 541.

(*l*) See *R.* v. *Slaney*, 5 C. & P. 213.

(*m*) *R.* v. *Watson*, 2 Stark. 149, *et seq.*: *Harris* v. *Tippet*, 2 Camp. 637.

(*n*) See Arch. Sum. C. L. 102.

Indorsing Name of Interested Witness on Record.

whose behalf he shall have been examined, be admissible evidence against him, or any one claiming under him." By sect. 27, "the *name of every witness objected to as incompetent*, on the ground that such verdict or judgment would be admissible in evidence for or against him, *shall at the trial be indorsed on the record* or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the court, at the request of either party, and *shall be afterwards entered on the record* of the judgment; and such indorsement or entry shall be sufficient evidence that such witness was examined, in any subsequent proceeding in which the verdict or judgment shall be offered in evidence" (*o*). The effect of that enactment is, in many cases, to supersede the necessity and save the expense of a release, which was formerly given to make a witness competent (*p*). It applies to all cases where the witness has no interest, except that the verdict or judgment might be used against him. Therefore, in an action on the case for negligence in driving by the defendant's servant, it was held that the servant might be made a competent witness by his name being indorsed on the record, without being released (*q*). So, in the action by the indorsee against the acceptor of a bill accepted for the drawer's accommodation, the drawer is a competent witness for the defendant under this statute, his name being indorsed on the *postea* (*r*). So is an executor and residuary legatee, in an action by a third party against a legatee for the value of a horse bequeathed to him, to prove property in the plaintiff at the time of the testator's death (*s*). So is a tenant in an action by a reversioner for an obstruction of a private right of way beneficial to the tenant (*t*). But if the witness has a direct and immediate interest in the event of the suit, independently of the verdict, there the statute will not apply (*u*). Therefore, in an action against one of two makers of a joint and several promissory note, the other maker of the note cannot be called as a witness for the defendant to prove that the consideration given for the note was an illegal consideration, his interest in defeating the note altogether rendering him incompetent (*v*). So, a witness interested in the result of an equity suit is not made competent by this act on an issue directed in such suit (*x*). Nor is a partner in an action by his co-partners (*y*). Nor is a former owner who has covenanted for title, in an action for obstructing an easement (*z*). Nor is a sheriff's officer who

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(*o*) As to the incompetency of witnesses, on the ground of their being interested in the event of the suit, see *R.* v. *Bray*, Cas. temp. Hardw. 358: *Abraham* v. *Burne*, 4 Bur. 2251: *Bent* v. *Baker*, 3 T. R. 27: *Smith* v. *Prager*, 7 Id. 60: *Doddington* v. *Hudson*, 1 Bing. 257; 8 Moo. 163: *Radburn* v. *Morris*, 1 Moo. & P. 648; 4 Bing. 649, *S.C.*

(*p*) See *per Alderson*, B., *Yeomans* v. *Legh*, 2 M. & W. 419.

(*q*) *Yeomans* v. *Legh*, 2 M. & W. 419: and see *Pickles* v. *Hollings*, 1 M. & Rob. 468: *Creevy* v. *Bowman*, Id. 496: *Bowman* v. *Willis*, 3 Bing. N. C. 671: *Fancourt* v. *Bull*, 1 Id. 681: *semb*, overruling *Harrington* v. *Coswell*, 6 C. & P. 352: *Harding* v. *Cobley*, Id. 664: *Hodson* v. *Marshall*, 7 Id. 16: *Burgess* v. *Cuthill*, 6 C. & P. 282.

(*r*) *Faith* v. *M'Intyre*, 7 C. & P. 44: *sed. vide Burgess* v. *Cuthill*, 6 C. & P. 282; 1 M. & Rob. 315, *S. C.*

(*s*) *Bowman* v *Willis*, *ubi supra.*

(*t*) *Adeane* v. *Mortlock*, 5 Bing. N. C. 236. It seems he is a competent witness without indorsement. (Id.)

(*u*) *Bowman* v. *Willis*, 3 Bing. N. C. 671: *Bailiffs of Godmanchester* v. *Phillips*, 6 N. & M. 215.

(*v*) *Slegg* v. *Phillips*, 6 Nev. & M. 360; 4 B. & Ad. 852; 2 H. & W. 51.

(*x*) *Stewart* v. *Barnes*, 1 M. & Rob. 472.

(*y*) *Jackson* v. *Galloway*, 8 C. & P. 480, *Tindal*, C. J.

(*z*) *Steers* v. *Carwardine*, 8 C. & P. 570, *Patteson*, J.

has given an indemnity bond, in an action against the sheriff (*a*). Nor, it seems, is any person who is expressly bound to indemnify the person who calls him (*b*).

Witness must only speak to Facts within his own Knowledge and Recollection.

A witness can be allowed only to speak of facts within his own knowledge and recollection (*c*). He cannot therefore be permitted to read his evidence (*d*); but he will be allowed to refresh his memory from any book or paper, if he can afterwards swear to the fact from his recollection (*e*), and this though he himself did not make the entry (*f*). If he know the fact, however, only from seeing it in the book or paper, the original book or paper must be given in evidence and proved by other means (*g*). But where a witness, on seeing his initials affixed to an entry of payment, said, "I have no recollection that I received the money: I know nothing but by the book; but seeing my initials, I have no doubt that I received the money;" this was held sufficient evidence (*h*). Depositions made by an old witness have been allowed to be read to him, for the purpose of refreshing his memory as to dates, &c. (*i*). He will not be allowed to refresh his memory from a copy of a paper made by himself six months after he wrote the original, though the original is proved to be so covered with figures as to be unintelligible (*k*). Where a paper is put into the hands of a witness to refresh his memory, the opposite counsel has a right to inspect it without being forced to read it in evidence (*l*).

Opinion admissible on Questions of Science.

There is another exception, also, to the general rule lastly above mentioned, namely, that, in questions of science, a witness may be examined as to his *opinion*, upon facts previously stated; thus, although a physician may have never seen the patient, he may swear to his opinion of the disease, &c., upon facts stated by others (*m*).

Contradicting Witnesses.

The plaintiff or defendant shall not be allowed to call witnesses to disprove a matter of fact which his own witnesses have already sworn (*n*), unless, perhaps, where what the witness swears is palpably false, and it would be a great injustice to allow the party's case to be sacrificed for that reason (*o*). But the opposite party may call witnesses for that purpose; or may give in evidence what the same witness swore at another time about the same matter, in order to prove a variance, and thereby detract from his credit (*p*). So, a letter written by the same witness contradictory to his present testimony (*q*), and *à fortiori*, depositions of the same witness, taken *de bene esse*, may be given in evidence for the same purpose. Where a party tenders evidence *primâ facie* admissible, the other

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(*a*) *Groom* v. *Bradley*, 8 C. & P. 500, *Coltman*, J.

(*b*) *Stanley* v *Robson*, 2 M. & Rob. 103, *Patteson*, J.

(*c*) Arch. Pl. & Ev. 386: *Friedlander* v. *London Ass. Company*, 4 B. & Ad. 193; 1 N. & M. 30, *S. C.*

(*d*) 5 St. Tr. 455.

(*e*) *Doe* v. *Perkins*, 3 T. R. 749.

(*f*) *Henry* v. *Lee*, 2 Chit. Rep. 124: *Burrough* v. *Martin*, 2 Camp. 112.

(*g*) *Doe* v. *Perkins*, 3 T. R. 749.

(*h*) *Maughan* v. *Hubbard*, 8 B. & C. 14; 2 M. & R. 5, *S. C.*: see *Trentham* v. *Deveril*, 3 Bing. N. C. 397; 4 Scott, 128.

(*i*) *Vaughan* v. *Martin*, 1 Esp. 440.

(*k*) *Jones* v. *Stroud*, 2 C. & P. 196.

(*l*) *Sinclair* v. *Stevenson*, 10 Moore, 46; 1 C. & P. 532; 2 Bing. 514, *S. C.*: *R.* v. *Ramsden*, 2 C. & P. 603.

(*m*) Rosc. 131, 251; Peake, Ev. 208: and see *Rickards* v. *Murdoch*, 10 B. & C. 527: but see *Campbell v. Richards*, 2 Nev. & M. 542; 5 B. & Ad. 840, *S. C.*

(*n*) 5 St. Tr. 2, 764, 792: *Ewer* v. *Ambrose*, 3 B. & C. 749; 5 D. & R. 629, *S. C.*: *Elton* v. *Larkins*, 5 C. & P. 385.

(*o*) See *Alexander* v. *Gibson*, 2 Camp. 556: *Richardson* v. *Allan*, 2 Stark. 334; 2 Chit. 657, *S. C.*

(*p*) 2 Hawk. c. 46, s. 11: *Lowe* v. *Joliffe*, 1 W. Bla. 365: *Richardson* v. *Allan*, 2 Stark. 334; 2 Chit. 657, *S. C.*

(*q*) *De Sailly* v. *Morgan*, 2 Esp. 691.

party will not be allowed to interpose with evidence for the purpose of excluding it; but it should be received, and expunged if afterwards shewn not to be properly receivable (*r*).

Ordering Witnesses out of Court.

It may sometimes be advisable to examine witnesses separately, and out of the hearing of each other, with a view to obviate the danger of a connected story among them, and to prevent the influence which the account given by one may have upon another (*s*). It is then usual to order the witnesses out of court, with notice that they will not be examined if they remain (*t*). Either party, at any period of the cause, has a right to require that the unexamined witnesses should be out of court (*u*). But where a witness remains in court, after an order for the witnesses to withdraw, it is discretionary in the judge to allow him to be examined or not, subject to observation on his conduct in disobeying the order (*x*). Where witnesses had been all ordered out of court, but one of them came into court again, and heard the evidence of another witness, the witness who had so come back into court was allowed to be examined as to such facts only as had not been spoken to by any other witness (*y*). In the Exchequer, in revenue causes, he is peremptorily excluded from being examined if he remain in court after an order to quit it (*z*). If the attorney in the cause is a witness, he will be suffered to remain, his assistance being absolutely necessary to the proper conduct of the cause (*a*).

Cross-examination.

Cross-examination.] When the direct examination is finished, the witness may be cross-examined by the counsel for the opposite party. But if the party calling a witness do not think proper to examine him after he is called and sworn, he may nevertheless be cross-examined by the counsel for the opposite party (*b*), unless he were merely called to produce a document (*c*). In cross-examining a witness, the counsel may ask him leading questions, or indeed any questions at all relevant to the cause (*d*). He may even be cross-examined as to a fact irrelevant to the issue, for the purpose of discrediting his testimony by what he himself may state in evidence (*e*); but otherwise where it is done with the intention of calling other witnesses to disprove what he says (*f*).

Re-examination.

Re-examination.] If any new fact arise out of the cross-examination, the witness may be re-examined as to it by the counsel who first examined him. In the same manner he may be re-examined, when necessary, in order to explain any part of his cross-examination (*g*).

(*r*) *Jones* v. *Fort*, 1 M. & M. 196.

(*s*) Phil. Ev. 4th ed. 282: Rosc. 126.

(*t*) Ib.: *R.* v. *Colley*, 1 M. & M. 329.

(*u*) *Southey* v. *Nash*, 7 C. & P. 632.

(*x*) *Parker* v. *M'William*, 4 Moo. & P. 480: 6 Bing. 683, *S. C.*: *R.* v. *Colley*, 1 M. & M. 329: *R.* v. *Wylde*, 6 C. & P. 380.

(*y*) *Beamon* v. *Ellice*, 4 C. & P. 585.

(*z*) *Attorney General v. Bulpit*, 9 Price, 4.

(*a*) *Pomeroy* v. *Baddeley*, R. & M. 430: but see *R.* v. *Webb*, 3 Stark. Ev. 1733.

(*b*) *Phillips* v. *Eamer*, 1 Esp. 357: *R.* v. *Brooke*, 2 Stark. 472.

(*c*) *Rush* v. *Smith*, 1 C., M. & R. 94: *Summers* v. *Moseley*, Id. 96, n., and cases there cited.

(*d*) See Arch. Sum. C.L. 112: Rosc. 127: and see *Dickinson* v. *Shee*, 4 Esp. 68.

(*e*) *Harris* v. *Tippett*, 2 Camp. 637.

(*f*) *Spenceley* v. *De Willott*, 7 East, 103. See, as to the cross-examination of a witness, generally, Arch. Sum. C. L. 111: Rosc. 127

(*g*) See, as to the re-examination of a

Further Evidence, or recalling Witness, after Plaintiff's Case is closed.

Further Evidence, or recalling Witnesses, after Plaintiff's Case is closed.] The plaintiff must take care to shape his evidence in the most favourable manner he can, from the first, and adapt it to the proof of the matter in issue; for, where, in an action for an assault, with but one count in the declaration, the plaintiff, having proved one assault, wished to abandon that and prove another, the court would not allow him to do so (*h*). Nor will the court allow counsel to prove any other case than that stated to the jury; therefore, where counsel, in his address to the jury, confines himself to a case upon a bill of exchange, the court would not, perhaps, afterwards allow him to prove a case under the money counts (*i*).

It must also be remarked, that, after the plaintiff's case has been closed, the court will not permit him to remedy a defect in his evidence, by calling back a witness or otherwise, unless such defect arose from inadvertency on the part of his counsel (*k*). But the judge will allow plaintiff's counsel, after he has closed his case, to recall witness for the purpose of obviating objections which are beside the justice of the case, and little more than mere matter of form (*l*). It is in the discretion of the judge whether he will permit a witness to be recalled, and it is not necessary that the opposite side should consent (*m*). In an action for work and labour, after the plaintiff had closed his case, the defendant called a witness, who stated that there had been a contract in writing between the plaintiff and defendant, which the latter produced, but it not being stamped, the judge refused to receive it in evidence; and the Court of Common Pleas held that it was properly rejected, but granted a new trial on payment of costs, in order that the defendant might have an opportunity of producing an instrument duly stamped (*n*).

Right to Reply on Objections taken during the Trial.

Right to Reply on Objections taken during the Trial.] If the defendant's counsel take an objection, and the plaintiff's counsel answer it, and, in replying on the objection, the defendant's counsel cite a case, the plaintiff's counsel will be allowed to observe on the case so cited (*o*). And when a defendant relies upon a legal objection, and calls evidence to support it, the plaintiff's counsel having answered the objection, the defendant is entitled to be heard on the law in reply (*p*). If certain parts of a book are used to refresh the memory of a witness for the plaintiff, and the defendant's counsel, in his address to the jury, observe upon the general state of the book, and refer to other parts of it, such observations do not give the plaintiff's counsel the right to reply (*q*). Where the defendant, who had begun, had closed his case, and the plaintiff's counsel had, after that, in his address to the jury, read a letter, which he caused one of the defendant's witnesses to prove, but neither gave it in evidence nor adduced

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witness, Arch. Sum. C. L. 118: *The Queen's case*, 2 B. & B. 297, per *Abbott*, C. J.

(*h*) *Stante* v. *Pricket*, 1 Camp. 473.

(*i*) *Ante*, 272: *Paterson* v. *Zachariah*, 1 Stark. 72: but see *Murray* v. *Butler*, 3 Esp. 105: *Penson* v. *Lee*, 2 B. & P. 331—333 *semb.*, *contra*.

(*k*) *Aldred* v. *Halliwell*, 1 Stark. 117: *Giles* v. *Powell*, 2 C. & P. 259: *Soulby* v. *Pickford*, 2 Moo. & P. 545.

(*l*) *Giles* v. *Powell*, 2 C. & P. 259.

(*m*) *Adams* v. *Bankart*, 1 C., M. & R. 681.

(*n*) *Fielder* v. *Ray*, 3 Moo. & P. 659.

(*o*) *Fairlie* v. *Denton*, 3 C. & P. 103: and see *Power* v. *Barham*, 7 C. & P. 356; 4 A. & E. 473, S. C.

(*p*) *Arden v. Tucker*, 1 Moo. & R. 192.

(*q*) *Pullen* v. *White*, 3 C. & P. 434.

any evidence at all, the judge would not allow the defendant's counsel to reply; but suggested that the plaintiff's counsel should have the letter put in and read, after which the defendant's counsel should reply (*r*).

The Defence.

The Defence.] When the party who opened the cause has gone through his evidence, examined all his witnesses, and closed his case, the senior counsel of the opposite party then states to the jury the matter of his client's defence, the evidence (if any) which he will adduce in support of it, and remarks on the case and evidence of the other party. The witnesses for the defence (if any) are then examined and cross-examined in the manner already mentioned: and here the defence closes (*s*).

The Reply.

The Reply.] If the counsel for the defence have examined any witnesses, or adduced any evidence in support of it, the opposite party is entitled to the reply, as of right; otherwise not, unless when the queen is a party, and the privilege of replying is claimed by the Attorney-General in right of his office (*t*). But where the counsel for the defendant opens facts to the jury as to which he calls no witnesses to prove, it is in the discretion of the judge to permit the plaintiff's counsel to reply (*u*). Where the defendant brings evidence to impeach the plaintiff's case, and also sets up an entire new case, which again the plaintiff controverts by evidence, the defendant's reply in such case is confined to the new case set up by him, for, upon that relied upon by the plaintiff, his counsel has already commented in the opening of the defendant's case, and the plaintiff is entitled to the general reply (*x*). Where the defendant proves a payment to the plaintiff, by shewing the particulars of demand delivered under a judge's order, in which the plaintiff has credited the defendant, this is the evidence of the defendant, and entitles the plaintiff to a reply (*y*). If certain parts of a book are used to refresh the memory of a witness for the plaintiff, and the defendant's counsel, in his address to the jury, observe upon the general state of the book, and refer to other parts of it, such observations do not give the plaintiff's counsel the right of reply (*z*). In the Court of Common Pleas, the defendant's merely giving evidence of payment of money into court, under a rule, will not entitle the plaintiff to the reply (*a*). Before he replies, the plaintiff's counsel may, if he think proper, produce evidence to disprove any part of the defence set up by the defendant; in which case the defendant's counsel has the privilege of again addressing the jury, but his observations must be confined to the evidence thus given by the plaintiff. The evidence of the plaintiffs also, which is given in reply, must not be merely in confirm-

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(*r*) *Faith* v. *M'Intyre*, 7 C. & P. 44.

(*s*) As to acquitting one of several defendants, against whom no evidence has been given, in order to make him a good witness for his co-defendants, see Rosc. 118: *Sowell* v. *Champion*, 2 Nev. & P. 627.

(*t*) *R.* v. *Earl Abingdon*, Peake, N. P. C. 236; 1 Esp. 226, *S. C.*: *R.* v. *Marsden*, 1 M. & M. 439: *R.* v. *Bell*, 1 Id. 440: see *Rowe* v. *Brenton*, 3 M. & R. 304.

(*u*) *Crerar* v. *Sodo*, 1 M. & M. 8: see *R.* v. *Bignold*, 4 D. & R. 70: *R.* v. *Horne*, 20 How. St. Tr. 763

(*x*) Stark. Evid 384: *Meagoe* v. *Simmons*, M. & M. 121; 3 C. & P. 76, *S. C.*: Rosc. 174.

(*y*) *Rymer* v. *Cook*, 1 M. & M. 86, n.

(*z*) *Pullen* v. *White*, 3 C. & P. 434.

(*a*) *Skarratt* v. *Vaughan*, 2 Taunt. 267.

ation of the original case (*b*). Where there are cross demands between the plaintiff and the defendant, the plaintiff need not in the first instance prove the whole of his account, but need only prove the balance which he claims; and if the defendant proves his set-off to a larger amount, the plaintiff may then prove other parts of his account to exclude the defendant's set-off (*c*). The reply then closes the case on both sides.

Summing up.

The Summing up.] When the case is closed on both sides, if the plaintiff do not elect, or have not previously elected, to be nonsuit, the judge then sums up the evidence (as it is termed); that is, he states to the jury the matters really in dispute between the parties; he recapitulates from his notes the evidence given on both sides, and makes his remarks on it when necessary; if any question of law be mixed up with the questions of fact, he states to them the principles of law upon which the case must be decided, and the manner in which they must be applied to, and their effect upon it; and lastly, he states to them, if necessary, the form in which they are to give their verdict. As all this, however, is intended merely as an assistance to the jury, the judge, in his discretion, will omit any part of it he may think unnecessary: thus, where the evidence is short, and there is no complexity in it, and where but a short interval of time has elapsed between the giving of it and the closing of the case, so that it is impossible the jury can have forgotten any part of it, the judge will omit the recapitulation of the evidence. So, where the case is very clear, both in point of law and fact, and it is apparent that the jury have already determined on a verdict according with the justice and merits of the case, the judge will omit the summing up altogether.

Amendments of Variances at the Trial.

Amendments of Variances at the Trial.] By the 9 *G.* 4, *c.* 15, every court of record holding plea in civil actions, and any judge at *Nisi Prius*, (if they think fit), may cause the record, when a *variance* appears between any *matter in writing or in print* produced in evidence, and the *recital* or *setting forth thereof upon the record*, to be forthwith amended in such particular by some officer of the court, on payment of such costs (if any) to the other party as such judge or court shall think reasonable; and thereupon the trial shall proceed as if no such variance had appeared; and in case such trial shall be had at *Nisi Prius*, the order for the amendment shall be indorsed on the *postea*, and returned together with the record; and thereupon the papers, rolls, and other records of the court from which such record issued, shall be amended accordingly. This statute, being a remedial act, always receives a liberal construction (*d*); but it extends only to variances between

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(*b*) See *R.* v. *Hilditch*, 5 C. & P. 299.

(*c*) *Williams* v. *Davis*, 1 Dowl. 647; 1 C. & M. 464, *S. C.: sed vide Browne* v. *Murray*, R. & M. 254: *Rees* v. *Smith*, 2 Stark. 31.

(*d*) And if the variance be in an averment referring to a written instrument, the court, or a judge, may still allow an amendment, under this act of 9 G. 4, although the instrument itself be not set out. And where, in an action for not obeying a subpœna, the declaration stated that the plaintiff caused to be left with the defendant a copy of the writ of subpœna, it was considered that the judge might allow an amendment in the following words:—"A copy of so much of the said writ as related to the said defendant." (*Mastermann* v. *Judson*, 1 Moo. & Sc. 367; 8 Bing. 224, *S. C.:* and see *Lamey* v. *Bi-*

matters in *writing* or in *print* produced in evidence, and the record; and to remedy this, and the great expense, delay, and failure of justice which frequently took place by reason of variances in *other matters*, the 3 & 4 *W.* 4, *c.* 42, *s.* 23, was passed, by which, after reciting that great expense was often incurred, and delay or failure of justice took place at trials, by reason of *vacancies* (*e*), as to some particular or particulars, between the *proof* and the *record*, or setting forth on the record or document on which the trial was had, of contracts, customs, prescriptions, names, and other matters or circumstances, not material to the merits of the case, and by the misstatement of which the opposite party could not have been prejudiced, and the same could not in any case be amended at the trial, except where the variance was between any matter in *writing* or in *print* produced in evidence, and the *record;* and that it was expedient to allow such amendments as thereinafter mentioned to be made on the trial of the cause (*f*), it is enacted, "that it shall be lawful for any court of record, holding plea in civil actions, and any judge sitting at *Nisi Prius*, (if such court or judge shall see fit so to do), to cause the record, writ, or document on which any trial may be pending before any such court or judge, in any civil action, or in any information in the nature of a *quo warranto*, or proceedings on a *mandamus*, when any *variance* shall appear between the proof and the recital or setting forth, on the record, writ, or document on which the trial is proceeding, of any *contract*, *custom*, *prescription*, *name*, or *other matter*, in any particular or particulars in the judgment of such court or judge *not material to the merits* of the case, and by which the *opposite party cannot have been prejudiced* in the conduct of his action, prosecution, or defence, to be *forthwith amended* by some officer of the court or otherwise, both in part of the pleading where such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms as to *payment of costs* to the other party, or *postponing the trial* to be had before the same or another jury, or both payment of costs and postponement, as such court or judge shall think reasonable. And in case such variance shall be in some particular or particulars in the judgment of such court or judge *not material to the merits* of the case, but *such as that the opposite party*

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shop, 1 N. & M. 332; 4 B. & Ad. 479, *S. C.*: *Moilett* v. *Powell*, 6 C. & P. 233). And where, in a declaration on a bill of exchange, the date of the bill was stated to be the 26th March, when it was really the 29th, the judge allowed the variance to be amended. (*Bentzing* v. *Scott*, 4 C. & P. 24). So an amendment was allowed where a judgment was mis-stated to be of one court instead of another. (*Briant* v. *Eicke*, 1 M. & M. 359). The judge, however, would not allow an amendment, under that act, of variances substantially altering the nature of the averment. Thus, where the declaration stated that the defendants "did not prosecute the suit complained of, but therein made default, and their pledges were in mercy" &c., it was held, that the production of a rule to discontinue did not prove the averment; and Lord *Tenterden* refused to allow an amendment under that act. (*Webb* v. *Hill*, 1 M. & M. 253; 3 C. & P. 485, *S. C.*) Where, in replevin, the defendant avowed for rent in arrear, and, on production of the lease, it varied from the terms of the tenancy stated in the avowry, *Park*, J., refused to permit an amendment under this statute, observing, that it only applied to cases where some particular written instrument was professed to be set out or recited. (*Ryder* v. *Malbon*, 3 C. & P. 594). So, where certain words had been added to an acceptance of a bill, obviously after the bill was accepted, and the declaration stated the acceptance, with the addition of those words, Lord *Tenterden* refused an amendment, saying, that it was not one of those cases where there had been a verbal mistake in setting out some written document. (*Jelf* v. *Oriel*, 4 C. & P. 22: and see *Rutherford* v. *Evans*, Id. 79: but see *Parks* v. *Edge*, 1 C. & M. 429: *Brown* v. *Dean*, 2 N. & M. 322).

(*e*) Mis printed for "*variances.*"

(*f*) See the preamble to stat. 3 & 4 W. 4, c. 42, s. 23; and Tidd, New Prac. 514.

may have been prejudiced thereby in the conduct of his action, prosecution, or defence, then such court or judge shall have power to cause the same to be amended upon payment of costs to the other party, and *withdrawing the record* or *postponing the trial* as aforesaid, as such court or judge shall think reasonable. And after any such amendment *the trial shall proceed* (in case the same shall be proceeded with) *in the same manner* in all respects, both with respect to the liability of witnesses to be indicted for perjury, and otherwise, as if no such variance had appeared. And in case such trial shall be had at *Nisi Prius* or by virtue of such writ as aforesaid, *the order for the amendment shall be indorsed on the postea or the writ*, (as the case may be), and returned together with the record or writ, and thereupon such papers, rolls, and other records of the court from which such record or writ issued, as it may be necessary to amend, shall be amended accordingly. And in case the trial shall be had in any court of record, then the *order for amendment shall be entered on the roll* or other document upon which the trial shall be had; provided that it shall be lawful for any party who is *dissatisfied* with the decision of such judge at *Nisi Prius*, sheriff, or other officer, respecting his allowance of any such amendment, to apply to the court from which such record or writ issued for a *new trial* upon that ground; and in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit, or the court shall make such other order as to them may seem meet."

Cases of Amendment under 9 G. 4, c. 15.

Under the 9 *G.* 4, *c.* 15, where a judgment was stated in the record as of one court, and it appeared by the production of an examined copy to have been obtained in another, the record was allowed to be amended (*h*). Also where the declaration against the acceptor of a bill mis-stated the date of the bill, *Park*, J., allowed an amendment, under the same act (*i*). And where in an action on a bill, by the indorsee against the indorser, the bill was stated to have been drawn payable to the drawer's order, and by him indorsed to A. B., whereas it appeared in evidence to have been drawn in favour of A. B., the judge allowed an amendment (*k*). And a variance between a written contract and the statement of it in the pleadings was allowed in a case, although it did not appear by the record that the contract was in writing (*l*). And see the instances already noticed in the note (*d*), *ante*, 280.

Under 3 & 4 W. 4, c. 42.

In pursuance of the power of amendment given by the statute, 3 & 4 *W.* 4, *c.* 42, *s.* 23, where a contract, by which A. guaranteed to B. the amount of a debt to be contracted with B. by C., was described, in pleading, as a promise to *pay* the debt to be so contracted, the judge allowed an amendment by substituting "guarantee" for "pay" (*m*). So, where, in *assumpsit* on the warranty of a horse, a general warranty of soundness was declared on, and the warranty proved was of soundness "except in one foot," the judge allowed the declaration to be amended, the real dispute being whether the

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(*h*) *Briant* v. *Eicke*, 1 M. & M. 359.

(*i*) *Bentzing* v. *Scott*, 4 C. & P. 79; Rosc.

(*k*) *Parker* v. *Ade*, 1 Dowl. 643: 1 C. & M. 429, nom. *Parks* v. *Edge*, *S. C.*

(*l*) *Lamey* v. *Bishop*, 4 B. & Ad. 479; 1 N. & M. 332, *S C.*: see *Masterman* v. *Judson*, 8 Bing. 224.

(*m*) *Hanbury* v. *Ella*, 3 N. & M. 438; 1 A. & E. 61, *S. C.*

horse was a roarer (*n*). So, in case for a fraudulent misrepresentation on the warranty of a horse, an amendment of the misrepresentation charged was allowed (*o*). Where, in trespass for breaking the plaintiff's close called Clover *Hill*, the defendant pleaded "not guilty," and that the close was not the plaintiff's, and the real name of the close appeared to be Clover *Moor*, an amendment of the variance was allowed (*p*). And where, in an ejectment, the parish in which the premises were situated was mis-stated, an amendment was allowed, and this although the ejectment was for a forfeiture (*q*). And where, in an action on the *case* against the defendants as carriers, for negligence, it appeared from the evidence that the defendants, if liable at all, were liable as *wharfingers*, upon a contract to *forward;* and just before the plaintiff's counsel commenced his reply, he applied to the judge to amend the declaration, which, however, the judge refused to do, but left it to the jury to say whether there was a contract to forward, or a contract so carry, and they found that there was a contract to forward, upon which the judge directed the verdict to be entered for the defendant, but the special finding to be indorsed on the *postea*, that the court might proceed thereon according to the above statute; the court afterwards allowed the amendment, and granted a new trial, on payment of costs, observing, that the learned judge might have allowed the amendment, and postponed the trial to a future day, pursuant to *s.* 23 of that statute (*r*). So, in an action on a bill of exchange, where the defendant had omitted to state the period at which the bill became due, and at the trial of the cause at *Nisi Prius* the judge refused to allow the defendant to amend, and directed a nonsuit, the court set aside the nonsuit, and granted leave to amend, on payment of costs, the defendant being allowed to plead *de novo* (*s*). So, where an agreement between plaintiff on the one part, and defendant and two others on the other part, but signed by plaintiff and defendant only, was described as made between plaintiff and defendant, an amendment was allowed (*t*). And where the judge permitted a declaration on a contract to deliver potatoes within a reasonable time to be amended, according to the evidence which was of a contract to deliver at digging time, reserving leave to apply to enter a nonsuit; no affidavit being produced to shew that the defendant was prejudiced by the amendment, the court refused a rule, and Lord *Abinger*, C. B., said, "The power of amendment given by the statute vests a wide discretion in the judge; if he exercises it to the best of his information at the time, and does not plainly appear to have been wrong, the court will not interfere;" and *Parke*, B. said, "Unless the judges are very liberal in the allowance of amendments, the rule which binds a plaintiff to one count will operate very harshly" (*u*). An amendment has also been allowed in the amount of damages, where the amount stated in the particulars exceeded that in the declaration (*v*).

(*n*) *Kenning* v. *Parry*, 6 C. & P. 580.

(*o*) *Mash* v. *Densham*, 1 M. & Rob. 442.

(*p*) *Howell* v. *Thomas*, 7 C. & P. 342.

(*q*) *Doe Marriott* v. *Edwards*, 6 C. & P. 208; 1 M. & Rob. 319, *S. C.*

(*r*) *Parry* v. *Fairhurst*, 2 C., M. & R. 190; 5 Tyr. 685, *S. C.*: see *Gaylor* v. *Farrant*, 4 Bing. N. C. 286; 5 Scott, 701; 6 Dowl. 426, *S. C.*

(*s*) *Pullen* v. *Seymour*, 5 Dowl. 164.

(*t*) *Boys* v. *Ancell*. 5 Bing. N. C. 390.

(*u*) *Sainsbury* v. *Mathews*. 4 M. & W. 343.

(*v*) *Dew* v. *Katz*, 8 C. & P. 315.

On the other hand, where several defendants were sued in debt, and the evidence did not fix all of them, amendment by striking out the names of the defendants who were not proved to have been liable to the debt was refused (*w*). And in an ejectment, where a demise in the name of two tenants in common instead of separate demises was inserted, an amendment was refused (*x*). Where, in an action on the *case* for diverting a water-course, a party who had a right to the use of running water, as an owner of adjoining lands, had appropriated it, and by his declaration claimed the right thereto, as the owner of a mill not *twenty* years old, this was holden to be bad, and the judge at the trial would not allow the declaration to be amended (*y*). And even if in such a case the jury find the plaintiff's right specially, and it be indorsed on the *postea*, under the twenty-fourth section of the statute, the court above will not give judgment for the plaintiff on that finding; because, if the plaintiff had stated his right properly, the defendant might have pleaded differently (*y*). So, in trespass for taking mirrors and handkerchiefs, where the defendant justified the taking the mirrors, but by mistake omitted the taking of the handkerchiefs, the judge held that this omission could not be amended at the trial (*z*).

Where A. covenanted to pay B. 270*l.* on the 15th December, with interest up to that time, and not having done so, B. brought an action of debt, laying his damages at 10*l.*, it was holden that B. could not recover more than the principal, with interest up to the 15th December, and 10*l.* more, although the interest up to the time of the action amounted to a larger sum; and the judge, at the trial, would not allow an amendment by inserting a larger sum than 10*l.* damages (*a*). In an action for a libel the judge would not order superfluous averments and inuendoes to be struck out at the instance of the plaintiff at *Nisi Prius* (*b*). The judge has no power under the act, to order an amendment at *Nisi Prius* of the award of the *venire* on the *Nisi Prius* record (*c*). But where a record was taken down to trial without any issue having been joined by the addition of a *similiter*, the defect was allowed to be cured by adding it at the trial (*d*).

Special Finding under 3 & 4 W. 4, c. 42, and Judgment thereon.

Special Finding under 3 & 4 W. 4, c. 42, s. 24, and Judgment thereon.] The 24th section of the 3 & 4 *W.* 4, *c.* 42, provides "that the court or judge shall and may, if they or he think fit, in all such cases of variance, *instead of causing the record or document to be amended*, as aforesaid, *direct the jury to find the fact or facts according to the evidence;* and thereupon such finding shall be stated on such record or document, and, notwithstanding the finding on the issue joined, the said court, or the court from which the record has issued, shall, if

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(*w*) *Cooper* v. *Whitehouse*, 6 C. & P. 545.

(*x*) *Doe Poole* v. *Errington*, 1 M. & Rob. 343; 3 N. & M. 646; 1 A. & E 750, *S. C.*: but it would seem that the judge had, in such a case, power to make the amendment

(*y*) *Frankham* v. *Earl of Falmouth*, 6 C. & P. 529; 4 N. & M. 330, *S. C.*: and see *Kirby* v. *Simpson*, 3 Dowl. 791: Tidd, New Prac. 516.

(*z*) *John* v. *Currie*, 6 C. & P. 618: and see *Young* v. *Fewson*, 13 Leg. Obs. 396: Tidd, New Prac 516.

(*a*) *Watkins* v. *Morgan*, 6 C. & P. 661: but see *Dew* v. *Katz*, 8 C. & P. 315.

(*b*) *Prudhomme* v. *Frazer*, 1 M. & Rob. 435.

(*c*) *Adams* v. *Power*, 7 C. & P. 76.

(*d*) *Dyson* v. *Warris*, 1 M. & Rob. 474. If the jury had been sworn before the defect was found out, they should have been re-sworn after the *similiter* had been added. (Id).

they shall think the said variance immaterial to the merits of the case, and the mis-statement such as could not have *prejudiced* the opposite party in the conduct of the action or defence, *give judgment according to the very right and justice of the case*" (*e*). Under the above section of the act, where, in an action against the sheriff for allowing a defendant to escape after he had been arrested on mesne process, it was proved at the trial that an opportunity only had offered itself of making the arrest, but that the sheriff had not availed himself of it by arresting the party, the judge, on an application for leave to amend the declaration, directed the jury to find the facts specially, reserving the question of the plaintiff's right to amend for the opinion of the court; and the court, holding that the variance was immaterial to the merits of the case, and that the mis-statement could not have prejudiced the defendant in the conduct of his defence, gave judgment for the plaintiff according to the finding of the jury (*f*). But the court have, in some cases, permitted an amendment instead of giving judgment under the 24th section: thus, where in replevin, the defendant avowed for three quarters of a year's rent, and at the trial the matter in dispute was whether the rent was 110*l*. or 115*l*., and whether it was quarterly or half-yearly, and the jury found that it was 115*l*., and half-yearly, and that finding was entered on record, the court allowed the avowry to be amended under *s*. 24, although the plaintiff gave notice of his intention to rely on the variance, and to oppose any amendment (*g*). And, in a late case, where the declaration was bad on the ground of variance, as it stated the agreement to be made between the plaintiff and defendant, whereas there were other parties to it of the first part besides the plaintiff, and the facts were found specially under *s*. 24, on an application for judgment under the statute, the court are reported to have made a rule absolute for a nonsuit (*h*).

Terms not imposed.

Under the above section of the act, the court has no power to impose any terms upon the party for whom judgment is ordered to be entered (*i*).

Withdrawing a Juror.

Withdrawing a Juror.] During the trial, after the jury are sworn, the parties frequently agree to withdraw a juror. This is usually done at the recommendation of the judge, in cases where it is doubtful whether the action will lie, or where the judge intimates an opinion, that, under the peculiar circumstances of the case, the action should proceed no further. When a juror is withdrawn, each party pays his own costs (*j*). The withdrawing a juror by consent of the parties is, it seems, no bar to a future action for the same cause (*k*). But where the plaintiff, at the suggestion of the judge, withdraws a juror, with the intention and understanding of bringing the matter to a final conclusion, it amounts to an undertaking not to bring a second action for the same

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(*e*) See form of *postea* and judgment, Chit. Forms.

(*f*) *Guest* v. *Elwes*, 6 N. & M. 433; 2 Nev. & P. 230; 5 A. & E. 118; 2 H. & W. 34, *S. C.*

(*g*) *Gayler* v. *Farrant*, 4 Bing. N. C. 286; 6 Dowl. 426, *S. C.*: see *Parry* v. *Fairhurst*, 2 C., M. & R. 190: *Boys* v. *Ancell*, 5 Bing. N. C. 390.

(*h*) *Chanter* v. *Leese*, 4 M. & W. 295.

(*i*) *Guest* v. *Elwes*, 6 N. & M. 433.

(*j*) *Stodhard* v. *Johnson*, 3 T. R. 657.

(*k*) *Sanderson* v. *Nestor*, R. & M. 402: see *Harvies* v. *Thomas*, 2 M. & W. 32: *Everett* v. *Youells*, 3 B. & Ad. 349: see form of *postea* and judgment, where a juror is withdrawn, Chit. Forms.

cause; and if a second action be commenced, the court will stay the proceedings as against good faith (*l*). Discharging a jury by consent does not terminate the suit, and in this respect is like the withdrawing a juror (*m*).

Plea puis darrein Continuance.

Plea puis darrein Continuance.] At any time before the jury actually give their verdict, the defendant may plead, in abatement or bar of the action, any matter of defence arising within the last eight days. This shall be treated of more particularly in the next section. When this plea is pleaded, and received at *Nisi Prius* or the assizes, it is entered on the back of the record of *Nisi Prius*, and certified to the court above; and all further proceedings in the cause, at the assizes or *Nisi Prius*, are thereby suspended.

Bill of Exceptions.

Bill of Exceptions.] If, during the trial, you wish to object to the opinion and direction of the judge, either as to the competency of a witness, the admissibility of evidence, or for overruling a challenge, or refusing a demurrer to evidence, or nonsuiting the plaintiff improperly (*n*), you may tender a bill of exceptions; and this is afterwards determined in a court of error (*o*).

Demurrer to Evidence.

Demurrer to Evidence.] When you think that the facts proved do not maintain the issue, this being in itself a point of law, you may, if you wish, withdraw it from the consideration of the jury, by demurring to the evidence; which demurrer will afterwards be determined by the court in which the action was commenced (*p*).

Nonsuit.

Nonsuit.] If the plaintiff find that his evidence is not sufficient to maintain his case, he may elect to be nonsuit, in order that he may have an opportunity of bringing another action, either in another shape, or when better prepared with evidence. This is done usually after the plaintiff has closed his evidence, or after the defendant's case is closed, and before the judge has summed up; but it may be done at any time before the jury have delivered their verdict (*q*). When a plaintiff's case is closed, the defendant's counsel may, if he think there is no evidence to go to the jury, ask the judge to nonsuit the plaintiff; but if the defendant's counsel has addressed the jury, and examined witnesses, he has then no right to address the judge for a nonsuit (*r*).

Verdict, how given.

Verdict, how given.] If no plea *puis darrein continuance* be put in and received, and if there be no demurrer to evidence, or if there be no nonsuit, the jury, after the evidence is given and the judge has summed it up, proceed to consider of their verdict.

Jury to be kept together without Meat or Drink.

After the evidence is given, and the case closed on both sides, the jury must be kept together, without meat, drink, or fire, (candle-light only excepted), until they have delivered their verdict, unless otherwise ordered by the judge. Also, they

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(*l*) *Moscati* v. *Lawson*, 1 H. & W. 572: see *Harries* v. *Thomas*, 2 M. & W. 32.

(*m*) *Everett* v. *Youells*,, 3 B & Ad. 349.

(*n*) *Strother* v. *Hutchinson*, 4 Bing. N. C. 83: see *per Tindal*, C. J.

(*o*) See this subject particularly treated of, *post*, sect. 7: and see form of Bill of Exceptions, Chit. Forms, 85.

(*p*) See as to this subject, *post*, sect. 7: and see the form of the demurrer, Chit. Forms, 84; and of the joinder, Id. 85.

(*q*) See more particularly on this subject, *post*, sect. 8; and see the forms of *postea*, judgment, and execution upon a nonsuit, Chit. Forms, 86, 87.

(*r*) *Roberts* v. *Croft*, 7 C. & P. 376.

must not be allowed to speak with any person whatever, until they have *agreed* upon their verdict; between which time, and the time of delivering their verdict, they may speak with the bailiff who keeps them, but with no other person. And before the jury retire, the bailiff is sworn in open court to keep them thus. If they eat or drink at their own expense, or at the expense of either of the parties, they subject themselves to be fined; and if at the expense of the party for whom they afterwards give their verdict, it also avoids the verdict (*s*). Where, however, a trial was not concluded on the first day, but the court adjourned to the day following, and in the meantime the jury separated and went to their respective homes, without the assent or knowledge of the defendant; still the court held it to be no ground for granting a new trial, unless it could also be shewn that some improper attempt had been made to practise upon or tamper with the jury, whilst they were thus separated (*t*).

Where they cannot agree.

If the jurors do not agree in their verdict at the assizes before the judges are about to leave the town, the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart (*u*).

Casting Lots for their Verdict.

If the jury determine their verdict by lots, the verdict shall be set aside, and the jurors fined (*v*); but the verdict in such a case cannot be impeached upon the testimony of any of the jurors themselves, not even by affidavit of a third party as to their admissions (*x*); the fact must be substantiated by other evidence (*y*).

Withdrawing and receiving further Evidence, &c.

The jury either give their verdict without quitting the jury-box, or in cases of difficulty, or where there is a difference of opinion among them, they may withdraw to a room provided for the purpose, in order to deliberate on their verdict. When the jury withdraw, they may take with them letters-patent, deeds under seal, and exemplifications of depositions in equity if the witnesses be dead; and, with the assent of the parties, they may take with them books or writings under seal (*z*). Or even if they take them without such leave or consent, that circumstance, however irregular, will not avoid the verdict (*a*). But the jury cannot take with them evidence which has not been shewn to the court (*b*); and if the party, for whom the verdict is afterwards given, deliver such evidence to the jury after they have left the bar, it will avoid the verdict (*c*); but if delivered by the opposite party, or produced by one of the jurors, without having received it from the parties, it will not. Also, if the jury examine witnesses after they have left the bar, even to the same points to which the same witnesses were before examined in court, it

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(*s*) See *Everett* v. *Youells*, 4 B. & Ad. 681.

(*t*) *R.* v. *Kinnear*, 2 B. & Ald. 462: 3 Price, 536, *S. C.*: see *R.* v. *Fowler*, 4 B. & Ald. 273: 2 Doug. 416: Co. Lit. 227.

(*u*) 3 Bla. Com. 276: *Morris* v. *Davies*, 3 C. & P. 427, and notes.

(*v*) *Fry* v. *Hardy*, T. Jon. 83: *R.* v. *Lord Fitzwater*, 2 Lev. 140: *Foster* v. *Hawden*, Id. 205: *Hale* v. *Cove*, 1 Str. 642.

(*x*) *Straker* v. *Graham*, 4 M. & W. 721.

(*y*) *Vaise* v. *Delaval*, 1 T. R. 11: *Lawrence* v. *Boswell*, Say. 109: *Owen* v. *Warburton*, 1 New Rep. 326: *R.* v. *Wooller*, 2 Stark. 111: and see *R.* v. *Woodfall*, 5 Bur. 2667: *Cogan* v. *Ebden*, 1 Bur. 383: 2 Ld. Ken. 24, *S. C.*: *Clark* v. *Stephenson*, 2 W. Bl. 803: *Jackson* v. *Williamson*, 2 T. R. 281: *Hindle* v. *Birch*, *Sheriff of Middlesex*, 8 Taunt. 26; 1 Moore, 455, *S. C*

(*z*) *Vicary* v. *Farthing*, Cro. El. 411: *R.* v. *Burdett*, 1 L. Raym. 148; 3 Salk. 645, *S. C.*

(*a*) Co. Litt. 227 b.

(*b*) 2 Ro. Abr. 686.

(*c*) *Graves* v. *Short*, Cro. El. 616.

will avoid the verdict (*d*). But they may return into court to hear evidence as to any matter of which they are in doubt (*e*), or to ask any question of the court (*f*). And, after the jury have had the case summed up to them, and have retired, the judge will not permit them to see a treatise on the law of the subject, even with the consent of the parties; they should state their difficulty to the judge, and receive his direction as to the law (*g*).

Irregularity to be stated on the Record.

When any irregularity of the above description, capable of avoiding the verdict, occurs, it must be stated upon the *postea* or made parcel of the record; otherwise it cannot be made the subject of a motion in arrest of judgment, or of a writ of error (*h*).

Juror taken Ill.

If one of the jury happen to be taken suddenly ill, so as to be incapable of remaining until the verdict is agreed on, the court may discharge that jury, and charge another with the cause (*i*).

Calling on another Cause where Jury long absent.

If the jury are likely to be absent any considerable time, another cause will be called on, and another jury drawn and sworn, in the manner stated *ante*, 267; and when the first jury return to deliver their verdict, or for any other purpose, the court for a while suspends the proceedings in the second action.

Verdict, when, where, and how Delivered.

When the jury return to the bar, they are asked if they have agreed upon their verdict, and whether they find for the plaintiff or the defendant. The foreman of the jury, in the presence and hearing of the remainder of the jurors (*k*), then delivers the verdict, and it is recorded (*l*). This verdict is either general or special:—general, when the jury find generally for the plaintiff, and state the damages, or for the defendant; special, when they find the facts of the case specially, as proved. The verdict is also either public or privy. A public verdict is that which is given by the jury in open court, whilst the court are sitting. A privy verdict is given before one of the judges of the court, after the court have risen; but it must be observed, that if the judge *adjourn* the court to his lodgings, and the jury then deliver their verdict, this will be a public and not a privy verdict (*m*). A privy verdict also must be confirmed by the jury in open court, before it can be recorded; before which time the jury may vary from it if they think proper (*n*); but after a verdict is recorded, no alteration, however slight, can be made in it (*n*). Also, before the verdict is recorded, a jury is at liberty to vary from their first offer, and to tender a new verdict; and that verdict which is recorded shall stand (*o*).

In a recent case, the judge at *Nisi Prius* having told the jury that, in case of their believing a particular fact, the verdict must be for the plaintiff, the jury retired, and the judge and counsel, on both sides, quitted the court, leaving the associate. The jury returned into court and told the

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(*d*) *Vicary* v. *Farthing*, Cro. El. 411, 412: see *R.* v. *Fowler*, 4 B. & Ald. 273.

(*e*) 2 Ro. Abr. 676.

(*f*) 2 Hale, 296.

(*g*) *Burrows* v. *Unwin*, 3 C. & P. 310.

(*h*) *Graves* v. *Short*, Cro. El. 616.

(*i*) R. v. *Edwards*, 4 Taunt. 309: 3 Camp. 207, *S. C.*: *R.* v. *Scalbert*, 2 Leach, 620.

(*k*) See *R.* v. *Wooller*, 2 Stark. 111: *Cogan* v. *Ebden*, 1 Bur. 383; 2 Ld. Ken. 24, *S. C.*

(*l*) See generally, as to the verdict, *post*, Sect. 9.

(*m*) 3 Bl. Com. 377 a: and see *Dawson* v. *Howard*, 1 L. Raym. 129.

(*n*) Co. Lit. 227.

(*o*) Co. Litt. 227 b: *Napier* v. *Daniel*, 3 Bing. N. C. 77; 3 Scott, 417.

associate that they found the fact; the associate then informed them that this was a verdict for the plaintiff, and entered it so; but the jury expressed to him their dissent, and said that they were not agreed to find for the plaintiff. The court discharged a rule *nisi*, obtained on affidavit of these facts, for setting aside the verdict and having a new trial, upon the ground (only) of the jury not having agreed to find for the plaintiff (*p*).

Verdict against Evidence.

If the jury find a verdict manifestly against evidence, the court may send them back to re-consider it, before it is recorded, but not afterwards (*q*). This, however, is very unusual.

Verdict founded on Jurors' own Knowledge of the Case.

It is said that a jury may ground their verdict on their own knowledge of the facts of the case (*r*). But this doctrine, although generally entertained, appears questionable. It seems to be contrary to these words in the juror's oath, "and a true verdict give *according to the evidence*;" for, to say that the word "*evidence*," here, includes anything which the jurors may know of their own knowledge of the subject, and which has not been disclosed to the court, would be giving a construction to the word very different from its common and legal acceptation. The proper mode seems to be, for the juror to state to the court that he has such knowledge, and thereupon be examined and cross-examined as a witness (*s*).

Attaints and new Trials.

Formerly, if the jury gave a false verdict, the party injured by it might sue out and prosecute a writ of attaint against them, either at common law, or on the stat. 11 *H.* 7, *c.* 24, at his election, for the purpose of reversing the judgment, and punishing the jury for their verdict (*t*); but not where the jury erred merely in point of law, if they found according to the judge's direction (*u*). The practice of setting aside verdicts, and granting new trials, however, has so superseded the use of attaints, that there is no instance of one to be found in our books of reports later than in the time of Elizabeth (*v*); and it is now altogether abolished by stat. 6 *G.* 4, *c.* 50, *s.* 60. And in no case can the court or judge, in any other manner fine or imprison or otherwise punish a jury for their verdict, however erroneous (*x*).

Certificate for Speedy Execution.

Certificate for Speedy Execution.] Formerly, if a verdict was obtained in vacation, the judgment and execution were in all cases delayed, by reason of the intervals between the terms, until after the return of the *distringas* or *habeas corpora* in the next term; but now, by the 1 *W.* 4, *c.* 7, *s.* 2, it is enacted, "that in *all actions* brought in either of the said [superior] courts, by whatever form of process the same may be commenced, it shall be lawful for the *judge* before whom any issue joined in such action shall be to be tried, in case the plaintiff or demandant therein shall become nonsuit, or a verdict shall be given for the plaintiff or demandant, defendant or tenant, to

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(*p*) *Doe Lewis* v. *Barter*, 5 A. & E. 129.

(*q*) 2 Hawk. c. 47, s. 11: see *Napier* v. *Daniel*, 3 Bing. N. C. 77.

(*r*) Trial per Pais, 279, 209: *Smith's Case*, 1 Vent. 67: *Anon.*, 1 Salk. 405.

(*s*) 6 Howell's State Trials, 1012, n.

(*t*) See Finch, L. 484, &c.; Bro. Attaint; 3 Inst. 164.

(*u*) *Groenvelt* v. *Burwell*, 1 L. Raym. 470.

(*v*) *Reg.* v. *Ingersall*, Cro. El. 309.

(*x*) *Bushell's case*, Vaugh. 135; 2 Hale, 315.

certify under his hand (*y*), *on the back of the record, at any time before the end of the sittings or assizes*, that in his opinion *execution ought to issue in such action forthwith*, or at some day to be named in such certificate, and subject, or not, to any condition or qualification, and in case of a verdict for the plaintiff, then either for the whole or for any part of the sum found by such verdict; in all which cases a rule for judgment (*z*) may be given, costs taxed, and judgment signed forthwith; and *execution may be issued forthwith*, or afterwards, according to the terms of such certificate, on any day in vacation or term; and the *postea*, with such certificate as a part thereof, shall and may be entered of record, as of the day on which the judgment shall be signed, although the writ of *distringas juratores* or *habeas corpora juratorum may not be returnable until after such day*: provided always, that it shall be lawful for the party entitled to such judgment to postpone the signing thereof."

Judgment may be entered on, though Court not sitting.

By sect. 3, "every judgment to be signed by virtue of this act may be *entered and recorded* as the judgment of the court wherein the action shall be depending, although the court may not be sitting on the day of the signing thereof; and every *execution* issued by virtue of this act shall and may bear teste on the day of issuing thereof: and such judgment and execution shall be as valid and effectual as if the same had been signed and recorded and issued according to the course of the common law."

May be set aside.

By sect. 4, "notwithstanding any judgment signed or recorded, or execution issued by virtue of this act, it shall be lawful for the *court* in which the action shall have been brought to order such *judgment to be vacated*, and *execution* to be stayed or set aside, and to enter an *arrest of judgment*, or grant a *new trial* or new writ of inquiry, as justice may appear to require; and thereupon the party affected by such writ of execution shall be *restored* to all that he may have lost thereby in such manner as upon the reversal of a judgment by writ of error, or otherwise, as the court may think fit to direct."

Restitution.

In what Cases Certificate granted.

This statute is not limited to cases of *contract*, but applies to all actions where the judge thinks there ought to be early execution (*a*). And the judge may certify under this act for immediate execution in an action of *debt* on simple contract, as well as in other forms of action (*b*); and the judge may so certify though the verdict be taken by consent, and the consent does not contain any such terms (*c*). If, in an action for goods sold, there be a special demurrer to the count upon an account stated, which has not been argued at the time of the trial, and the jury find for the plaintiff on the count for goods sold, the judge, if it be a proper case for speedy execution, will order it on the plaintiff's undertaking to enter a *nolle prosequi* as to the count demurred to (*d*). The certificate is not, in general, granted where there is a reasonable ground of defence (*e*). In an action against an executor on the bond of his testator, where a verdict is given for the plaintiff on the plea

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(*y*) See form, Chit. Forms, 100.

(*z*) By R. H., 2 W. 4, r. 67, this rule is dispensed with: see Jervis, Rules, 30, n.

(*a*) *Barden* v. *Cox*, 1 M. & Rob. 203: *Hambridge* v. *Crawley*, 5 C. & P. 9, n.

(*b*) *Younge* v. *Crooks*, 1 M. and Rob. 223: *Barden* v. *Cox*, Id. 203: *sed vide Fisher* v. *Davies*, 2 M. & M. 93: *Percival* v. *Alcock*, 1 M. & Rob. 167.

(*c*) *Anon.*, 1 M. & Rob. 167.

(*d*) *Allsop* v. *Smith*, 7 C. & P. 708.

(*e*) *Barford* v. *Nelson*, 5 C. & P. 8: *Wright* v. *Guiver*, Id. 9: *Crookshank* v. *Rose*, Id. 19, 20.

of *non est factum*, if the judge make an order for immediate execution, it will not entitle the plaintiff to issue execution in the first instance against the goods of the defendant (*f*). In debt on bond to secure the payment by instalments of the consideration for the purchase of a business, the plaintiff ought to suggest breaches; and if he has not done so, and a verdict be found for him, on the plea of *non est factum*, he is not entitled to a certificate for speedy execution (*g*).

No Affidavit necessary for.

It is not requisite that there should be any affidavit to induce the judge to grant this certificate, though, in some cases, it might be desirable to be prepared with one (*h*). In order to induce the judge to refuse the certificate, the party may, it seems, shew, by affidavit or otherwise, facts which would constitute grounds for a new trial, or for arresting the judgment, or facts which may induce the judge to grant time, or other indulgence, as, that the defendant had *bonâ fide* ground for trying the cause, or that he was misled by others, or that he is, at present, unable to pay the damages, but that, if time should be granted, he will be able to raise the money before the next term, or other future day; or that he has property to deposit, which is not immediately convertible into money; or the like (*i*).

Proceedings after.

Where a judge, in pursuance of the act, certifies that the plaintiff shall have execution within a limited time, and judgment is thereupon entered up and execution issued, the defendant is not precluded from applying in the first four days of the next term to the court, to enter a suggestion to deprive the plaintiff of costs (*j*). Where the judge so certified, and the defendant at once paid over the sum in question, and the motion for a new trial was afterwards made, the court would not order the plaintiff to pay into court the sum he had received during the pendency of that rule (*k*).

As to the practice of signing and entering up the judgment when the judge grants his certificate under this statute, see *post*, 331; and as to the writ of execution thereon, see *post*, 332. See also, as to the moving for a new trial, or arresting the judgment, or staying the execution, *post*, 332.

(*f*) *Ward* v. *Thomas*, 1 C. & M. 532: 2 Dowl. 87, *S. C.*

(*g*) *D'Aranda* v. *Houston*, 6 C. & P. 511.

(*h*) Lord *Lyndhurst*, in *Gervas* v. *Burtchley*, 2 M. & M. 150, considered that this affidavit was not admissible, and refused to receive it; but *Bayley*, B., in *Ruddick* v. *Simmons*, 1 M. & Rob. 184, held otherwise, and received it.

(*i*) See Chit. Sum. Prac. 365.

(*j*) *Baddley* v. *Oliver*, 1 Dowl. 598; 1 C. & M. 219, *S. C.* A judge at the assizes has no power to order such a suggestion to be entered. (Id.)

(*k*) *Morton* v. *Burn*, 5 Dowl. 421.

SECT. 3.

Trial before the Sheriff.

Statutes as to, and to what Cases they extend, 292.
Application for, 293.
The Writ of Trial, Form of, &c., id.
The Issue on, 295.
Notice of the Trial, id.
The Trial, 295.
Judgment and Execution on, &c., 296.
Obtaining Sheriff's Notes of Trial, 297.
New Trial after, id.
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Statutes as to.

Statutes as to, and to what Cases they extend.] BEFORE the 3 & 4 *W.* 4, *c.* 42, trials were only at bar or *Nisi Prius;* but by that statute, *s.* 17, "in any action depending in any of the said superior courts for any *debt* or *demand* in which the sum sought to be recovered, and *indorsed on the writ of summons*, shall not exceed *twenty pounds*, it shall be lawful for the court in which such suit shall be depending, or any judge of any of the said courts, (if such court or judge shall be satisfied that the trial will not involve any *difficult question of fact* or *law*, and such court or judge shall think fit so to do), to order and direct that the issue or issues joined shall be tried before the *sheriff* of the county where the action is brought, or any *judge of any court of record* for the recovery of *debt* in such county; and for that purpose a *writ* shall issue directed to such sheriff (*l*), *commanding him to try such issue or issues*, by a jury to be summoned by him, and to *return such writ with the finding of the jury thereon indorsed*, at a day certain, in term or in vacation, to be named in such writ; and thereupon such sheriff or judge shall summon a jury, and shall proceed to try such issue or issues." The recent act of 4 & 5 *W.* 4, *c.* 62, for improving the practice and proceedings in the Court of Common Pleas of the county palatine of Lancaster, contains a similar enactment (*s.* 20).

Extends only to Actions for Debt or demand not exceeding 20*l*.

The above statute, it will be seen, extends only to actions for a *debt* or *demand*, in which the sum sought to be recovered *and* indorsed on the writ of *summons*, does not exceed 20*l*. (*m*). It does not extend to a case in which the action, though not exceeding 20*l*., is commenced by writ of *capias* or *detainer*, or to a case where the debt, or demand, or any part of it (*n*), is not indorsable on the writ of summons under *R. H.*, 2 *W.* 4, or to a claim for a *tort* (*o*). And it has been held not to extend to an action for wages, and also for damages for the discharge of the plaintiff and his wife without notice (*p*). But actions in which the damages sought to be recovered amount to a specific sum, *ex. gr.* an action on the warranty of a horse, which has been returned on discovering his unsound-

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(*l*) It should be observed, that the words, "or judge," are here omitted; but they are so by mistake, and it has been held that the writ may issue, and be directed, to a judge of an inferior court of record. (See *Clarke* v. *Marner*, 2 Dowl. 774; 4 M. & Scott, 471, *S. C.*)

(*m*) It is to be observed, that the sum indorsed on the writ of summons is not the only criterion for determining whether a case is within this act; for after the period for payment specified in the indorsement has elapsed, the plaintiff may go for more than that amount. (See *Jacquot* v. *Boura*, 3 Jurist, 461; 7 Dowl. 331, *S. C.*)

(*n*) *Jacquot* v. *Boura*, 7 Dowl. 331.

(*o*) *Watson* v. *Abbott*, 2 C. & M. 150; 4 Tyr. 64: 2 Dowl. 215, *S. C.*: *Smith* v. *Brown*, 2 M. & W. 851.

(*p*) *Jacquot* v. *Boura*, 7 Dowl. 331.

ness (*q*); or for the price of a horse sent to defendant under a representation that he had authority to bespeak it for another (*r*), are within the statute. It was decided in one case that the court or a judge could not amend the indorsement on the writ of summons by reducing the amount of the claim indorsed upon it, in order to try the cause before the sheriff (*s*). But according to the more recent cases, where the cause is proper to be tried before the sheriff, such an amendment will be allowed (*t*). According to one case, it seems that the court will not, at the instance of the party who obtained the writ, set aside a trial before the sheriff on the ground that the case was not within the statute (*u*): but, according to a more recent decision, the court would interfere in any case to set aside a judgment where the sheriff had clearly no power to try the cause (*x*).

All the proceedings preparatory to the trial of the issue before the sheriff must be considered as the course and practice of the court, and have all the incidents connected with them.

Application for.

Application for.] Before making the application for an order for the writ of trial, issue must be joined in the cause. The application for the writ of trial may be made either to the court or to a judge at chambers. It seems, that when an application has been made to a judge at chambers who has refused to make the order, the court will not in general entertain the application, although the party might under the act have come before the court in the first instance (*y*).

To the Court.

In support of an application to the court under the act, (but which is seldom made), *make an affidavit of the circumstances as to the nature of the cause of action, that issue has been joined in it, and that the trial will not involve any difficult question of fact or law, and give it to counsel with a motion paper, to move for a rule* nisi *"to shew cause why the issue joined in this cause should not be tried before the sheriff of ——"* (*z*)*: draw up the rule with one of the masters, and serve a copy of it on the opposite attorney, and afterwards move to make it absolute on an affidavit of service* (*a*). *Draw up the rule absolute with one of the masters.*

At Chambers.

If the application be made to a judge, and which is the most usual course, *take out a summons to shew cause why the issue joined in the cause should not be tried before the sheriff, &c. Serve a copy on the opposite attorney, and the judge, upon your satisfying him that the case is within the statute, and that the trial will not involve any difficult question of law or fact, will grant his order* (*b*) *for the trial to take place before the sheriff, &c. In some cases, perhaps, the judge might require the affidavit above mentioned.*

The Writ of Trial.

The Writ of Trial.] Having obtained the rule or order for that purpose, as above mentioned, *prepare the writ for the*

(*q*) *Allen* v. *Pink*, 4 M. & W. 140.

(*r*) *Price* v. *Morgan*, 2 M. &. W. 53.

(*s*) *Trotter* v. *Bass*, 1 Scott, 403; 3 Dowl. 407; 1 Hodges, 23, *S. C.*: and see *Edge* v. *Shaw*, 4 Dowl. 189; 2 C., M. & R. 415, *S. C.*

(*t*) *Edge* v. *Shaw*, 4 Dowl. 189; 2 C., M. & R. 415, *S. C.*: *Frodsham* v. *Round*, 4 Dowl. 569; 1 H. & W. 667, *S. C.*

(*u*) *Price* v. *Morgan*, 2 M. & W. 53.

(*x*) *Smith* v. *Brown*, 5 Dowl. 736: *Jacquot* v. *Boura*, 3 Jurist, 461; 7 Dowl. 331, *S. C.*

(*y*) *Davies* v. *Lloyd*, 4 Dowl. 478; Tyr. & G. 28, *S. C.*

(*z*) See form, Chit. Forms, 79.

(*a*) See a form of Affidavit, Chit. Forms, 78.

(*b*) See form, Chit. Forms, 79.

trial (*c*); *engross it on plain parchment; get it sealed by the sealer of the writs.* By *R. H.*, 4 *W.* 4, *s.* 1, *r.* 19, "writs of trial shall be sealed only, and not signed." *Indorse on it a memorandum, stating the court in which the action is brought, the names of the parties, nature of the writ, and the day and place at which it is to be executed* (*d*); *annex the rule or order to it, and leave it at the sheriff's office a reasonable time* (*at least two days*) *before the day of trial. The sheriff will thereupon summon the jury.* The writ is directed to the judge of the court of record in those places in which there is a court of record, and to the sheriff where there is no such court. Where a writ of trial was directed to the mayor of Colchester, and the cause was tried by his deputy, the court refused to set aside the proceedings on a suggestion that the cause ought to have been tried by the mayor himself, it not appearing that the mayor had no authority to appoint a deputy (*e*).

Must agree with Form prescribed by R. H., 4 W. 4.

Care should be taken that the writ of trial follows the form given by the rule of *H. T.*, 4 *W.* 4. It is a ground for arresting the judgment, if that part of the form which gives jurisdiction to the inferior court to try issues from the superior courts (commencing, "And forasmuch" &c., for, "And whereas" &c.) be omitted or curtailed (*f*). It may be well to add, that the word "impleaded," in that form, means that the action was commenced (*g*).

Must correspond with the other Proceedings.

Care should also be taken that the writ of trial corresponds with the other proceedings. There is apparently some conflict between the courts, as to how and when a variance may be taken advantage of. It seems that, in general, in case of an omission, or of a variance between the writ of trial and the writ of summons, or the issue delivered, if the defendant appear on the trial, the court will not, after verdict, set aside the proceedings, but will allow an amendment (*h*). If, however, the defendant do not appear at the trial, the court will, it seems, set aside the proceedings (*i*). Again, if the defendant appear on the trial, but under protest against the irregularity, the Court of Common Pleas will allow him to take advantage of it after verdict (*j*); but the Court of Exchequer will not (*k*). Also, in a case in the latter court, where there were issues in law and fact, the plaintiff gave notice of trial before the sheriff, and that the jury would then assess the damages on the demurrers. The award of *venire* in the issue was, "as well to try the issues joined, as to inquire what damages the plaintiff hath sustained by occasion of the premises, whereof the parties have put themselves upon the judgment of the court," &c. These words were omitted in the writ of trial, but the plaintiff gave the defendant notice that he did not mean to assess the damages. And, notwithstanding that the defendant at the trial protested against the irregularity, the court, after verdict, refused to set aside the proceedings, and

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(*c*) See form, Chit. Forms, 80, as prescribed by the recent rule of H.T., 4 W. 4.

(*d*) See form, Chit. Form, 80.

(*e*) *Clarke* v. *Marner*, 4 M. & Scott, 171; 2 Dowl. 774, *S. C.*: see form of appointment of deputy, Chit. Forms, 81.

(*f*) *Handford* v. *Handford*, 6 Dowl. 473.

(*g*) *Robinson* v. *Robland*, 6 Dowl. 271.

(*h*) *Percival* v. *Connell*, 6 Dowl. 68; 5 Scott, 91, *S. C.*: see *Farwig* v. *Cockerton*, 6 Dowl. 337; 3 M. & W. 169, *S. C.*

(*i*) *Wight* v. *Perrers*, 2 M. & W. 289; 5 Dowl, 463, *S. C.*: see *Blissett* v. *Tenant*, 6 Dowl. 436; 5 Scott, 479; 4 Bing. N. C. 168, *S. C.*

(*j*) *Blissett v. Tenant*, *ubi supra.*

(*k*) *Farwig* v. *Cockerton*, 6 Dowl. 337; 3 M. & W. 169, *S. C.*: and see *Hiam* v *Smith*, 6 Dowl. 710.

Lord *Abinger* observed, that after notice had been given that the plaintiff did not mean to assess contingent damages on the demurrer, then that statement must be considered as struck out of the issue. And on *Blissett* v. *Tenant* (*ubi supra*) being cited, his Lordship added, "I am glad that I am not a party to that decision, such cases, instead of facilitating justice, are rather opposed to it" (*l*). After opinions so strongly expressed as those in *Blissett* v. *Tenant*, *Farwig* v. *Cockerton*, and *Hiam* v. *Smith*, a new general rule seems necessary to reconcile the practice of the courts on this point. In the meanwhile, it is probable that the Court of Queen's Bench will follow the practice of the Exchequer (*m*).

Issue.

The Issue.] Before the trial the issue must be made up and delivered as in other cases. The form of it (which is prescribed by *R. H.*, 4 *W.* 4) is the same as in other cases as far as the entry of the pleadings inclusive, after which it concludes with the award of the writ of trial. It should follow the form prescribed by rule, *H.* 4 *W.* 4 (*n*). If made up in an improper form, an order should be obtained for its amendment (*o*); and if it has been made up and delivered before the order for the trial, it should be amended (*p*).

Notice of Trial.

Notice of Trial.] *The plaintiff must give a written notice of the intended trial, the same as on a trial at Nisi Prius* (*see ante*, 205), *viz. eight or sometimes fourteen days' notice when the trial is to be had in London or Middlesex, or ten days' notice when it is to be had in any other county, exclusive of the day on which it is given, and inclusive of that on which the trial is to take place* (*q*). If notice of trial be given for a day not fixed for trying issues, it is a nullity, and no ground for moving to set it aside. Where notice was given for Easter Tuesday, and afterwards continued to a subsequent day, *Williams*, J., held that Easter Tuesday was not a *dies non* for that purpose, and that the notice was sufficient (*r*).

After giving notice of the trial, the next step to be taken is to subpœna the witnesses, and which may be done as in other cases (*See ante*, 232, 233) (*s*).

Trial, &c.

Trial, &c.] *Attend, at the time appointed, with your counsel and witnesses; and the trial will be taken in nearly the same manner as a trial at Nisi Prius* (*ante*, 264 *to* 291). But the master will not in general allow costs for the attendance of counsel and preparing briefs, &c. (*t*).

Amendments by Sheriff at Trial.

Certifying as to Costs, &c.

The sheriff or his deputy, or judge presiding at the trial, has the like powers with respect to amendments on such trial as are given to judges at *Nisi Prius*, by the 3 & 4 *W.* 4, *c.* 42, *ante*, 282 to 284 (*u*). And he may certify for immediate or speedy execution, as a judge at *Nisi Prius* may under 1 *W.* 4, *c.* 7, *s.* 2 (*x*). He has no power of certifying under the 43 *Eliz.*

(*l*) *Hiam* v. *Smith*, 6 Dowl. 710.

(*m*) See *Cox* v. *Painter*, 1 N. & P. 581.

(*n*) See *Handford* v. *Handford*, 6 Dowl. 473.

(*o*) See *Atwill* v. *Baker*, 2 M. & W. 272; 5 Dowl. 462, *S. C.*: *Ikin* v. *Plevin*, 5 Dowl. 594. See form of issue, Chit. Forms, 79.

(*p*) *Peel* v. *Ward*, 5 Dowl. 169; 1 M. & W. 743, *S. C.*.

(*q*) See the form, Chit. Forms, 81.

(*r*) *Charnock* v. *Smith*, 3 Dowl. 607; 1 H. & W. 217, *S. C.*

(*s*) See form of subpœna, Chit. Forms, 82.

(*t*) See as to the allowance of such costs on writs of inquiry, *post*, Vol. II. Book II. Part IV. Ch. 4.

(*u*) 3 & 4 W. 4, c. 42, s. 18. See *Hill* v. *Salter*, 2 Dowl. 380.

(*x*) 3 & 4 W. 4, c. 42, s. 19.

c. 6, *s.* 2, to deprive the plaintiff of costs (*y*), or of certifying under the Middlesex Court of Request Act, 23 *G.* 2, *c.* 33, *s.* 19, that the freehold or act of bankruptcy was in question (*z*), for he is not a *judge* within the meaning of those enactments; but he has the same power as a judge at *Nisi Prius* to direct a nonsuit (*a*). The verdict of the jury will be as valid and of the like force as a verdict of a jury at *Nisi Prius* (*b*).

Sheriff may refuse to hear an Unqualified Person.

An under-sheriff is holden to be justified in laying down a rule that no person but a barrister or attorney shall appear as the advocate of a party on the trial (*c*).

Cannot Postpone the Trial.

It seems that the sheriff or under-sheriff has no power to postpone the trial; but the application must be made to the court or a judge. And in a case where it was made to the under-sheriff after the jury were sworn, on the ground of the absence of a material witness, and refused, the court would only grant a new trial on payment of costs (*d*).

Bill of Exceptions.

Where the sheriff refused to receive or seal a bill of exceptions, the court would not stay judgment and execution, but left the party to his action (*e*).

Judgment as in case of a Nonsuit.

Judgment and Execution on.] The defendant may obtain a judgment as in case of a nonsuit as in other cases; and therefore, if a plaintiff does not proceed to trial within two terms after issue is joined, which issue is directed to be tried before the sheriff, the defendant is entitled to judgment as in case of a nonsuit, as in other cases (*f*); and for those cases, and the mode of applying for the judgment, and the time of the application, see *post*, *Vol. II. Book IV. Part I. Ch.* 24. Where a peremptory undertaking is given on discharging a rule for judgment as in case of a nonsuit, the court will require the plaintiff to proceed to trial in a reasonable time, to be regulated by the practice of the sheriff's court (*g*).

Judgment and Execution, &c.

"At the return of any such writ for the trial of such issue or issues as aforesaid, *costs shall be taxed*, *judgment signed*, *and execution issued forthwith*, unless the sheriff, or his deputy, or the judge before whom such trial shall be had, shall *certify under his hand* (*h*) upon such writ that *judgment ought not to be signed until the defendant shall have had an opportunity to apply to the court for a new trial*, or a *judge* of any of the said courts shall think fit to order that *judgment or execution shall be stayed* till a day to be named in such order (*i*); and the verdict of such jury on the trial of such issue or issues shall be as valid and of the like force as a verdict of a jury at *Nisi Prius;* and the sheriff or his deputy, or judge, presiding at

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(*y*) *Wardroper v. Richardson*, 1 A. & E. 75: *Jones* v. *Bond*, 5 Dowl. 455: *Story* v. *Hodson*, 5 Dowl. 558; and the court have no such power. (Id.)

(*z*) *Pritchard* v. *M'Gill*, 2 M. & W. 380. It was said in that case, that it should have been shewn for cause when the application was made for the trial before the sheriff, when it might be imposed as a term, that he should have power to certify. But *quære*, though such a term were imposed, if he would have the power? (See *Jones* v. *Barnes*, Id. 382).

(*a*) *Watson* v. *Abbott*, 2 C. & M. 150; 2 Dowl. 215, S C.

(*b*) *Begbie* v. *Grenville*, 2 Dowl. 238: *Walls* v. *Redmayne*, Id. 508: *Horwood* v. *Roberts*, Id. 534.

(*c*) *Tribe* v. *Wingfield*, 2 M. & W. 128.

(*d*) *Packham* v. *Newnham*, 3 Dowl. 165; 5 Tyr. 215; 1 C., M. & R. 584, *S. C.*

(*e*) *White* v. *Hislop*, 4 M. & W. 73.

(*f*) See *Begbie* v. *Grenville*, 2 Dowl. 238: *Walls* v. *Redmayne*, Id. 508: *Horwood* v. *Roberts*, Id. 534: *Maddeley* v. *Batty*, 3 Dowl. 205: *Butterworth v. Crabtree*, 1 C., M. & R., 519: *Banks* v. *Wright*, 3 Dowl. 14: *Harle* v. *Wilson*, 1 Gale, 139.

(*g*) *Mullins* v. *Bishop*, 2 Dowl. 557: *Banks* v. *Wright*, 3 Dowl. 14: and see *Williams* v. *Edwards*, 3 Dowl. 660.

(*h*) See form, Chit. Forms, 82.

(*i*) See form of summons and order, Chit. Forms, 83.

the trial of such issue or issues, shall have the like powers with respect to amendment on such trial as are hereinafter given (*ante*, 281) to judges at *Nisi Prius* (*k*). The plaintiff, unless otherwise ordered, may in this case get his costs taxed, and sign judgment and issue execution directly after the verdict is obtained; even on the same day (*l*). Where it appeared by the return of the sheriff to a writ of trial, that it was executed a day after the return day, and an application was made by the unsuccessful party who had appeared at the trial to set the writ aside, the court intimated that in such a case they would amend the return if necessary (*m*). (*See as to the mode of signing the judgment*, *post*, 333). The 19th section of the above statute 3 & 4 *W.* 4, *c.* 42, enacts, "that all the provisions contained in the 11 *G.* 4 & 1 *W.* 4, *c.* 70, shall, so far as the same are applicable thereto, be extended and applied to judgments and executions upon these writs for the trials of issues, in like manner as if the same were expressly re-enacted therein." Under the authority of this provision, the court will in the next term entertain a motion to vacate and arrest a judgment signed in vacation, after a trial before the sheriff (*n*).

Costs.

Where the plaintiff did not recover 5*l.* in a case within the provisions of the London Court of Conscience Act, (39 & 40 *G.* 3, *c.* 104, *s.* 12), he was held not entitled to costs (*o*). And a defendant, by consenting to a cause being tried before the sheriff, knowing at the time that he was liable to be sued for the debt in a local court only, does not thereby waive his right to claim costs from the plaintiff upon his recovering less than 5*l.* (*p*).

Obtaining Sheriff's Notes.

Obtaining Sheriff's Notes of Trial.] The sheriff should, on being applied to by one of the parties for that purpose, produce to him his notes of the trial had before him. Where an under-sheriff refused to produce such notes, the court made him pay the costs consequent on such refusal (*q*); but he is not answerable for his agent's conduct in withholding them, unless it is shewn that the latter acted under his direction (*q*).

New Trial after.

New Trial after.] The court will set aside a nonsuit or verdict, and grant a new trial, as in other cases, and when the *defendant* intends to make an application for that purpose, he ought to obtain a certificate from the sheriff or other judge before whom the trial is had, or a judge's order to stay judgment or execution (*r*). Where the cause was tried in the absence of the defendant's attorney, before the time mentioned in the writ of trial, the verdict was set aside without an affidavit of merits, and with costs (*s*). If the sheriff or judge before whom the cause was tried, with the assent of the plaintiff or his attorney, gives permission for that purpose,

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(*k*) 3 & 4 W. 4, c. 42, s. 18.

(*l*) *Nichols* v. *Chambers*, 4 Tyr. 836; 2 Dowl. 693; 1 C., M. & R. 385, *S. C.*

(*m*) *Sherman* v. *Tinsley*, 3 Hodges, 32. *Sed quære*; for it seems that in such case the court has no jurisdiction to try the cause; (*Mortimer* v. *Preedy*, 6 Dowl. 544); and the proper course appears to be to apply to a judge to extend the time for the return of the writ. (*Per Parke*, B., Ibid.)

(*n*) *Pyke* v. *Glendinning*, 2 Dowl. 611.

(*o*) *Kidd* v. *Mason*, 3 Dowl. 85: *Bond* v. *Bailey*, Id. 808; 2 C., M. & R. 246, *S. C.* See now the 5 & 6 W. 4, c. 94.

(*p*) *Shaw* v. *Oates*, 4 Dowl. 720.

(*q*) *Metcalf* v. *Parry*, 2 Dowl. 589; 3 Dowl. 93, *S. C.*

(*r*) See 3 & 4 W. 4, c. 42, s. 17; and *ante*, 292.

(*s*) *Hanslow* v. *Wilks*, 5 Dowl. 295. See the other causes for which a new trial will be granted, in Vol. II. Book IV. Part I. Chap. 27.

but not otherwise, the court may set aside the verdict and enter a nonsuit (*t*). The court, however, will not grant a new trial if the verdict be for less than 5*l*. (*u*), unless, perhaps, where it is a perverse one (*x*).

Motion for, how made.

The motion for a new trial should be supported by the production of the under-sheriff's notes, verified by affidavit (*y*), or else their non-production must be accounted for by affidavit of the under-sheriff's refusal to produce them; and, in that case, the facts proved at the trial must be sworn to (*y*). Where no counsel was employed in the cause, an affidavit, setting forth the cause or nature of the application, must be made (*z*). If the motion be made by counsel engaged at the trial, the court, under special circumstances, will not require the production of the sheriff's notes (*a*), and where they have been delivered to one of the judges, neither party is entitled to them for the purpose of his motion for a new trial (*b*). The affidavit verifying the sheriff's notes need only state, that the paper annexed contains the notes sent by the sheriff to the court (*c*); and it is not necessary, in applying for a new trial, to state the pleadings in the affidavits; the writ of trial, like the *postea* in an action tried at *Nisi Prius*, being assumed to be in court (*d*). Where the application is supported by an affidavit verifying the sheriff's notes, affidavits are admissible on the other side of evidence given at the trial, which does not appear on the notes (*e*). But where a new trial was moved for, on the ground of mis-direction, and the mis-direction did not appear on the under-sheriff's notes, *Littledale*, J., held, that it could not be shewn by affidavits, but that an application ought to be made to the under-sheriff to amend his notes (*f*). It seems the court will not compel the under-sheriff to make an affidavit of circumstances which occurred at the trial (*g*). The sheriff's notes need not be filed (*h*), and where they were produced on moving for a new trial, but the rule was drawn up on reading the *affidavit* only, and not on reading the sheriff's notes, it was holden to be sufficient in order to save expense; for, if that course had not been adopted, the opposite party must have taken office-copies of the notes (*i*).

When to be made.

The application for a new trial should be made within four days after the return of the writ of trial, if the cause be tried in term (*k*), and if there be not so many as four days in term after the return of the writ of trial, it would seem, in analogy to the rule in ordinary cases, that the rule must be moved for on or before the last day of term. If the cause be tried in

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(*t*) *Ricketts* v. *Burman*, 4 Dowl. 578.

(*u*) *Lyddon* v. *Coombes*, 5 Dowl. 560: *Packham* v. *Newman*, 1 C., M. & R. 585: *Williams* v. *Evans*, 2 M. & W. 220: see *Taylor* v. *Helps*, 5 B. & Ad. 1068: *Edwards* v. *Dignam*, 2 Dowl. 642: *Fleetwood* v. *Taylor*, 6 Dowl. 796.

(*x*) *Owen* v. *Pugh*, 1 T. & G. 26.

(*y*) *Hall* v. *Middleton*, 4 N. & M. 368; 1 H. & W. 7, *S. C.*: and see *Johnson* v. *Wells*, 2 Dowl. 352; 2 C. & M. 428, *S. C.*: *Hellings* v. *Stevens*, 4 Tyr. 270: *Mansfield* v. *Brearey*, 1 A. & E. 347; 3 N. & M. 471, *S. C.*: *Muppin* v. *Gillatt*, 4 Dowl. 190: *Burney* v. *Moxal*, 3 N. & M. 471, n.: *Grainger* v. *Shopper*, 2 Dowl. 644.

(*z*) Resolved by the judges, 4 M. & Scott, 485.

(*a*) *Barnet* v. *Glossop*, 3 Dowl. 625.

(*b*) *Vickers* v. *Cook*, 3 Dowl. 492.

(*c*) *Hellings* v. *Stevens*, 4 Tyr. 1001.

(*d*) *Milligan* v. *Thomas*, 2 C., M. & R. 756; 1 Tyr. & G. 134; 4 Dowl. 373; 1 Gale, 320, *S. C.*

(*e*) *Lilley* v. *Johnson*, 2 M. & W. 386: *sed vide Jones* v. *Howell*, 4 Dowl. 176: *Doe* v. *Baytup*, 1 H. & W. 270: *Evans* v. *Downes*, Q. B., M. 1838; 2 Jurist, 1066.

(*f*) *Evans* v. *Downes*, Q. B., Bail Court, M. 1838; 2 Jurist, 1066.

(*g*) *Power* v. *Horton*, 3 Hodges, 14.

(*h*) *Mansfield* v. *Brearey*, 1 A. & E. 347; 3 N. & M. 471, *S. C.*

(*i*) *Stephens* v. *Pell*, 2 Dowl. 629; 2 C., M. & R. 710, *S. C.*

(*k*) *Wheeler* v. *Whitmore*, 4 Dowl. 235.

vacation, the rule must be moved for within the first four days of the following term (*m*). The court refused the motion after the fourth day of term, though the sheriff's notes had not been received until the fifth day, when the motion was made (*m*). But the court will sometimes allow a further time for making the application, where the sheriff neglects to furnish his notes in proper time (*n*).

Not set down in New Trial Paper.

By a resolution of the judges, all motions to set aside verdicts obtained in causes tried before sheriffs or judges of inferior courts of record, pursuant to the Writ of Trial Act, shall come on for hearing as motions in the ordinary course, and not be set down in the new trial paper (*o*).

Trial by Proviso.

If a new trial from the sheriff's court has been granted at the instance of the plaintiff, who afterwards neglects to re-try the cause, the defendant cannot take down the record by proviso (*p*).

Arrest of Judgment.

Arrest of Judgment after.] Judgment may be arrested, as in other cases. As to what defects in the writ of trial, &c., are bad in arrest of judgment, see *ante*, 296, 297.

◆

SECT. 4.

Plea, puis darrein Continuance.

Plea puis darrein Continuance.

IF any matter of defence arise after the defendant has pleaded, and before the jury have actually delivered their verdict (*q*), the defendant may (within eight days after such matter of defence arose, unless a further time be allowed by the court or a judge, *R. H.*, 4 *W.* 4, *r.* 2, *post*, 300) avail himself of it by a plea; formerly, before the abolition of the entry of *continuance*, termed a "*plea puis darrein continuance.*" Thus, if, after plea pleaded, the plaintiff give the defendant a release, the latter may within such eight days afterwards plead the release, and if he omit to plead, it will not be otherwise available for him (*r*). Or, if the plaintiff or defendant

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(*m*) *Anon.*, 1 H. & W. 146.

(*n*) *Thomas* v. *Edwards*, 2 Dowl. 664, 4 Tyr. 835; 1 C., M. & R. 382, *S. C.*: *Anon.*, 1 H. & W. 146.

(*o*) 4 M. & Scott, 485.

(*p*) *Corone* v. *Garment*, 1 Hodges, 74: *Day* v. *Day*, 1 M. & W. 39; 4 Dowl. 740; 1 T. & G. 314; 1 Gale, 403, *S. C.*

(*q*) 2 Lutw. 1143: Bull, N. P. 310: *Stamp* v. *Parker*, Cro. Jac. 646: see *Lovell* v. *Eastaff*, 3 Term Rep. 554: *Fitch* v. *Toulmin*, 1 Stark. 62. See, in case of reference to arbitration, *Alder* v. *Park*, 5 Dowl. 16; 2 H. & W. 78, *S. C.*

(*r*) In the case of a co-plaintiff executing a release against the consent of the other plaintiff, the court, if a case of fraud be made out, will set it aside; and this is the only mode of defeating it. (*Jones* v. *Herbert*, 7 Taunt. 421: *Alner* v. *George*, 1 Camp. 322). Thus, if the plaintiffs be suing as trustees for another person, a fraudulent release by one of them will be set aside. (*Mountstephen* v. *Brooke*, 1 Chit. Rep. 390; 1 B. & Ald. 224, *S. C.*) So, if there be only one plaintiff who sues as trustee, and he fraudulently release, it might be set aside. (*Innell* v. *Newman*, 4 B. & Ald. 419: *Doe* v. *Franklin*, 7 Taunt. 9: *Hickey* v. *Burt*, Id. 48). And where one of several plaintiffs, assignees of a bankrupt, released the cause of action, and the release was pleaded, the court set aside the plea, suspicion being thrown upon the plaintiff's conduct in the transaction, and the co-plaintiffs indemnifying the plaintiff who had given the release against costs. (*Johnson* v. *Holdsworth*, 4 Dowl. 63). But the court will not interfere where there is no fraud shewn; and in all cases, it seems, the fraud should be very palpable. (*Herbert* v. *Piggott*, 2 Dowl. 392; 2 C. & M. 384, *S. C.*: *Jones* v. *Herbert*, 7 Taunt. 421: *Arton* v. *Booth*, 4 Moore, 192: *Furnival* v. *Weston*, 7 Moore, 356). In an action of covenant, where the defendant pleaded payment to the plaintiff on the record, who was only the nominal plaintiff to the suit, there being no fraud alleged, the court would not set aside the plea. (*Gibson* v. *Winter*, 2 Nev. & M. 737; 1 H. & W. 436).

have become bankrupt, &c., the bankruptcy may within that time be pleaded (*s*). And in the case of a defendant becoming bankrupt, and obtaining his certificate after plea and before verdict, if he does not plead it, and judgment is obtained against him, he cannot plead the certificate to an action on such judgment (*t*). Where an action of ejectment was brought, and, after issue joined, the lessor of the plaintiff entered into part of the premises, the court held that the defendant might plead this matter (*u*). So, an award made in the cause, after issue joined, may be thus pleaded (*x*). So, in an action against an executor, the defendant may plead a judgment recovered against him, after plea pleaded (*y*). But the defendant cannot plead a release by one of the lessors of the plaintiff in ejectment (*z*).

When it may be pleaded.

A plea, *puis darrein continuance* may be pleaded, though the defendant be under terms of pleading issuably and taking short notice of trial (*a*); but it cannot be pleaded after a demurrer (*b*); nor after verdict (*c*). In an action which had been set down for trial in the term as undefended, and postponed on the condition of giving judgment of the term, a plea of *puis darrein continuance* of the defendant's bankruptcy and certificate, the certificate having been obtained since the term, was held admissible (*d*).

By the rule of *H. T.*, 4 *W.* 4, *r.* 2, which prohibits the entry of *continuances* by way of *imparlance*, *curia advisari vult*, *vicecomes non misit breve*, or otherwise, on any roll or record, except the *jurata ponitur*, (*ante*, 200), it is provided, "that such regulation shall not alter or affect any existing rules of practice, *as to the times of proceeding in a cause;* provided also, that in all cases in which a plea *puis darrein continuance* is now by law pleadable *in banc* or at *Nisi Prius*, the same defence may be pleaded, with an allegation that the matter arose *after the last pleading*, or the *issuing of the jury process*, as the case may be: provided also, that no *such* plea shall be allowed, unless accompanied by an *affidavit* that *the matter thereof arose* within *eight* days next before the pleading of such plea, or *unless* the *court* or a *judge shall otherwise order*." The eight days are to be reckoned exclusive of the first, and inclusive of the last (*e*).

How pleaded before Trial.

Since this rule, and the abolition of the entry of *continuances*, the plea must be pleaded within *eight* days after the matter of defence has arisen, (unless the court or a judge otherwise orders), and it seems that it must be so pleaded before any subsequent step is taken in the cause (*f*). *Engross the plea*

(*s*) See *Lovell* v. *Eastaff*, 3 T. R. 554: *Duff* v. *Campbell*, 3 B. & Ald. 577: *Biggs* v. *Cox*, 4 B. & C. 920: 7 D. & R 409, *S. C.*: *Bretherton* v. *Osborne*, 1 Dowl. 457.

(*t*) *Todd* v. *Maxfield*, 6 B. & C. 105; 9 D. & R. 171, *S. C.*

(*u*) *Moore* v. *Hawkins*, Yelv. 180: *Hawkins* v. *Moore*, Cro. Jac. 261, *S. C.*: *sed vide Doe* v. *Brewer*, 2 Chit Rep. 323; 4 M. & Sel. 301, *S. C.*

(*x*) *Storey* v. *Bloxam*, 2 Esp. 504.

(*y*) *Prince* v. *Nicholson*, 5 Taunt. 333; 1 Marsh, 70, *S. C.*: and see *Prince* v. *Nicholson*, 5 Id. 665; 1 Id. 280, *S. C.*: *Lyttleton* v. *Cross*, 3 B. & C. 317; 5 D. & R. 175, *S. C.*

(*z*) *Doe* v. *Brewer*, 2 Chit. Rep. 323; 4 M. & Sel. 301, *S. C.*

(*a*) *Bryant* v. *Perring*, 2 Moo. & P. 760; 5 Bing. 414, *S. C.*

(*b*) *Day* v. *Savage*, Moore, 871: *Martin* v. *Wyvil*, 1 Str. 492.

(*c*) 2 Lutw. 1143: Bull N. P. 310: *Stamp* v. *Parker*, Cro. Jac 646: see *Lovell* v. *Eastaff*, 3 T. R. 554.

(*d*) *Whitmore* v. *Bantock*, 1 M. & M. 122.

(*e*) R. H., 2 W. 4, r. 8: see *Dudden* v. *Triquet*, 7 Dowl. 171; 4 M. & W. 676, *S. C.*

(*f*) See *Duff* v. *Campbell*, 3 B. & Ald. 577; *Soutten* v. *Soutten*, 1 D. & R. 521;

on plain paper; get it signed by counsel, and deliver it in the same manner as other special pleas (*g*). *Accompany it with an affidavit of its truth, and of the matters thereof having arisen within eight days next before the pleading of the plea, unless such affidavit be dispensed with by the order of the court or a judge* (*h*).

How at Nisi Prius.

The plea may, it should seem, be put in at Nisi Prius, or at the assizes, upon paper, either when the assize is called on, or at any other time before the jury have actually delivered their verdict (*i*), (*provided eight days have not elapsed since the subject-matter of the defence arose*), *and it is the duty of the attorney afterwards to transcribe it on the Nisi Prius record* (*k*). An affidavit to verify such plea at the assizes, if sworn at the assize town on the commission day of the assizes, before a commission for taking affidavits, is bad; it should be sworn before one of the judges of assize; but the judge at *Nisi Prius* may allow it to be re-sworn before him (*l*). And where a plea *puis darrein continuance* stated that since the last *continuance* the plaintiff had recovered a judgment for the same cause of action, and the affidavit to verify the plea stated the time at which the judgment was recovered, which, by reference to the *Nisi Prius* record, appeared to be not since the last *continuance*, it was holden, that this affidavit did not verify the plea, and that the plea could not be received (*m*).

Judge cannot refuse it.

If this plea be put in at the assizes, or at *Nisi Prius*, the judge has no discretion to refuse it, and no further proceedings can be had on it there; but it must be certified on the back of the record at *Nisi Prius*, and returned to the court above (*n*). And if one of the two defendants plead a plea of bankruptcy *puis darrein continuance*, the plaintiff cannot, at *Nisi Prius*, confess this plea to be true, and go on with the case as to the other defendant (*o*). After the record is thus returned, the plaintiff may reply or demur to the plea, and then proceed as in ordinary cases (*p*).

How treated when pleaded for Delay, or when clearly bad.

If the plea be accompanied with a proper affidavit, and be not a nullity, it must be accepted by the plaintiff's attorney, or by the judge at *Nisi Prius*, or the assizes, if there pleaded, though it be clearly bad on the face of it (*q*), or though there be reason to believe that it is pleaded for delay (*r*). In order, however, to prevent pleas of this kind being used for the mere purpose of delay, if the plaintiff demur to them, the court may order them to be set down for argument for the first paper day in term, so that the plaintiff may have judgment as soon as he would have had if they had not been pleaded (*s*).

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5 B. & Ald. 852, *S. C.*: *R.* v. *Taylor*, 5 D. & R. 521; 3 B. & C. 612, *S. C.*: but see *Prince* v. *Nicholson*, 5 Taunt. 333; 1 Marsh. 70, *S. C.*

(*g*) See *ante*, 170, 171; and the form, Chit. Forms, 83.

(*h*) See *Willoughby* v. *Wilkins*, 2 Smith, 398. See the form of affidavit, Chit. Forms, 84.

(*i*) See Bull. N. P. 310: Dyer, 361: *Duff* v. *Campbell*, 3 B. & Ald. 577: *Lovell* v. *Eastaff*, 3 T. R. 554: *Bretherton* v. *Osborne*, 1 Dowl. 457.

(*k*) See *Myers* v. *Taylor*, R. & M. 404; 2 C. & P. 306, *S. C.*

(*l*) *Bartlett* v. *Leighton*, 3 C. & P. 408.

(*m*) *Minshull* v. *Evans*, 4 C. & P. 555.

(*n*) *Corporation of Ludlow* v. *Tyler*, 7 C. & P. 537: *Abbott* v. *Rugeley*, 2 Mod. 307: Freem 252.

(*o*) *Pascall* v. *Horsley*, 3 C & P. 372.

(*p*) See, upon this subject generally, 1 Chit. Plead. 6 ed. 657 to 661.

(*q*) *Paris* v. *Salkeld*, 2 Wils 137: *Lovell* v. *Eastaff*, 3 T. R. 554: *Fitch* v. *Toulmin*, 1 Stark. 62: *Prince* v. *Nicholson*, 5 Taunt. 387; 1 Marsh. 401, *S. C.*: *sed vide* Bull. N. P. 309; and, perhaps, the court might now hold differently (see *ante*, 167).

(*r*) *Corporation of Ludlow*, v. *Tyler*, 7 C. & P. 537.

(*s*) *Fitch* v. *Toulmin*, 1 Stark. 62.

Can be pleaded but once.

The defendant can, it seems, plead but one plea *puis darrein continuance*, that the plaintiff may not be delayed *in infinitum*, for if he made a second change, he might have made a third, and so *in infinitum;* but some have held, that he might plead an outlawry after the last continuance, because *nullum tempus occurrit regi*, though this seems questionable (*t*).

Where Amendable.

If pleaded at the assizes, it is said the plea cannot be amended in matter of substance after the assizes (*u*), but it may, it seems, be so amended in matters of form. When pleaded *in banc*, the court have allowed it to be amended, upon the terms of the defendant taking short notice of trial (*x*); and as a general rule, if a plea in bar, it may be amended (*y*).

Is a Waiver of former Pleas.

By pleading *puis darrein continuance* you waive your former pleading (*z*); and the case then stands in the same state as if this had been the plea originally put in. Also, if this be even a plea in abatement, if the original plea have been a plea in bar, the judgment on demurrer, as well as on verdict, will be peremptory, *quod recuperit*, and not a *respondeas ouster* (*a*); therefore, before you plead *puis darrein continuance*, you should, in general, be satisfied that the matter of such plea will be a better and safer defence to the action than the plea originally pleaded.

Costs of.

As regards the *costs* on a plea *puis darrein continuance*, as a general rule, where the defendant pleads such a plea, he cannot force the plaintiff to reply, and the plaintiff is entitled to discontinue the action, without payment of costs (*b*). And even if the plaintiff do reply, and the defendant succeed in the action, he will not be entitled to any costs incurred previously to the plea. Therefore, where in covenant against executors, the defendants pleaded *plene administravit* and a retainer, and afterwards at the trial the defendants pleaded a plea *puis darrein continuance*, to which the plaintiff replied, and the defendants demurred to the replication, and judgment was given for them on the demurrer, it was held that they were entitled to the costs incurred after the plea *puis darrein continuance*, but not to the costs of the whole cause (*c*).

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Sect. 5.

Auditâ Querelâ.

Auditâ Querelâ.

This writ is given in order to afford a remedy to the defendant (*d*), where matter of defence (such as a release, &c.) has arisen since the judgment. But the indulgence now shewn by the courts, in granting a summary relief upon motion (*e*), has

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(*t*) Bro. Continuance, 5, 41: Gilb. C. P. 105: 1 Salk. 178.

(*u*) Bull. N.P. 309: Freem. 252: *Moore* v. *Hawkins*, Yelv. 181.

(*x*) *Lindo* v. *Simpson*, 2 Smith, 659.

(*y*) See 2 Cro. 261.

(*z*) *Barber* v. *Palmer*, 1 L. Raym. 693; 1 Salk. 178, *S. C.*

(*a*) Gilb. C. P. 105: Freem. 252.

(*b*) *Wollen* v. *Smith*, *Horncastle* v. *Smith*, and *Price* v. *Morgan*, 1 Per. & D. 374: *Baker* v. *Morrey*, 1 Moo. & P. 138.

(*c*) *Lyttleton* v. *Cross*, 4 B. & C. 117; 6 D. & R. 81, *S. C.*

(*d*) See *per Parke*, B., 2 M. & W. 413.

(*e*) See *Wicket* v. *Cremer*, 1 L. Raym.

rendered this proceeding by *auditâ querelâ* obsolete. The reader is therefore referred, for information upon the subject, to Bacon's Abr., tit. "*Auditâ querelâ*," and to 2 Sellon, 253—258, 2 Saund. 137 e.

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SECT. 6.

Jury.

1 *Jurors*, 303.
  Who may be, id.
  Qualification of, 304.
  How punished for Non-attendance, 305.
2 *Challenges*, 305.
  Species of, id.
2 *Challenges*—continued.
  To the Array, 305.
  To the Polls, 306.
  When and how to be made, 308.
  How Tried, 309.

Who may be Jurors.

ALL persons between twenty-one and sixty possessing the property necessary by law to qualify them to serve on juries, may be jurors—with the following exceptions: *viz.* aliens cannot serve on a jury, unless the jury be *de medietate linguæ*(*f*); nor can persons attainted of treason or felony, or of any crime that is infamous, unless they have obtained a pardon (*g*); nor can any person who is under outlawry or excommunication (*g*); nor women, unless on a writ *de ventre inspiciendo*(*h*).

Who exempt from Serving

Those who are merely exempted from serving on juries may be classed under the following heads: *viz.* peers, judges of the courts of record at Westminster; clergymen in holy orders; qualified Roman Catholic clergymen; qualified Protestant dissenting clergymen; serjeants and barristers-at-law actually practising; doctors and advocates of the civil law actually practising; attornies and proctors duly admitted, and actually practising in the courts of law or equity, or in the ecclesiastical or Admiralty courts, who have taken out their annual certificates; officers in any of these courts, actually executing the duties of their offices; coroners; gaolers and keepers of houses of correction; members and licentiates of the Royal College of Physicians in London, actually practising; surgeons who are members of one of the royal colleges of surgeons in London, Edinburgh, or Dublin, and actually practising; Apothecaries certificated by the court of examiners of the Apothecaries' Company, and actually practising; officers of the navy or army on full pay; pilots licensed by the Trinity-house of Deptford, Hull, or Newcastle; masters of ships in the buoy and light service; and pilots licensed by the lord warden of the cinque ports, or under any act of parliament or charter in any other port; the household servants of her majesty (*i*); officers

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439: *Lister* v. *Mundell*, 1 B. & P. 427: *Baker* v. *Ridgway*, 9 Moore, 114; 2 Bing. 41, *S. C.*: *Hanson* v. *Blakey*, 1 Moo. & P. 261; 4 Bing. 493, *S. C.*: *Plevin* v. *Henshall*, 3 M. & Scott, 403; 10 Bing. 24, *S. C.*

(*f*) 6 G. 4, c. 59, s. 3. But a special juror can be challenged for alienage, if at all, only at the time when the special jury is struck. (*R.* v. *Despard*, 2 M. & R. 406; 8 B. & C. 417, *S. C.*)

(*g*) 6 G. 4, c. 59, s. 3.

(*h*) Trial per Pais, 86: *post*, 307.

(*i*) There is a customary order in council published on the accession of a sovereign to the throne, exempting the officers and servants attached to the royal household from serving on juries, or holding of the customs or excise; sheriffs' officers; high constables; and parish clerks; these shall be exempt from serving on juries, and their names shall not be inserted in the jury lists (*k*). Also, persons exempt from serving on juries by prescription, charter, grant, or writ, shall continue to enjoy such exemption as they did before this act (*k*). In Middlesex, no person shall be returned to serve on a jury at *Nisi Prius*, who has served as a juror in either of the two preceding terms or vacations, having the sheriff's certificate of having so served; and no person shall be returned to serve on a jury at the assizes who has before served on a jury, in Yorkshire within four years, in Wales or in the counties of Hereford, Cambridge, Huntingdon, or Rutland, within one year, or in any other county within two years, having the sheriff's certificate of having so served (*l*); which certificate the sheriff is bound to give to every common juror serving or attending as such, but not to grand or special jurors (*m*). And if any sheriff shall return a person as juror within the times above mentioned, the court, on examination and proof of such offence in a summary way, may set such fine upon the offender as the court shall think meet (*n*). Persons in the service of the Post-office are exempt from serving on juries (*o*). In all these cases of exemption, the party, if summoned, should either attend and claim his privilege (*p*), or should get some person to attend for him, who will be able to satisfy the court as to his title to such exemption.

Qualifications of Jurors; generally.

Qualifications of Jurors.] Every man, between the ages of twenty-one years and sixty, who shall have within the county in which he resides, in his own name or in trust for him, 10*l.* by the year above reprizes, in lands or tenements, of freehold, copyhold, or customary tenure, or of ancient demesne, or in rents issuing out of such lands or tenements, or in lands, tenements, and rents taken together, in fee-simple, fee-tail, or for the life of himself or some other person,—or who shall have, within the same county, 20*l.* by the year above reprizes in lands or tenements held by lease for twenty-one years or longer, or for a term of years determinable on any life or lives, *or* who, being a householder, shall be rated or assessed to the poor-rate, or to the inhabited house-duty, in Middlesex on a value of not less than 30*l.*, or in any other county on a value of not less than 20*l.*,—*or* who shall occupy a house containing not less than fifteen windows,—shall be qualified and liable to serve on juries (*q*).

In London.

In London, a juror must be a householder, *or* the occupier of a shop, warehouse, counting-house, chambers, or office, for the purpose of trade or commerce, within the said city, *and* have lands, tenements, or personal estate of the value of 100*l.* (*r*).

Of Special Jurors.

As to special jurors:—all those described in the juror's book as esquires or persons of higher degree, or as bankers or merchants, shall be qualified and liable to serve on special juries;

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any public office, within the cities of London or Westminster, and the counties of Middlesex and Surrey. (See the Gazette of Tuesday, 15th of August, 1837).

(*k*) 6 G. 4, c. 50, s. 2.

(*l*) Id., s. 42.

(*m*) Id. s. 40: *Ex parte Atkinson*, 10 Bing. 399; 2 Dowl. 773; 4 M. & Scott, 160, *S. C.*

(*n*) 6 G. 4, c. 50, s. 42.

(*o*) Id. s. 40.

(*p*) Trial per Pais, 87.

(*q*) 6 G. 4, c. 50, s. 1.

(*r*) Id. s. 50.

and the sheriff or under-sheriff shall set down their names in alphabetical order, in a list to be called "the special jurors' list," and shall prefix to each name a number; which numbers shall also be written out on distinct pieces of parchment or card, and put into a drawer or box, to be kept for the purpose of nominating special juries (*s*), as mentioned *ante*, 254.

On Writs of Inquiry.

Upon writs of inquiry executed in London, or in any county in England or Wales, the jurors must be qualified in like manner as jurors at *Nisi Prius* in the same city, county, &c.; but if executed in any liberty, franchise, city, borough, or town corporate not being a county, or in any city, borough, or town being a county of itself, the jurors may be of the same description as was usual before the passing of this act (*t*).

Of Jury de Medietate Llinguæ.

In a jury *de medietate linguæ*, (which is allowed only in cases of felony and misdemeanour), the aliens need not be qualified as above mentioned (*u*).

How Punished for Non-attendance.

How Punished for Non-attendance.] If any man, summoned to attend on a jury, shall not attend in pursuance of such summons, or being thrice called shall not answer to his name; or if any such man, or any talesman, after being called, shall be present but not appear, or after appearance shall wilfully withdraw himself from the presence of the court; the court shall set such fine upon him as the court shall think meet, and in the case of a viewer not less than 10*l.*, unless some reasonable excuse shall be proved by oath or affidavit (*x*); or, upon such default at the execution of a writ of inquiry, the under-sheriff, &c., may set a fine, not exceeding 5*l.* (*y*). The court will not hear counsel for a juryman who has been fined for a contempt (*z*).

2. *Challenges.*

2. Challenges.

When a full jury appear (*a*), either party may challenge them for cause,—as well the talesmen (*b*) as the jurors originally returned.

Species of.

Challenges are of two kinds—to the array, or to the polls; and each of these is again subdivided into principal challenges and challenges to the favour. In this order they shall now be considered.

Challenge to the Array.

To the Array.] A challenge to the array is an objection to all the jurors returned by the sheriff, collectively (*c*), not for any defect in them, but for some partiality or default in the sheriff, or his under-officer, who arrayed the pannel (*d*). This is either a principal challenge, or a challenge to the favour.

Causes of principal Challenge to the Array.

The causes of principal challenge to the array are such as the following: *viz.* that the sheriff or other returning officer is of kindred or affinity to the plaintiff or defendant, if the affinity continue; that one or more of the jury are returned at the

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(*s*) Id. s. 31.

(*t*) Id. s. 52. As to a "good jury" in writs of inquiry, see *post*, Vol. II. Book II. Part IV. Ch. 4, s. 1.

(*u*) 6 G. 4, c. 50, s. 47.

(*x*) Id. ss. 38, 51.

(*y*) Id. s. 53.

(*z*) *Carne* v. *Nicoll*, 1 Scott, 68; 3 Dowl. 115, S. C. But they will attend to affidavits stating circumstances in extenuation of his conduct.

(*a*) See *R.* v. *Edmonds*, 4 B. & Ald. 471.

(*b*) 6 G. 4, c. 50, s. 37.

(*c*) Co. Lit. 156, 158.

(*d*) 3 Bl. Com. 359.

nomination of the plaintiff or defendant; that an action of battery is pending at the suit of the plaintiff or defendant against the sheriff, or at the suit of the sheriff against the plaintiff or defendant; that an action of debt is pending at the suit of the plaintiff or defendant against the sheriff, but not if by the sheriff against the plaintiff or defendant; that the sheriff or returning officer holds land depending upon the same title with that in litigation between the parties; that the sheriff, &c., is under the distress of the plaintiff or defendant; that the sheriff, &c, is counsel, attorney (*e*), officer, servant, or gossip of either party; or is an arbitrator in the same matter, and has treated thereof (*f*). Formerly, where a peer was a party, the array might be challenged if a knight were not returned of the jury; but this has been expressly altered by the stat. 6 *G.* 4, *c.* 50, *s.* 28; nor shall any challenge be now allowed for want of hundredors. (*Id. s.* 13.)

Of Challenges to the Array for Favour.

The cause of challenge to the array for favour are such as imply, at least, a probability of bias or partiality in the sheriff, but do not amount to a principal challenge. Thus, that the plaintiff or defendant is tenant to the sheriff; or that the son of the sheriff has married the daughter of the plaintiff or defendant; or the like (*f*).

In Special Jury Cause.

What has been said here, as to challenges to the array, must, perhaps, be understood as having reference only to common and not to special juries; for it seems very doubtful if the array in special jury cases can be challenged (*g*). Nor indeed are challenges to the array very usual in common jury cases; for, if there be an objection to the sheriff, you may have the *venire* directed to the coroner, as mentioned *ante*, 250; besides, this objection would be a good ground for a new trial (*h*).

Principal. Challenges to the Polls.

To the Polls.] A challenge to the polls is an exception to one or more of the jurors who have appeared, individually; and this is either a principal challenge, or a challenge to the favour. The causes of principal challenge to the polls may be classed under the following heads:—

Propter Honoris Respectum.

1. Challenge *propter honoris respectum:* as, if a lord of parliament be put upon a jury, he may challenge himself, or he may have a writ of privilege for his discharge (*i*); but it is doubtful if either party can challenge him, for he is merely exempted from serving by stat. 6 *G.* 4, *c.* 50, *s.* 2. (*Vide post*, 307).

For Defect in Property, Person, or Description.

2. Challenge *propter defectum:* that the juror is not qualified to serve upon a jury (*k*). Thus, that he has not sufficient property, or is not otherwise qualified, as required by stat. 6 *G.* 4, *c.* 50, (*see ante*, 304), in which case he shall be discharged, if the court be satisfied of the fact (*l*); but this does not extend to special jurors: that he is an alien (*m*), excepting, of course, where the jury are *de medietate linguæ* (*n*); or the juror be a special one (*o*); that he is within the age of

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(*e*) *Baylis* v. *Lucas*, Cowp. 112.

(*f*) Co. Lit. 156.

(*g*) See 6 G. 4, c. 50, s. 27: *R.* v. *Johnson*, 2 Str. 1000: *R.* v. *Burridge*, 1 Str. 593; 2 L. Raym. 13 4, *S. C.*

(*h*) *Baylis* v. *Lucas*, Cowp. 112.

(*i*) Co. Lit. 156: 2 Hawk. c. 43, s. 11: 3 Bl. Com. 361.

(*k*) See *ante*, 303, 304.

(*l*) 6 G. 4, c. 50, s. 27: Co. Lit. 156.

(*m*) Co. Lit. 156.

(*n*) 6 G. 4, c. 50, s. 3.

(*o*) *Semb.*, *R.* v. *Despard*, 2 M. & R. 406; 8 B. & C. 417, *S. C.*

twenty-one (*p*); or that he is an idiot or lunatic (*q*): so, if a woman be impanneled she may be challenged *propter defectum sexus* (*r*), unless impanneled, on the writ *de ventre inspiciendo* (*s*). But a matter which merely *exempts* a man from serving on a jury, and does not incapacitate him, can never be a cause of challenge; and it is said (*t*) that if a person, thus exempted, be summoned, and appear, he cannot excuse himself from serving on a jury, if there be not a sufficient number of jurors without him.

Wrong Name.

If a juror be erroneously named in the *distringas*, pannel, &c. and sworn by such wrong name,—if the error be in the christian name, it amounts only to a matter of challenge, and cannot be objected to after verdict (*u*); if in the surname, (particularly where the person serving is not the same that was intended to be summoned), the court have, in such a case, set aside the verdict (*x*); but in another case (*y*), the court held that it was discretionary with them to grant a new trial in such a case or not; and that they would not do so unless the mistake as to the juror had been productive of some injustice.

For Partiality or Bias.

3. Challenge *propter affectum*: by reason of some supposed bias or partiality. Thus, that the juror is of kin to either party, within the ninth degree (*z*), or, according to Lord *Coke*, however remote the kindred (*a*),—that there is affinity or alliance by marriage between the juror and one of the parties, if such affinity continue, or there be issue of the marriage alive; for otherwise it would be but a challenge to the favour (*a*);—that the juror is godfather to the party's child, or the party godfather to the juror's child;—that the juror has land which depends upon the same title as the land in question;—or, in a cause where the parson of a parish is party, and the right to the church comes in debate, that the juror is a parishioner, is a good cause of challenge; and so in all other cases where the juror has an interest in the action, direct or collateral;—that the juror has before given a verdict in the same cause, or upon the same title or matter, though between other parties;—that he was chosen arbitrator in the same cause by one of the parties, and had entered upon an examination of it; but otherwise if he were chosen indifferently by both parties;—that he is counsellor, servant, or of fee, of either party (*a*);—that he is tenant of either party (*b*);—that he is of the same society or corporation with either party (*c*); but, that he is his fellow-servant, is but a challenge to the favour (*d*); that he has taken information of the case before he is sworn (*e*); that he has declared his opinion of the case beforehand (*f*);—that since he has been returned, he has eaten or drunk at the expense of one of the parties (*g*); but, that one of the parties

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(*p*) Co. Lit. 157: and see 6 G. 4, c. 50, s. 1: *ante*, 304.

(*q*) Gilb. C. B. 95.

(*r*) 3 Bl. Com. 362.

(*s*) See *Willoughby's case*, Cro. El. 566: *ante*, 302.

(*t*) 2 Hawk. c. 43, s. 26.

(*u*) *Wray* v. *Thorn*, Willes, 488: *Hill* v. *Yates*, 12 East, 230 a; 3 Burn, J., 521, *S. C.*

(*x*) *Norman* v. *Beaumont*, Willes, 484; Barnes, 453, *S. C.*: *Dovey* v. *Hobson*, 6 Taunt. 460; 2 Marsh. 154, *S. C.*: and see *Russell* v. *Ball*, Barnes, 455.

(*y*) *Hill* v. *Yates*, 12 East, 229.

(*z*) Finch, L. 401: 3 Bl. Com, 363.

(*a*) Co. Lit. 157.

(*b*) Gilb. C. B. 95.

(*c*) 3 Bl. Com. 363.

(*d*) Co. Lit. 157.

(*e*) 2 Hale, 306.

(*f*) 2 Hawk. c. 43, s. 28.

(*g*) Co. Lit. 157.

has lately been entertained at the juror's house, is only matter of challenge to the favour (*h*);—that one of the parties has laboured the juror, and given him money or other things for giving his verdict; but if the party only labour the juror to appear and act conscientiously, it is no matter of challenge whatever;—that an action, implying malice or displeasure, is pending between the juror and one of the parties; but if not implying malice, &c., it is but matter of challenge to the favour (*i*).

For Crime.

4. Challenge *propter delictum:* when, for some act of the juror, he has ceased to be, in consideration of law, *probus et legalis homo.* Thus, that he has been attainted of treason or felony, or convicted of any crime that is infamous, of which he has not obtained a free pardon (*k*); or that he is under outlawry or excommunication (*l*).

Challenge to the Polls for Favour.

The challenge to the polls *for favour* is of the same nature with the principal challenge *propter affectum*, but of an inferior degree. The general rule of law is, that the juror shall be indifferent; and if it appear probable that he is not so, this may be made the subject of challenge, either principal or to the favour, according to the degree of probability of his being biassed. The cause of a principal challenge to the polls, we have seen, is such matter as carries with it, *primâ facie*, evident marks of suspicion either of malice or favour. But when, from circumstances, it appears probable that a juror may be biassed in favour of or against either party, and yet such circumstances do not amount to matter for a principal challenge, it may then be made a challenge to the favour. The effect of these two species of challenge is the same; the only difference between them is in the mode of trying them.

When to be made.

When and how to be made.] No challenge, either to the array or to the polls, can be made before a full jury have appeared (*l*). It is immaterial which party challenges first; but the party who first begins to challenge must finish all his challenges before the other begins; otherwise he is precluded from making any further challenge. Also the challenges of the party who challenged first shall be first tried (*m*).

How to be made.

The challenge to the polls is made *ore tenus;* and it is not in general required that the party challenging shall immediately declare his cause of challenge, unless there be not a sufficient number of jurors remaining on the pannel, or that the other side challenge *touts par avail* (*n*). But if the juror were formerly sworn in the same cause, and be now challenged (in which case the cause of challenge must have arisen since the jury was before sworn); or if, after a challenge to the array is tried and overruled, the party challenge the polls, the party must declare his cause of challenge presently (*o*). If a juror be challenged, and the challenge tried and overruled, he may still be challenged by the opposite party (*o*).

Form of.

The challenge to the array must be in writing. It may be in the following form:—"*And now at this day, to wit, on* ——,

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(*h*) *Anon.*, 3 Salk. 81.

(*i*) Co. Lit. 157.

(*k*) 6 G. 4, c. 50, s. 3.

(*l*) 2 Hawk. c. 43, s. 1: and see *Brunskill* v. *Giles*, 2 M. & Scott, 41; 9 Bing. 13, *S. C.*

(*m*) Tr. per Pais, 144.

(*n*) Tr. per Pais, 143.

(*o*) Co. Lit. 158.

come as well the aforesaid J. S. as the aforesaid J. N. by their respective attornies; and the jurors of the jury impanneled, being summoned, also come, and hereupon the said J. N. challengeth the array of the said pannel because he saith that [here set forth the matter of challenge with certainty and precision]. *And this he is ready to verify; wherefore he prayeth judgment, and that the said pannel may be quashed*" (*p*).

Trial of Challenge to Array.

How tried.] As to challenges to the array, it lies entirely in the discretion of the court how they shall be tried; sometimes they are tried by two of the coroners, sometimes by two of the jury (*q*). If the challenge, however, be a principal challenge, it may be tried by the court itself, without the aid or intervention of triers.

Proceedings of Array quashed.

If the array be quashed as to the sheriff, a new *venire* shall be awarded to the coroner; if quashed as to the coroner, then the *venire* is awarded to persons appointed by the court for that particular purpose, called elisors, to whose array no challenge is allowed (*r*). If the array be not quashed, the party may then make his challenges to the polls.

Trial of Challenges to Poll to Favour.

Challenges to the polls, if to the favour, are thus tried:—If two jurors have been already sworn, they shall try the challenge; if not, the court appoint two indifferent persons to try it, and who are thence named triers. If the triers try one juror, and he be found indifferent, he shall be sworn; and then he and the two triers shall try the next. When another is found indifferent, the two triers shall be superseded, and the two first so sworn on the jury shall try the next (*r*). The following oath is previously administered to those who try the challenge: "*You shall well and truly try whether J. S.* [the juror challenged] *stand indifferent between the parties to this issue; so help you God*" (*s*). But where the challenge to the polls is a principal challenge, it is tried by the court without the aid or intervention of triers. And, indeed, in both cases, of principal challenge and challenge to the favour, the associate or master, upon your intimating to him an objection to any particular person in the pannel, will in general refrain from calling him.

Principal.

Juror may be Examined.

The juror himself may be examined as to the matter of challenge, provided it do not tend to his dishonour or discredit (*t*).

Result of Trial of.

After the challenge is decided, if the juror be found indifferent, he is immediately sworn on the jury; if otherwise, he is desired to quit the jury-box, and the officer proceeds to swear the next juror, if not challenged. If a juror be challenged and rejected, he cannot afterwards be sworn as a talesman (*u*).

(*p*) See the form of a challenge to the array, Chit. Forms, 84;—that the jury were returned at the instance of the party, 2 Burn, J. 868;—that the sheriff is of kin to one of the parties, Id.;—that the sheriff is an alderman, and interested in the event of the trial Cr. Cir. Comp. 105;—that the sheriff is a citizen and a freeman, and has paid a sum of money towards defraying the expenses of the suit, Id.:—and see a counterplea to this last challenge, and a demurrer to the counterplea, Id.: see also, Tr. pr. Pais, 159 to 184; 10 Went. 472; 2 Rich. Prac. C. B. 180; Lil. Ent. 472.

(*q*) 2 Hale, 275.

(*r*) Co. Lit. 158.

(*s*) *Anon.*, 1 Salk. 152.

(*t*) Co. Lit. 158: *Anon.*, 1 Salk, 153.

(*u*) *Parker* v. *Thornton*, 2 L. Raym. 1410; 1 Str. 640, S. C.

SECT. 7.

Demurrer to Evidence, and Bill of Exceptions.

1. *Demurrer to Evidence.*

1. Demurrer to Evidence.

WHEN you think that the facts proved do not maintain the issue, the question whether they do or do not being merely a question of law, you may, if you wish, withdraw it from the consideration of the jury, and have it decided by the court, by demurring to the evidence (*x*). This demurrer, however, is not so much in use as formerly; for the effect of it may, in general, be obtained upon motion for a new trial (*y*).

Allowance of.

A demurrer to evidence admits all the facts proved, but alleges that they are not sufficient to maintain the issue. The court, upon a trial at bar, or the judge at *Nisi Prius*, are bound to receive it, if tendered, and if they do not, it is a good ground for a bill of exceptions (*z*). If they admit it, the associate is usually ordered to take a note of the testimony, which is immediately signed by the counsel on both sides; and the demurrer being afterwards drawn up in form from it, and engrossed, is tacked to the *postea*, and remitted to the court above (*a*).

Assessment of Damages on.

Upon the demurrer being allowed, the jury may proceed to assess the damages conditionally; or, afterwards, if judgment be given for the plaintiff on the demurrer, they may be assessed by another jury, upon a writ of inquiry (*b*); and the latter is said to be the most usual course (*c*).

Joinder in.

Upon a demurrer to evidence, if the evidence be matter of record or other written evidence, the opposite party *must* join in demurrer; and the same in the case of parol evidence, provided it be certain and positive. But if parol evidence be either loose or indeterminate, or circumstantial merely, the opposite party *may* join in demurrer if he wish it, but he cannot be obliged to do so, unless the party demurring distinctly admit, upon the record, every fact and conclusion which the evidence conduced to prove (*d*).

Argument of.

In arguing a demurrer to evidence, no advantage whatever can be taken of any defect in the pleadings (*e*). But after the execution of the writ of inquiry, a defect in the pleadings may, of course, be taken advantage of upon motion in arrest of final judgment (*f*).

Judgment on.

In giving judgment upon a demurrer to evidence, the court

(*x*) See *Gibson* v. *Hunter*, 2 H. Bla. 235: *Bulkley* v. *Butler*, 2 B. & C. 445; 4 D. & R. 625, *S. C.*: *Miller* v. *Warre*, 1 C. & P. 239, 240.

(*y*) 3 Bl. Com. 372, 373.

(*z*) *Gibson* v. *Hunter*, 2 H. Bl. 208.

(*a*) Bull. N. P. 313. See form of demurrer to evidence, Chit Forms, 85; of a joinder by a defendant, Ib.; by plaintiff, Ib.

(*b*) *Cort* v. *Birkbeck*, 1 Doug. 222, n.

(*c*) *Darrose* v. *Newbott*, Cro. Car. 143. See form of entry, where the jury are discharged without assessing damages, Chit. Forms, 85; and where they assess damages conditionally, 85.

(*d*) See *Gibson* v. *Hunter*, 2 H. Bl. 187 to 209. See the form of a joinder by plaintiff, Chit. Forms, 85; by the defendant, Id.

(*e*) *Cort* v. *Birkbeck*, 1 Doug. 218 to 225.

(*f*) Id. 222.

will infer, from the evidence demurred to, every conclusion the jury could have inferred from it, had they been allowed to give a verdict (*g*). But where a demurrer is so negligently framed, that there is no certainty in the statement of the facts proved, the court, instead of giving judgment upon it, will award a *venire de novo* (*h*).

2. *Bill of Exceptions.*

2. Bill of Exceptions.

If the judge, at the trial of the cause, either in his direction or decision, mistake the law, the counsel on either side may require him to seal a bill of exceptions (*i*). It must, however, be upon some point of law, either in admitting or refusing evidence, or a challenge, or in some matter of law arising upon fact not denied, in which either party is overruled by the court (*k*). On a bill of exceptions, the case always goes to the jury (*l*). If the judge allow the matter to be evidence, but not conclusive, and so refer it to the jury; as, for instance, where the probate of a will was produced to prove a devise of a term of years, and the judge left it to the jury, it was holden that a bill of exceptions would not lie (*m*). Also, as a bill of exceptions can only be available on a writ of error; consequently, where a writ of error will not lie, there can be no bill of exceptions (*n*). It is available in a county court, or other inferior court, though not of record (*o*). A bill of exceptions may be tendered as well at a trial at bar as at *Nisi Prius* (*p*).

What and where it lies.

Must be in Writing, and Sealed by the Judge.

The bill of exceptions must be tendered at the trial. Like the demurrer to evidence, the substance of it must be reduced to writing at the time the objection is made, although it need not then be drawn up in form (*q*). If the exceptions be truly stated in the bill, the judge should affix his seal to it; but otherwise if the bill contain matters false or erroneously stated, or matters wherein the party was not overruled. If the judge refuse to sign the bill, the party grieved may have a writ upon stat. Westm. 2nd (13 *Ed.* 1.), *c.* 31, reciting the form of the exception taken and overruled, and commanding, "*quod si ita est, tunc sigilla vestra apponatis;*" and if the writ be returned "*quod non ita est,*" the party may have an action against the judge for the false return (*r*). If the bill be sealed, both parties are concluded by it as to the truth of the matters contained in it, and the adverse party cannot afterwards aver the contrary, or even supply an omission in it (*s*). If the judge seals the bill of exceptions, and dies, a *scire facias* lies against his executors to certify it (*t*).

How placed on the Record.

If the bill of exceptions be not tacked to the record, it is necessary that the whole record should be set forth in it (*u*);

(*g*) *Cocksedge* v. *Fanshawe*, 1 Doug. 119 to 134.

(*h*) *Gibson* v. *Hunter*, 2 H. Bl. 209.

(*i*) 3 Bl. Com. 372. The bill of exceptions lies in the case of a mistake of a judge in awarding judgment of *nonsuit*, as well as to mistakes in refusing demurrers to evidence, rejecting or admitting challenges to jurors, and other matters. (*Strother* v. *Hutchinson*, 4 Bing. N. C. 83).

(*k*) Bull. N. P. 316.

(*l*) *Miller* v. *Warre*, 1 C. & P. 239, 240.

(*m*) *Chichester* v. *Phillips*, T. Raym. 405.

(*n*) *R.* v. *Inhabitants of Preston*, Hardw. 249; Bull. N. P. 316.

(*o*) *Strother* v. *Hutchinson*, 4 Bing. N. C. 83; 5 Scott, 346; 6 Dowl. 238, *S. C.*

(*p*) *Thruston* v. *Slatford*, 3 Salk, 155: *Davies* v. *Lowndes*, 2 Scott, 74.

(*q*) Bull. N. P. 316.

(*r*) Ib.: 2 Inst. 426: and see *Rowe* v. *Brenton*, 3 M. & R. 266.

(*s*) Show. P. C. 120: Bull. N. P. 316.

(*t*) 2 Will. Executors. 1275.

(*u*) See the form, Bull. N. P. 317; Tidd, Forms, 327.

but if tacked to the record, it then merely states the proceedings after issue joined, and the exceptions (*x*). Where the exceptions were placed upon the record after the finding of the jury, it was held that they were improperly taken, and that the court of error could not give judgment thereon (*y*).

Proceedings after Completion of.

As soon as the bill of exceptions is completed, and that judgment has been given upon the verdict, &c., the mode of proceeding is by bringing a writ of error on the judgment, and having the matter determined in a court of error; for it cannot be determined by the court in which the record was made up, as in the case of a demurrer to evidence (*z*). And bringing the writ of error, before the party has obtained the judge's signature to the bill of exceptions, is deemed a waiver of the bill of exceptions (*a*). But where the defendant had sent the plaintiff a copy of the bill of exceptions, in order to his concurring in the statement of facts, and at the same time sued out a writ of error, the Court of Common Pleas held that the plaintiff had no right to retain the bill of exceptions, in order to frustrate the writ of error, on the ground that the defendant had waived it by suing out such writ (*b*). And where the defendant below tendered a bill of exceptions, and afterwards brought error, the bill of exceptions not having been ready when the writ of error was returned, the court, on consideration of the circumstances, allowed it to be tacked to the record afterwards (*c*).

Upon the return of the writ of error, the judge is called upon to confess or deny his seal (*d*); and if he confess it, the proceedings are then entered upon record, and the party assigns his errors (*e*).

Judgment on.

The judgment on the writ of error is, that the former judgment be either affirmed or reversed (*f*). If reversed, *a venire de novo* issues (*g*), which must be returnable in the court where the record is, although the judgment may have been given in another court (*h*).

Costs on.

It must be observed, as to *costs*, that when the bill of exceptions has been tendered by a defendant, the court of error cannot award him his costs of the trial, &c., upon reversing the judgment (*i*); but they may award the costs of the proceedings on the bill of exceptions (*k*), as to which the court in which the cause was commenced have no authority to interfere (*l*). The costs of settling a bill of exceptions are costs in the court of error (*m*).

Must be abandoned on moving for New Trial.

Although the regular mode of proceeding upon a bill of exceptions is by writ of error, yet the court in which the record was made up, in order to prevent delay and expense, will, in

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(*x*) See the form, Bull. N. P. 319; Chit. Forms, 86.

(*y*) *Armstrong* v. *Lewis*, 4 M. & Scott, 1; 2 C. & M. 275, *S. C.*

(*z*) *Davenport* v. *Tyrrell*, 1 W. Bl. 679; Lofft, 84, *S. C.*

(*a*) *Dillon* v. *Parker*, 1 Bing. 17; 11 Price, 100, *S. C.*

(*b*) *Willans* v *Taylor*, 4 Moo. & P. 257; 6 Bing. 512, *S. C.*

(*c*) See *Taylor* v. *Willans*, 2 B. & Ad. 846.

(*d*) See Rast. Ent. 293.

(*e*) 2 Lutw. 905, 906: and see, as to the proceedings on a bill of exceptions generally, *Money* v. *Leech*, 3 Bur. 1692 to 1742; 1 W. Bl. 555, *S. C.*; Tidd, 9th ed. 862, and Chitty's General Prac., Part VII.

(*f*) Tidd, 9th ed. 865.

(*g*) *Daries* v. *Pierce*, 2 T. R., 125, 126.

(*h*) *Bent* v. *Baker*, 3 T. R., 36.

(*i*) *Bell* v. *Potts*, 5 East, 49; 2 Esp. 712, *S. C.*

(*k*) *Gardner* v. *Baillie*, 1 B. & P. 33; 6 T. R., 591, *S. C.*

(*l*) *Gardner* v. *Baillie*, 1 B. & P. 32.

(*m*) *Doe Harvey* v. *Francis*, 7 Dowl. 193.

general, before judgment, give you the effect of a writ of error, upon a motion for a new trial. But where a bill of exceptions has been tendered, you cannot obtain a rule for a new trial without first abandoning the bill of exceptions (*n*).

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SECT. 8.

Nonsuit.

Plaintiff may Elect to be Nonsuit.

IF the plaintiff find that his evidence is not sufficient to maintain his case, he may elect to be nonsuit, in order that he may have an opportunity of bringing it on again, either in another shape, or when better prepared with evidence; for, after a nonsuit, which is only a default, he may commence another suit against the defendant for the same cause of action; but if a verdict be once given, and judgment follow thereon, he is for ever barred from suing the defendant upon the same ground of complaint (*o*). It is entirely optional, however, with the plaintiff, whether he will submit to a nonsuit or not; he cannot be compelled to do so, but may insist on the case going to the jury, and take his chance of the verdict (*p*).

At what Time called for.

When a plaintiff submits to a nonsuit, it is done usually after he has stated his case or closed his evidence, or after the defendant's case is closed and before the judge has summed up; but it may be done at any time before the jury have actually delivered their verdict (*q*).

In what Cases.

In general, it is only in cases where a verdict can be given, that the plaintiff can be nonsuited (*r*). And it is said that he can only be nonsuited at the defendant's instance; therefore, when, after a cause was called on and the jury sworn, neither counsel, attornies, parties, nor witnesses appeared, it was holden that the only way was to discharge the jury, for the plaintiff could not be nonsuited (*s*). But the plaintiff may be nonsuited in an undefended cause (*t*). Where a point is reserved at the trial, a nonsuit may be entered on issues found for the plaintiff, notwithstanding there may be issues on the same record found for the defendant (*u*). Where one of two defendants allows judgment to go by default, and the other goes to trial, the plaintiff may be nonsuited (*x*), though it was formerly held otherwise (*y*). So, after a plea of tender, the plaintiff may be nonsuited (*z*). So he may after payment of money into court (*a*).

(*n*) *Doe Roberts* v. *Roberts*, 2 Chit. Rep. 272.

(*o*) This is so, even in a case of a set-off found against the defendant for want of evidence. (*Eastmure* v. *Lawes*, 5 Bing. N. C. 444).

(*p*) *Watkins* v. *Towers*, 2 T. R., 275 to 281: *Minchin* v. *Clement*, 1 B. & Ald. 252: *Lumby* v. *Allday*, 1 C. & J. 301: and see *Ward* v. *Mason*, 9 Price, 291: *Elworthy* v. *Bird*, 13 Id. 222: M'Clel. 69, *S. C.* The case of *Doe* v. *Smith*, in 1 Campb. 196, is not law: see *Long* v. *Wilkins*, 1 Nev. & P. 697: *Dewer* v. *Purday*, 4 N. & M. 633.

(*q*) See 3 Bl. Com. 376.

(*r*) See *Heath* v. *Walker*, 2 Str. 1117.

(*s*) *Arnold* v. *Johnson*, 1 Str. 267.

(*t*) *Halhead* v. *Abrahams*, 3 Taunt. 81: and see *Treacher* v. *Hinton*, 4 B & Ald. 413; 1 M. & R. 261 a.

(*u*) *Shepherd* v. *Bishop of Chester*, 4 Moo. & P. 130; 6 Bing. 435.

(*x*) *Murphy* v. *Donlan*, 5 B. & C. 178; 7 D. & R. 618, *S. C.*: *Jones* v. *Gibson*, 5 B. & C. 768; 8 D & R. 592, *S. C.*: see *Stuart* v. *Rogers*, 7 Dowl. 185.

(*y*) *Hannay* v. *Smith*, 3 T. R. 662: *Weller* v. *Goyton*, 1 Bur. 358: *Harris* v. *Butterley*, Cowp. 483.

(*z*) *Anderson* v. *Shaw*, 11 Moore, 44; 3 Bing. 290; 2 C. & P. 85, *S. C.*

(*a*) *Gutteridge* v. *Smith*, 2 H. Bl. 374: and see 2 Esp. 482, n.: *Burstall* v. *Horner*, 7 T. R. 372: *Rogers* v. *M'Carthy*, 3 Esp. 106.

In Trial by Proviso.

If a cause be carried down to trial by proviso, and the plaintiff does not appear, he should be nonsuited (*b*); in such a case, however, where a verdict is taken for the defendant by mistake instead of a nonsuit, the court will not set such verdict aside, unless the plaintiff consent to a nonsuit being entered (*c*).

Where Recorded, and Leave reserved for.

A nonsuit can be recorded only at *Nisi Prius*, and not by the court in *banc* (*d*). Frequently, at *Nisi Prius*, however, when it is doubtful whether the action will lie, or the like, the court will allow the plaintiff to take a verdict, with liberty to the defendant to enter a nonsuit if the court above should, upon application, be of opinion that the action did not lie. But without such leave, the court above have no authority to order a nonsuit to be entered (*e*). The reservation of leave to enter a nonsuit proceeds upon the assent, express or implied, of both parties, and the plaintiff's assent to such a reservation, does not empower the judge subsequently to enter a nonsuit without the further assent of the plaintiff (*f*).

Costs on.

Upon being nonsuited, the plaintiff is liable to costs, in the same manner as if the defendant had obtained a verdict (*g*). The judge may certify for the costs of a special Jury. (3 & 4 *W.* 4, *c.* 42, *s.* 35).

Judgment as in case of.

As to a judgment of nonsuit or *nonpros* for not declaring, replying, &c., see *Vol. II. Book IV. Part. I. Ch.* 18. And as to a judgment as in case of a nonsuit, see also *Vol. II. Book IV. Part I. Ch.* 24.

How set Aside, and on what Conditions.

If the judge at *Nisi Prius* nonsuit the plaintiff through mistake, a bill of exceptions may be tendered (*h*), or the court, upon application, will set aside the nonsuit (*i*). But the court will not set aside a nonsuit voluntarily suffered by the plaintiff, in order to let him in to plead *de novo* (*k*); nor will they set it aside, it should seem, on the ground that the case ought to have been submitted to the jury, unless this were desired on the part of the plaintiff at the trial of the cause (*l*); but in a late case, the Court of Queen's Bench held that, if a judge thinks fit to nonsuit, counsel are not bound to insist upon the case going to the jury (*m*). The court, as a matter of indulgence, will, in some cases, set aside a nonsuit upon payment of costs, and a peremptory undertaking to try at the next sittings or assizes, whether the plaintiff has been nonsuited on account of the non-attendance of his witnesses, or the like (*n*). If set aside upon payment of costs, such payment is a condition precedent to the setting aside of the nonsuit; and until it be made, the plaintiff cannot proceed to another trial (*o*).

(*b*) 2 Saund. 336 b: *Mann* v. *Lovejoy*, R. & M. 357: *Symes* v. *Larby*, 2 C. & P. 358.

(*c*) *Hodgson* v. *Foster*, 1 B. & C. 110; 2 D. & R. 221, *S. C.*

(*d*) See *Gardener* v. *Davies*, 1 Wils. 301: *Hicks* v. *Young*, Barnes, 458.

(*e*) *Minchin* v. *Clement*, 1 B. & Ald. 252: *Watkins* v. *Towers*, 2 T. R. 275 to 281: *Ricketts* v. *Burman*, 4 Dowl. 478.

(*f*) *Dewar* v. *Purday*, 4 N & M. 633.

(*g*) *Cameron* v. *Reynolds*, Cowp. 407; 2 B. & P 376, *S. C.*: *Davila* v. *Herring*, 1 Str. 300. In actions *qui tam*, *Wilkinson* v. *Allott*, Cowp. 366. See the forms of *postea*, judgment, and execution upon a nonsuit, Chit. Forms, 87 to 89.

(*h*) *Strother* v. *Hutchinson*, 4 Bing. N.C. 83; 5 Scott, 346; 6 Dowl. 238, *S. C.*

(*i*) *Sadler* v. *Evans*, 4 Bur. 1984: see *Alexander* v. *Barker*, 2 C. & J. 133: *Elsworthy* v. *Bird*, M'Cl. 69: *post*, Vol. II. Book IV. Part I. Ch. 27.

(*k*) *Hutchinson* v. *Brice*, 5 Bur. 2692.

(*l*) *Kindred* v. *Bagg*, 1 Taunt. 10.

(*m*) *Law* v. *Wilkins*, 1 Nev. & P. 697.

(*n*) See *Brown* v. *Ottley*, 1 B. & Ald. 253.

(*o*) *Nichols* v. *Bozon*, 13 East, 185.

SECT. 9.

Verdict.

1. *Species of Verdict.*
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2. *Damages.*
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1. *Verdict.*

1. Verdict, Species of.

THE verdict is either general or special. The jury may undoubtedly, in all cases, give a general verdict, thus taking upon themselves to judge of both the law and the fact. Or, (as is most usual where the questions of law arising in the case are doubtful), they may give a special verdict; that is, they may find the facts of the case specially, leaving to the court the application of the law to the facts thus found (*p*). Or they may find a general verdict, subject to a special case. These shall now be separately considered.

General Verdict.

General Verdict.] A general verdict is given *vivâ voce* by the jury, thus: "*We find for the plaintiff, damages* [20*l.*], *costs* 40*s.*;" or, if for the defendant, then merely, "*We find for the defendant.*" If there be several counts in the declaration, and they find for the plaintiff on some, and for the defendant on the rest, the verdict is then given thus: "*We find for the plaintiff on the* 1*st*, 2*nd*, *and* 4*th issues*, *damages* [20*l.*], *costs* 40*s.*; *and for the defendant on the* 3*rd*, 5*th*, *and* 6*th issues.* In *replevin*, however, if the jury find for the defendant, they must find damages and costs, as in other cases where they find for the plaintiff. This verdict is afterwards entered in form, in what is termed the *postea*, indorsed upon the *Nisi Prius* record (*q*).

Where it must be on all the Issues.

A verdict must comprehend the whole issue or issues submitted to the jury in that particular cause; otherwise the judgment founded on it may be reversed (*r*). As, where a jury found "not guilty" as to part, and gave no verdict as to the rest, the judgment was reversed (*s*). But where the jury, in debt on bond, and *nil debet* pleaded, found *nil debet* to part, and *debet* to the rest, it was holden sufficient after verdict (*t*).

Where it must be against all the Defendants.

In an action in form *ex contractu* against several defendants, the verdict must be found against all of them (*u*); but this is not requisite in an action in form *ex delicto*, unless the plea of one or more of the defendants be such as shews the plaintiff could have no cause of action against any of them (*x*). In

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(*p*) Co. Lit. 228: and see stat. Westm. 2, (13 E. 1), c. 30, s. 2.

(*q*) As to the form of entering the verdict on the *postea*, see the 1st section of the next Chapter: and see Chit. Forms, 92 *et seq.*

(*r*) *Miller* v. *Trets*, 1 L. Raym. 324.

(*s*) *Cattle* v. *Andrews*, 3 Salk. 372.

(*t*) *Hadley* v. *Stiles*, 2 Salk. 664.

(*u*) *Porter* v. *Harris*, 1 Lev. 63: Ca. Prac. C. P. 107: *Hannay* v. *Smith*, 3 T. R. 662.

(*x*) *Biggs* v. *Benger*, 2 L. Raym. 1372; 1 Stra. 610, *S. C.*: *Jones* v. *Harris*, 2 Str. 1100; Id. 1222. *Quære* as to the action of detinue. (See *Garth* v. *Howard*, 5 C. & P. 346.)

assumpsit against several defendants as executors, with a plea of *ne unques* executor, the plaintiff may have a verdict against the real executor on the counts laying the promises by the testator; and the other defendants may be discharged (*y*). On a plea by several executors, that they have fully administered, if some are shewn to have assets in their hands, and the others not, the latter are entitled to a verdict (*z*). Also, after a plea in abatement for non-joinder, if the plaintiff brings another action against the defendant who pleaded that plea and the party named in such plea, but fails in the second action in proving that that party was a contracting party, a verdict may nevertheless be found against the original defendant (*a*).

Where it must be on some Counts only.

Where, in an action on a promissory note, and also for goods sold and delivered, the plaintiff proved the delivery of the goods before the note was given, and did not shew the consideration of the note to have been distinct from them, it was ruled that the defendant must have a verdict on one of the counts, and that the plaintiff could not take a verdict on one, and have the jury discharged from giving a verdict on the other (*b*). Where there are several counts on the same cause of action, (but which can now rarely be the case), and only one cause of action is proved, the plaintiff is entitled to a verdict on one count only; and if the judge were to direct a verdict on more than one count, the defendant might, it seems, tender a bill of exceptions (*c*). And where a declaration in trespass contained two counts, and the defendant pleaded to one, and suffered judgment by default on the other, and, on the trial of the former, the plaintiff could only prove one act of trespass, which was covered by the second count, the court held that he was not entitled to a verdict on the first count (*d*).

On Distribution Pleas.

Also, where a plea can be construed distributively, as, for instance, a plea of right of way with cattle and carriages and on foot (*e*), or a right of way to bring water and goods (*f*), or *liberum tenementum* as to several closes (*g*), the jury may find for the plaintiff as to one part of the plea, and for the defendant as to the rest.

Special Verdict.

Special Verdict.] A special verdict must state the facts proved at the trial, and not merely the evidence given to prove those facts; otherwise the verdict will be insufficient, and the court will award a *venire de novo* (*h*). But deeds should not be set out in it *in hæc verba*, but merely the substance of them stated, unless the question in dispute rest on their construction (*i*). Yet, if the verdict state the contents of a deed, and also set out the deed *in hæc verba*, the court will not regard the collection the jury have made of the substance of the deed, but the deed itself as set forth (*j*). Also,

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(*y*) *Griffiths* v. *Franklin*, 1 M. & M. 146.

(*z*) *Parsons* v. *Hancock*, 1 M. & M. 330.

(*a*) 3 & 4 W. 4, c. 42, s. 10: *post*, Vol. II. Book II. Part I.

(*b*) *Mutrie* v. *Harris*, 1 M. & M. 322: and see *Bond* v. *Rust*, 2 C. & P. 342: *Powell* v. *Sonnett*, 3 Bing. 381; 11 Moore, 330, *S. C.*: *Marrack* v *Ellis*, 1 M. & R. 511: *Cossey* v. *Diggons*, 4 B. & Ald. 5:6.

(*c*) *Ward* v. *Bell*, 1 C. & M. 848: *Hall* v. *Ashurst*, Id. 714.

(*d*) See *Compere* v. *Hicks*, 7 T. R. 727.

(*e*) R. G. H., 4 W. 4, Trespass, ss. 4—6.

(*f*) *Knight* v. *Woore*, 5 Dowl. 201.

(*g*) *Phythian* v. *White*, 1 M. & W. 216.

(*h*) *Bird* v. *Appleton*, 1 East. 111; 8 T. R. 362, *S. C.*: *Hubbard* v. *Johnstone*, 3 Taunt. 209.

(*i*) R. M. 1654, s. 20.

(*j*) *Rowe* v. *Huntington*, Vaugh. 77.

a negative need not be found in a special verdict, unless when necessary to shew that some matter therein mentioned does not come within a particular exception (*k*).

How framed and settled.

The special verdict is dictated by the court at the trial, and signed by counsel on both sides, before the jury are discharged. If, in settling it, any difference of opinion arise about a fact, the opinion of the jury is taken, and the fact is stated accordingly (*l*). *Let the plaintiff's attorney get the special verdict drawn from the minutes taken at the trial, and get it settled and signed by counsel; then deliver it to the attorney of the defendant, who, after getting it settled and signed by his counsel, will re-deliver it to you.* If the counsel differ in the mode of settling it, the judge who tried the cause, being attended by the parties and their counsel, upon summons, will settle it according to his notes (*m*).

How set down for Argument.

When settled, leave it with one of the masters if in a town cause, or with the associate if in a country cause, and he will make out a copy of it for each party. Enter the proceedings on the roll, to the entry of the special verdict inclusive, and docket and file it of record. Get one of the masters to set the cause down for argument, and forthwith give notice thereof to the opposite party's attorney. Formerly, a rule for a *concilium* was necessary; but, by *R. H.*, 4 *W.* 4, *r.* 6, "no motion or rule for a *concilium* shall be required; but demurrers, as well as all special cases and special verdicts, shall be set down for argument, at the request of either party, with the clerk of the rules in the Queen's Bench and Exchequer, and the secondary in the Common Pleas, [now, since the 7 *W.* 4 *&* 1 *V. c.* 30, in either court, one of the masters], upon payment of a fee of 1*s.*; and notice thereof shall be given forthwith by such party to the opposite party." And lastly, by *R. H.*, 4 *W.* 4, *r.* 7, "*four clear days before the day appointed for argument, the plaintiff shall deliver copies of the demurrer book, special case, or special verdict, to the Lord Chief Justice of the King's Bench or Common Pleas, or Lord Chief Baron, as the case may be, and the senior judge of the court in which the action is brought; and the defendant shall deliver copies to the other two judges of the court next in seniority; and in default thereof by either party, the other party may on the day following deliver such copies as ought to have been so delivered by the party making default; and the party making default shall not be heard until he shall have paid for such copies, or deposited with the clerk of the rules in the King's Bench and Exchequer, or the secondary in the Common Pleas, as the case may be, [now, since the 7 W. 4 & 1 V. c. 30, in either court, one of the masters,] a sufficient sum to pay for such copies.*" The exceptions intended to be insisted on in argument must, as in the case of the demurrer books, be inserted in the margin of these copies so delivered to the judges (*n*). If these copies be not delivered, the cause will be struck out of the paper (*o*). But if either party neglect to deliver the books, and the other deliver all, the latter may, it seems, move for judgment without argument, for the former cannot be

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(*k*) *Mayor of Nottingham* v. *Lambert*, Willes, 117: see form of a special verdict, Chit. Forms, 89.

(*l*) 1 Bur. in Pref. iv.: and see R. M. 1654, sect. 20: *Hill* v. *Yates*, 8 Taunt. 183.

(*m*) *Vide post*, 319, 320.

(*n*) R. T., 40 G. 3, and R. H., 38 G. 3: *post*, Vol. II. Book II. Part II.

(*o*) MS., E. 1814: and see *Abraham* v. *Cook*, 3 Dowl. 215.

heard (*p*); and the practice upon these points is the same as in the case of a demurrer. The cause must be set down for argument within four days after the day in *banc*, unless the court, upon a proper application grounded on affidavits, think proper to enlarge the time.

Argument of.

The cause will be called on for argument in the order in which it stands in the paper. The plaintiff's counsel then states the pleadings shortly, and the special verdict at length; and then argues the case. The defendant's counsel is next heard in answer; and lastly, the plaintiff's counsel is heard in reply. Only one counsel on each side can be heard. The court then deliver their judgment. If the judges coincide in opinion, they deliver their opinions in the order of their precedence; but if they differ, then they deliver their opinions in an inverse order, namely, the junior puisne judge first, then the second puisne judge, then the senior puisne judge, and lastly, the chief justice, or chief baron.

Construction of.

It is a settled rule that the court will intend nothing in a special verdict but what is found by the jury (*q*); therefore, where a verdict found a recovery, the court would not presume a writ of seisin executed, although the recovery would be ineffectual without it (*r*). Yet, with this exception, the court will, in general, construe a special verdict in such a manner as to give effect to it, if possible. Therefore, where a special verdict stated that the defendant by his deed "*granted*" to the plaintiff the property in question, in a case where a *release* would have been the only effective conveyance, the court construed a special verdict as if it stated a release; although it would have been otherwise had the point arisen upon the construction of pleadings (*s*). So, where a verdict found that A. was the son of B., without stating that he was the heir also, the court said that, as it was in a verdict, they would intend A. to be the son and heir of B., no other person being therein found to be the heir (*t*). Where a verdict stated an offence to have been committed *contra formam statuti*, where it could not have been so, the court rejected the words *contra formam statuti* altogether as surplusage (*u*). Also, where the verdict found that J. S., being seised of land in fee, being upon the land, "demised" it to the plaintiff for life, and afterwards stated that there had been no other livery of seisin, the court rejected the matter of conclusion as surplusage, and held that there had been no demise (*v*).

Amendment of.

As to the cases in which the court will allow a special verdict to be amended, see *Vol. II. Book IV. Part I. Ch.* 28.

Venire de novo on.

In cases where it cannot be amended, and it is so defective that the court cannot give judgment on it, a *venire de novo* must be awarded (*w*).

Judgment, &c., on.

After the court has decided the case, the party in whose favour the decision is, may immediately sign judgment, tax his costs, and sue out execution, without giving any rule for judgment (*x*).

(*p*) 1 Sellon, 336: and see R. M., 17 Car. 1: *sed vide Fulham* v. *Bagshaw*, 1 B. & P. 292, *contra*. He will be allowed for them in costs.

(*q*) *Duncombe* v. *Wingfield*, Hob. 262.

(*r*) *Witham* v. *Derby, Earl of*, Wils. 55.

(*s*) 2 Saund. 97.

(*t*) *Lynch* v. *Spencer*, Cro. El. 515.

(*u*) 1 Hawk. c. 30, sect. 9.

(*v*) *Sharp* v. *Sharp*, Cro. El. 482.

(*w*) *Bird* v. *Appleton*, 1 East, 111: *Witham* v. *Derby, Earl of*, Wils. 55: see *Goodtitle* v. *Jones*, 7 T. R. 47, 52: *Buckle* v. *Hollis*, 2 Chit. Rep. 398.

(*x*) See *post*, 330: R. H., 2 W. 4, r. 67. See the form of the judgment, Chit. Forms, 90.

Special Case.

Special Case.] Also, where a difficulty in point of law arises, the jury may, instead of finding a special verdict, find a general verdict for the plaintiff, subject to the opinion of the judge, or the court above, on a *special case* stated by the counsel on both sides with regard to the matter of law; which has this advantage of a special verdict, that it is attended with much less expense, and obtains a much speedier decision. On the other hand, however, as nothing appears upon the record but the general verdict, the parties are hereby precluded from the benefit of a writ of error, if dissatisfied with the judgment of the court or judge upon the point of law (*y*). But the objection here mentioned is now usually obviated by the judge at *Nisi Prius* giving liberty to either party to have the special case afterwards turned into a special verdict, should it become necessary to take the opinion of a court of error on the case. Unless the judge thus expressly reserves this power of turning the special case into a special verdict, it cannot be done (*z*), except by the consent of the parties (*a*), and with this consent, it is frequently done, upon the suggestion of the court, before or after the argument of the special case (*b*).

How framed and settled.

The case ought to be dictated by the judge at the trial, and signed by counsel on both sides, before the jury are discharged; and if, in settling it, any difference of opinion arise about a fact, the opinion of the jury may be taken, and the fact stated accordingly (*c*). Yet this, in practice, is seldom done, but the case is afterwards drawn by the junior counsel of the plaintiff, and settled by the junior counsel for the defendant, in the same manner as a special verdict; and if any difference arise between them, the judge who tried the cause will, upon summons, and being attended by the junior counsel on both sides, settle the case from his notes. The case must be signed by counsel. In a case in the Common Pleas, (before that court was opened to the bar), where the judge, upon reference to him, decided that the case, as drawn, was correct, and the junior counsel on both sides, and a serjeant on the part of the plaintiff, signed it, but the defendant's attorney refused to get it signed by a serjeant on his behalf, the court gave the defendant two days to obtain such signature, and, on his non-compliance, ordered the *postea* to be delivered to the plaintiff (*d*). And where a verdict was found for the plaintiff, with nominal damages, subject to a special case to be prepared by the plaintiff, and he refused to prepare it, the court held that the plaintiff could not be compelled to complete it, but that the defendant might apply to set aside the verdict and have a new trial (*e*). And where the defendant had neglected to settle the case reserved on a *quo warranto*, a rule *nisi* was granted for the *postea* to be delivered over to the prosecutor, and that he should be at liberty to enter up judgment thereon (*f*). The facts proved at the trial, and not merely evidence

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(*y*) 3 Bl. Com. 378.

(*z*) *Archp. of Canterbury* v. *Robertson*, 2 Dowl. 78; 1 C. & M. 714, *S. C.*

(*a*) *Per Bayley*, B., *Attorney-General* v. *Diamond*, 1 C. & J. 371, (where the crown claimed a special privilege), "I know not upon what authority we can convert a statement of facts into a finding upon oath, except by the consent of the parties."

(*b*) See 1 N. & M. 181 n.

(*c*) 1 Bur. in Pref. iv.

(*d*) *Jackson* v *Hall*, 8 Taunt. 421; 2 Moore, 478, *S. C.*

(*e*) *Medley* v. *Smith*, 6 Moore, 53.

(*f*) R. v. *Smith*, 2 Chit. Rep. 398.

of facts, must be stated in a special case, in the same manner as in a special verdict (*f*).

How acted on.

The special case is not entered upon record. In every other respect the mode of proceeding is the same as upon a special verdict, as pointed out ante, 317.

Argument, &c., of.

The case must be argued in the order in which it stands in the paper, unless sufficient cause to the contrary be shewn on affidavit, two days at least previously to the day of argument (*h*). In arguing it, counsel will not be allowed to state any extrinsic matter; but the court must judge of the case as it is stated (*i*). If mis-stated, the parties may have leave to amend it (*j*). But if it do not admit of amendment, and be so defectively stated that the court cannot give judgment upon it, a new trial will be granted (*k*).

Verdict, how entered on.

The *postea* is stayed in the hands of one of the masters, or associate, until the question is argued and determined; after which a general verdict is entered for the prevailing party.

Special Case before Trial.

As to a special case stated and agreed on between the parties *before* the trial, see *post, Book I. Part III.*

2. *Damages.*

2. Damages In what Actions.

In real actions, no damages are recoverable. In mixed actions, damages are recoverable, either at common law, or by virtue of some particular statute. Damages are also recoverable in all personal actions, with the exception of actions upon statutes by common informers for penalties (*l*).

In most cases, damages are the sole object of the action; in some, however, they are merely nominal (*m*).

In Assumpsit, Covenant, Case, Trover, and Trespass.

In *assumpsit*, *covenant*, *case*, *trover*, and *trespass*, damages are the sole object of the action. In *assumpsit*, or covenant for nonpayment of money, the measure of damages is the sum agreed to be paid to the plaintiff; or, if not ascertained by the contract, the sum proved to be due to him at the time of bringing the action, with or without interest, according to the nature of the demand, and manner in which it arose (*n*). In *assumpsit* or covenant, when the contract is not for the payment of money, but for the doing or forbearing of some other act, the damages depend on the nature of the contract, and whether it relates to the person or to real or personal property (*o*). In trover, the general rule is, that the damages should be the value of the thing (*p*). Special damages are not recoverable in trover unless laid in the declaration (*q*), and then they may be so (*r*). As to the damages in an action for mesne profits, see *post, Vol. II. Book III. Part I. Ch.* 1.

In Debt.

In *debt*, the damages are, in general, merely nominal, the recovery of the debt itself being the principal object of the

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(*g*) *Palmer* v. *Johnson*, Wils. 163. See the form, Chit. Forms, 91.

(*h*) R. M., 30 G. 2.

(*i*) *Doe* v. *Lewis*, 1 Bur. 617: and see *Pike* v. *Carter*, 10 Moore, 376; 3 Bing. 85, *S. C.*

(*j*) *Doe* v. *Lewis*, 1 Bur. 617.

(*k*) *Davila* v. *Herring*, 1 Str. 300: and see *Hankey* v. *Smith*, 3 T. R. 507, n.: *Buckle* v. *Hollis*, 2 Chit. Rep. 398.

(*l*) See Tidd, 9th ed. 870: *Cumming* v. *Sibley*, 4 Bur. 2489.

(*m*) See Tidd, New Pract. 520.

(*n*) Id. 521: Tidd, Pract. 9th ed. 871.

(*o*) Tidd, New Pract. 523: and see the cases and decisions there collected.

(*p*) *Finch* v. *Blount*, 7 C. & P. 478: and see further, Tidd, New Pract. 525: *post*, 325.

(*q*) See *Evans* v. *Lewis*, 3 Dowl. 820.

(*r*) *Davis* v. *Oswell*, 7 C. & P. 804.

action. In this case the jury first find the matter of the issue; as, upon *nunquam indebitatus*, that the defendant owes to the plaintiff the amount of the debt proved; upon *non est factum*, that the writing obligatory, &c. is the deed of the defendant; upon *solvit ad diem*, that the defendant did not pay, &c. &c.; and then they assess nominal damages (usually one shilling) for the detention of the debt. But in debt on articles of agreement for a penalty (*s*); or on bonds conditioned for the performance of covenants or agreements, such as a bond for the performance of covenants contained in the same, or in any other deed or writing (*t*); or for the payment of money by instalments (*u*); or for the payment of an annuity (*x*); or for the performance of an award (*y*); or for the performance of any other specific act (not being a bond for the payment of a sum of money in gross at a certain time, as post-obit bonds, &c. (*z*); or bond for the payment of money provided for by the 9 *A. c.* 16, *s.* 13 (*a*); or a replevin bond (*b*); or a bail-bond (*c*); or the bond of a petitioning creditor, &c.) (*d*): where, in pursuance of 8 & 9 *W.* 3, *c.* 11, *s.* 8, one or more breaches of the condition are assigned upon record, the jury first assess nominal damages for the detention of the debt, as above-mentioned, and then assess actual damages upon the breaches assigned (*e*). In actions of debt upon records, the damages are only nominal (*f*); excepting in debt on an inland judgment, where interest may be recovered in the way of damages for the detention of the debt (*g*); and in some cases it has been allowed in an action on a foreign judgment; as, for instance, in an action on an Irish judgment on a bond, interest has been allowed beyond the penalty (*h*). In debt on a recognisance of bail, they are not liable to interest on the sum recovered subsequent to the judgment (*i*). In debt on statute by an informer for a penalty, no damages whatever can be given; but the verdict, after finding the debt, immediately passes on to the assessment of the costs (*k*). But in debt for a penalty on a statute by a party grieved, damages are, in general, recoverable (*l*).

In Detinue.

In *detinue*, the damages are merely nominal; but the jury find the value of the articles detained; and the judgment is, that the plaintiff recover the articles or their value, together

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(*s*) *Drage* v. *Brand*, Willes, 377.

(*t*) *Collins* v. *Collins*, 2 Bur. 824, 826; Ld. Ken. 530, *S. C.*

(*u*) *Willoughby* v. *Swinton*, 6 East, 550; 2 Smith, 636, *S. C.*

(*x*) *Walcot* v. *Goulding*, 8 T. R. 126.

(*y*) *Welch* v. *Ireland*, 6 East, 613; 2 Smith, 666, *S. C.*

(*z*) *Murray* v. *Earl Stair*, 2 B. & C. 82, 89; 3 D. & R. 278, *S. C.*: 2 Camp. 285, n.

(*a*) *Cardozo* v. *Hardy*, 2 Moore, 220.

(*b*) 2 Saund. 187.

(*c*) Ib: and see *Moody* v. *Pheasant*, 2 B. & P. 446.

(*d*) *Smith* v. *Broomhead*, 7 T. R. 300: *Smithey* v. *Edmondson*, 3 East, 22: and see *Saville* v *Jackson*, 13 Price, 715: *Smith* v. *Bond*, 3 M. & Scott, 528; 10 Bing. 125, *S. C.*

(*e*) See 1 Saund. 58; 2 Id. 187: and see *M'Arthur* v. *Lord Seaforth*, 2 Taunt. 557: Chit. Forms, 93.

(*f*) See *Ven* v. *Phillips*, 1 Salk. 208: *Fanshaw* v. *Morrison*, 2 L Raym. 1138.

(*g*) *Blackmore* v. *Flemyng*, 7 T. R. 446: *Entwistle* v. *Shepherd*, 2 Id. 78: and see *M'Clure* v. *Dunkin*, 1 East, 436; 2 T. R. 388, *S. C.*: *Hillhouse* v. *Davis*, 1 M. & Sel. 169: *Wood* v. *Silletto*, 1 Chit. Rep. 473.

(*h*) *M'Clure* v. *Dunkin*, 1 East, 436; 2 T. R. 388, *S. C.*: and see M. & M. 228: *Arnott* v. *Redfern* 11 Mo. 209: 3 Bing. 353, *S. C.* When not so allowed, see *Atkinson* v. *Lord Braybrooke*, 4 Camp. 380; 1 Stark. Rep. 319, *S. C.*: *Hillhouse* v. *Davis*, 1 M. & Sel. 173.

(*i*) *Waters* v. *Rees*, 3 Taunt. 503: *Welford* v. *Davidson*, 4 Bur. 2127.

(*k*) *Frederick* v. *Lookup*, 4 Bur. 2018: *Cuming* v. *Sibly*, Id. 2489.

(*l*) See *Powell* v. *Hord*, 1 Stra. 650: 2 L. Raym. 1411, *S. C.*: *Facy* v. *Lange*, Cro. Car. 559.

with the damages and costs found by the verdict, and the costs of increase.

In Replevin.

In *replevin*, a verdict for the plaintiff gives damages precisely as in trespass; if the action be in the *detinet*, (which is not a very usual form), these damages are calculated upon the value of the things taken, and the injury the plaintiff has sustained by the taking; if in the *detinuit*, (which is the usual form), the damages are given for the injury the plaintiff has sustained by the taking only (*m*). If the verdict be for the defendant, damages are given as in a verdict for a plaintiff in trespass (*n*).

In Ejectment.

In *ejectment*, the damages are (unless the lessor of the plaintiff proceed under the 1 *G.* 4, *c.* 87) but nominal; the damage really sustained by the lessor of the plaintiff, by the detention of the property in dispute, &c., being now usually recovered in a separate action of trespass for mesne profits (*o*).

Where Set-off is pleaded in undefended Cause.

Where the defendant has pleaded a set-off, but does not appear at the trial to give evidence of it, the plaintiff may either take a verdict for the whole sum he proves to be due to him, subject to be reduced to the sum really due on a balance of accounts, if the defendant will afterwards enter into a rule not to sue for the set-off; or he may take a verdict for the smaller sum, deducting the amount of the set-off really due, with a special indorsement on the *postea* as a foundation for the court to order a stay of proceedings, if another action should be brought for the amount of the set-off (*p*). It would seem that this course cannot be adopted except in cases where the defendant has pleaded a set-off, the statutes of set-off not being compulsory.

Where Amount of Damages doubtful.

In a case in the Court of Common Pleas, where it was evident that the plaintiff had sustained some damage, the jury, not being able to ascertain the amount, were about to find a verdict for the defendant, when the plaintiff submitted to a nonsuit: but afterwards the court, upon application, set aside the nonsuit, and ordered a verdict with nominal damages to be entered for the plaintiff (*q*).

Interest as Damages.

Interest, as Damages.] By the 3 & 4 *W.* 4, *c.* 42, *s.* 28, it is enacted, "that upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that

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(*m*) This, in general, is only four guineas—the expenses of the replevin bond.

(*n*) See 1 Saund. 195 a: and see Chit. Forms, Book III. Part I. Ch. 2: and see *post*, Vol. II. Book III. Part I. Ch. 2.

(*o*) See *post*, Vol. II. Book II. Part I. Ch. 1.

(*p*) *Laing* v. *Chatham*, 1 Camp. 252; 1 Chit. Rep. 878, n., *S. C.* In this case, which was before the rules of H. T., 4 W. 4, a *notice* of set-off was given.

(*q*) *Feize* v. *Thompson*, 1 Taunt. 121: see *Spencer* v. *Coter*, 1 H. Bl. 78.

interest shall be payable in all cases in which it is now payable by law." In an action on an attorney's bill, where the plaintiff gave notice, pursuant to the above act, that he should claim interest from the date of the notice, and, after the writ was issued, the bill was referred to taxation at the instance of the defendant, no terms being made as to the allowance of interest, the court held that the plaintiff could not afterwards have an assessment of damages for the purpose of recovering the interest (*r*). By sect. 29, "the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass *de bonis asportatis*, and over and above the money recoverable in all actions on policies of assurance made after the passing of this act." As to interest on judgments, see 1 & 2 *V*. *c*. 110, *s*. 17, *post*, 344.

Where there are several Defendants.

Where there are several Defendants.] We have already shortly pointed out when the verdict may be against one or more of several defendants (*s*). Where the defendants in trespass join in pleading, the jury, if they find them jointly guilty, cannot sever the damages (*t*). But they may find one of them guilty of the trespass at one time, and the other at another (*u*); or one of them guilty of part of the trespass, and the other of another (*x*); or some guilty of the whole trespass, and the others guilty of part only (*y*); in all which cases, the jury may assess several damages. Also, where the defendants plead severally, if they be found guilty of the same act of trespass, the jury cannot sever the damages (*z*), but the jury who try the first issue shall assess damages against all; and there shall be a *cesset executio* until the other issues are tried, when the other defendants, if found guilty, shall be contributory to those damages (*a*). Where the jury sever the damages by mistake, the plaintiff may cure the defect by taking judgment *de melioribus damnis* against one, and entering a *nolle prosequi* as to the other (*b*); or, by entering a *remittitur* as to the lesser damages, he may have judgment for the greater damages against both (*c*).

Contribution, where all the Damages are levied upon one Defendant.

Where the plaintiff has judgment for damages against several defendants, he may levy the whole upon any one of them; and such defendant, if the action were *ex contractu*, and not on a contract with the defendants as partners in trade (*d*), may, after paying these damages, maintain an action against the other defendants, and oblige them to contribute their respective shares; but if the action were *ex delicto*, he cannot, in general, oblige the others to contribute, and is altogether without remedy (*e*). But, although the law will not imply an indemnity between wrong-doers, yet the case is altered when the act done is indifferent in itself, and when it depends upon

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(*r*) *Berrington* v. *Phillips*, 1 M. & W. 48; 1 Tyr. & G. 322; 1 Gale, 404; 4 Dowl. 758, *S. C.*

(*s*) *Ante*, 315, 316.

(*t*) *Hill* v. *Goodchild*, 5 Bur. 2790: *Mitchell* v. *Millbank*, 6 T. R. 190.

(*u*) 11 Co. 5 b.

(*x*) *Player* v. *Warn*, Cro. Car. 54.

(*y*) *Austin* v. *Willward*, Cro. El. 860.

(*z*) Id.: 11 Co. 6 a, 7 a.

(*a*) 11 Co. 6 a, 7 a.

(*b*) *Rodney* v. *Strode*, Carth. 19: *Mitchell* v. *Millbank*, 6 T. R. 199, 200: *Dale* v. *Eyre*, 1 Wils. 306.

(*c*) *Johns* v. *Dodsworth*, Cro. Car. 192: *Sabin* v. *Long*, 1 Wils. 30, *per cur.*

(*d*) *Sadler* v. *Hickson*, 3 N. & M. 258: 5 B. & Adol. 936, *S. C.*

(*e*) *Merryweather* v. *Nixon*, 8 T. R. 186: *Hart* v. *Biggs*, Holt, C. N. P. 245: *Colburn* v. *Patmore*, 1 C., M. & R. 73; 4 Tyr. 677, *S. C.*

circumstances, whether it be wrong or not (*f*), and accordingly it has been held, that, if a party recover damages in case against one of two joint coach-proprietors, for an injury sustained by the negligence of their servants, such proprietor may maintain an action against his co-proprietor for contribution, on proving that he was not personally present when the accident happened (*g*). But no action at law can in such a case be maintained if there be a partnership fund (*h*).

Damages where there are several Counts, Issues, &c.

Where there are several Counts, Issues, &c.] Where the declaration contains several counts or breaches, the jury may assess either entire damages upon all or any of the counts, or several damages upon each (*i*). If a verdict be entered generally on all the counts, and entire damages given, and one count be bad, it is fatal; but the court will not arrest the judgment; they will award a *venire de novo* (*j*), unless the proceedings originated in an inferior court, in which case, as a court of error has no power to grant a *venire de novo*, judgment would be arrested altogether (*k*); and also, where a general verdict has been taken, and evidence given exclusively on the good counts, the court have permitted the verdict to be *amended* by the judge's notes (*l*). So, where it appears by the judge's notes, that the jury calculated the damages on evidence applicable to the good counts only, the court will amend the verdict by entering it on those counts, though evidence was given applicable to the bad counts also (*m*). The court, however, have refused to entertain an application for entering the verdict upon particular counts, according to the evidence on the judge's notes, after a lapse of eight years, and after the judgment had been reversed in error for a defect in one count (*n*). And in a penal action, where the jury found a verdict for one penalty, on evidence equally applicable to each of two counts, and the plaintiff applied it to one of the counts, which was subsequently found to be bad, the court would not allow him afterwards to enter it up on the other (*o*). In order, therefore, to avoid difficulty or error in this respect, care should be taken to enter the verdict on the good counts only; which may be done either at the trial, or by application to the judge at chambers, who tried the cause; the court also will compel the plaintiff to elect on which counts he will enter his verdict in the next term after the trial (*p*), but the judge at *Nisi Prius* will not (*q*). Where a general verdict was taken at the trial by consent on all the counts, the court refused to confine the verdict to particular counts on the application of the defendant. Even a misjoinder of counts may

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(*f*) *Adamson* v. *Jarvis*, 4 Bing. 72: *Betts* v. *Gibbons*, 2 Ad. & E. 57: *Humphreys* v. *Pratt*, 2 Dow. & C. 288.

(*g*) *Woolley* v. *Batte*, 2 C. & P. 417: and see *Knight* v. *Hughes*, 3 C. & P. 467.

(*h*) *Pearson* v. *Skelton*, 1 M. & W. 504.

(*i*) 1 Ro. Abr. 570 (F), pl. 1. See forms, Chit. Forms, 92, &c.

(*j*) *Leach* v. *Thomas*, 2 M. & W. 427: *Airey* v. *Fearnsides*, 6 Dowl. 654: *semb.*, overruling *Holt* v. *Scholefield*, 6 T. R. 691; 2 Saund. 171 a: *Hancock* v. *Haywood*, 3 T. R. 434: and see *Eddowes* v. *Hopkins*, Doug. 377: *Grant* v. *Astle*, Id. 722: *Richardson* v. *Mellish*, 3 Bing. 349: *Angle* v. *Alexander*, 7 Bing. 119: 4 Moo. & P. 870, *S. C.*: *Sicklemore* v. *Thistleton*, 6 M. & Sel. 9.

(*k*) *Trevor* v. *Wall*, 1 T. R. 151.

(*l*) *Eddowes* v. *Hopkins*, 1 Doug 376.

(*m*) *Williams* v. *Breedon*, 1 B. & P. 329: see *Spencer* v. *Goter*, 1 H. Bl. 78; 2 Saund. 171 a: *Spicer* v *Teasdale*, 2 B. & P. 49.

(*n*) *Harrison* v. *King*, 1 B. & Ald. 161; 4 Price, 46, *S. C.*

(*o*) *Holloway* v. *Bennett*, 3 T. R. 448: *Hardy* v. *Cathcart*, 5 Taunt. 2: 1 Marsh. 180, *S. C.*: *aliter* in an information by Attorney General, 10 Price, 9.

(*p*) *Lee* v. *Muggeridge*, 5 Taunt. 36.

(*q*) *Ferguson* v. *Clarke*, 2 Stark. 442.

be remedied in this manner; as, where *assumpsit* and trover are joined, you may remedy the error by entering the verdict on the count in *assumpsit* or the count in trover (*r*). But where there is a misjoinder of counts, and the jury find general damages, the judgment may be arrested, and the court cannot award a *venire de novo* (*s*).

In Action for Words.

In actions for words, if the words be set forth in one count, and some of them be actionable and others not, entire damages may be given; for it shall be intended that the damages were given for the words which were actionable, and that the others were inserted only for aggravation (*t*). But if the declaration consist of several counts, and all the words in some of them are not actionable, and there is not any special damage laid, or, if laid, not proved, then, if a *general* verdict be given on all the counts, and entire damages given, it will be bad, and the defendant may either move in arrest of judgment, or bring a writ of error (*u*).

Damages, when limited

Damages, when limited.] As to the measure of the damages, it must be observed that where there is a penalty expressed for the non-performance of a contract, and it appears evident that such penalty is the precise sum fixed and agreed upon between the parties as liquidated damages for the non-performance of the contract, the jury are confined to that sum; as in an action on a bond for 1,000*l.*, conditioned that the defendant should marry the plaintiff, the court held, that if the jury found a verdict for the plaintiff, they could not give more or less damages than the 1,000*l.* (*x*). But where it does not appear clear that the parties intended the sum stated in the agreement as liquidated damages, it must then be deemed a mere penalty; in which case, although the jury cannot exceed that sum, yet they may find a less sum as the measure of the damage the plaintiff has sustained (*y*). Therefore, in an action upon an agreement to serve the plaintiff in a certain capacity for four years, under the penalty of 50*l.*, the court held that the jury could not give damages beyond the penalty, but within that sum they might give the party any compensation to which he could prove himself entitled (*z*). In debt, against a sheriff or gaoler for the escape of a prisoner in execution, the jury cannot give a less sum than the creditor would have recovered against the prisoner, *viz.* the sum indorsed on the writ, with the legal fees and expenses of the execution (*a*). In trover, by the assignees of a bankrupt against the sheriff, to try the validity of a sale under an execution, the jury may, and often do, consider the sum at which the goods were actually sold, after deducting a reasonable sum for the expenses of sale,

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(*r*) MS., E. 1814: *Kightly* v. *Birch*, 2 M. & Sel. 533.

(*s*) *Corner* v. *Shew*, 4 M. & W. 163.

(*t*) 1 Ro. Abr. 576 (F), pl. 1: *Broughton's case*, Moore, 142, 143, 708: *Brooke* v. *Clarke*, Cro. El. 328: *Thaxbie* v. *Smith*, Id. 785: *Lynker* v. *Stanwell*, 1 Bulst. 37.

(*u*) 2 Saund. 171 c: *Lloyd* v. *Morris*, Willes, 443: 3 Bac. Abr. 7: and see *Cook* v. *Cox*, 3 M. & Sel. 110.

(*x*) *Lowe* v. *Peers*, 4 Bur. 2225: *Leighton* v. *Wales*, 3 M. & W. 545: and see *Barton* v. *Glover*, Holt, C. N. P. 43.

(*y*) See *Boys* v. *Ancell*, 5 Bing. N. C. 390: *Smith* v. *Dickenson*, 3 B. & P. 630: *Davies* v. *Penton*, 6 B. & C. 216: *Kemble* v. *Farren*, 3 Moo. & P. 425; 6 Bing. 141; 3 C. & P. 624 a, *S. C.*: *Jones* v. *Green*, 3 Y. & J. 298: *Charrington* v. *Laing*, 3 Moo. & P. 587; 6 Bing. 242, *S. C.*: *Reilly* v. *Jones*, 8 Moore, 244; 1 Bing. 302, *S. C.*: Tidd, 9th ed. 876.

(*z*) *Wilbean* v. *Ashton*, 1 Camp. 78.

(*a*) *Bonafous* v. *Walker*, 2 T. R. 126: *Robertson* v. *Taylor*, 2 Chit. Rep. 454: *Hawkins* v. *Plomer*, 2 Bla. Rep. 1048.

as a fair measure of damages (*b*). In all other cases, the jury are at liberty to give what damages they may think proper, proportioned to the degree of injury they may judge the plaintiff to have sustained from the tort or breach of contract complained of. And in an action for seduction, in ascertaining the damages, they are not obliged to confine themselves to such a sum as would be a sufficient compensation for the mere loss of service complained of; but they may also allow damages for the injury sustained by the daughter in her reputation and prospects in life, by the seduction (*c*). On the other hand, it is a general rule that the jury cannot take into consideration, in mitigation of damages, any fact or circumstance not pleaded, which could and should have been pleaded as a defence to the action (*d*). It is also a general rule, that the jury can in no case exceed the damages laid in the declaration (*e*); and it is the duty of the master or associate, if the jury by mistake find a verdict for greater damages, to enter it for the amount laid in the declaration merely (*f*). If entered, however, for more, the mistake may be rectified by application to the court, who will allow the plaintiff to enter a *remittitur* for the excess (*g*); and the court have ordered their judgment to be amended in this respect, even in a subsequent term (*h*). Or the court, in such a case, will, if the plaintiff wish it, grant a new trial, and allow the declaration to be amended (*i*).

Must not be given for Cause of Action subsequent to Suit.

It also seems to be an established principle, that where it is positively and expressly averred in the declaration, that the plaintiff has sustained damages from a cause subsequent to the commencement of the action, or previous to his having any right of action, and the jury give entire damages, judgment shall be arrested; but where the cause of action is properly laid, and the other matter (shewing a continuance of the injury after the commencement of the action, &c.) either comes under a *scilicet*, or is void, insensible, or impossible, and therefore it cannot be intended that the jury ever had it under their consideration, the plaintiff will be entitled to his judgment (*k*).

How limited in Action for Revenue Seizures.

In actions against persons for having seized goods, &c., by virtue of any law relating to the customs and excise, where the plaintiff obtains a verdict, if the judge who tries the cause certify that there was probable ground for the seizure, the plaintiff, besides the thing seized, or the value thereof, shall not be entitled to more than 2*d*. damages, nor to any costs of suit (*l*).

In Actions against Justices.

Also, in actions against justices of peace, on account of any conviction made by them, or for anything done by them, or by them commanded to be done for the levying of any

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(*b*) *Grimshaw* v. *Atterwell*, 8 C. & P. 6: *Whitehouse* v. *Atkinson*, 3 C. & P. 344: *Clarke* v. *Nicholson*, 3 Dowl. 454; 1 C., M. & R. 724: 1 Gale, 21, *S. C.*: and see *Glaspoole* v. *Young*, 9 B. & C. 696.

(*c*) See *Edmondson* v. *Machell*, 2 T. R. 4: *Andrews* v. *Askey*, 8 C. & P. 7: and the cases in Rosc. Ev. 484.

(*d*) See *Watson* v. *Christie*, 2 B. & P. 224; and the cases in Rosc. Ev. 397, 398.

(*e*) *Cheveley* v. *Morris*, 2 W. Bl. 1300.

(*f*) MS., M. 1814.

(*g*) *Pickwood* v. *Wright*, 1 H. Bl. 643: and see *Cheveley* v. *Morris*, 2 W. Bl. 1300: and *post*, Vol. II. Book IV. Part I. Ch. 26.

(*h*) MS., M. 1814.

(*i*) *Tomlinson* v. *Blacksmith*, 2 T. R. 132.

(*k*) 2 Saund. 171 a, b.

(*l*) 28 G. 3, c. 37, s. 24: and see 7 & 8 G. 4, c. 53, s. 119: 6 G. 4, c. 108, s. 92. See *Baldwin* v. *Tankard*, 1 H. Bl. 28: *Laugher* v. *Brefitt*, 5 B. & Ald. 762; 1 D. & R. 417, *S. C.*

penalty, or apprehending of any party, or in the carrying of any such conviction into effect, the plaintiff shall not recover more than 2*d*. damages, (over and above the amount of any penalty levied upon him, if any levy have been made), nor any costs of suit whatever, unless it be expressly alleged in the declaration that such acts were done by the defendant without any reasonable and probable cause; nor shall the plaintiff be entitled to recover the amount of any penalty levied, or any damages or costs whatsoever, if it be proved at the trial that he was guilty of the offence for which he was convicted, &c., and that he had undergone no greater punishment than is assigned by law for such offence (*m*).

Double and Treble Damages.

Double and treble damages are in some cases given by particular statutes; but at common law the damages are always single. Double and treble damages mean double and treble the damages actually given by the jury, and are not reckoned in the same manner as double or treble costs (*n*).

Damages, when Increased.

Damages, when increased, &c.] In actions for mayhem (*o*), and, perhaps, also in the case of an atrocious battery, where the injury to the party remains visible, and the damages given by the jury are inadequate (*p*), the court, upon inspecting the plaintiff, may increase the damages which the jury have given. This, however, is very rarely done. And in other cases the court have refused to amend the *postea*, by increasing the damages given by the jury, although all the jurymen joined in an affidavit, stating their intention to have given such increased damages, and that they conceived their verdict was calculated to give them (*q*). And where damages found by the jury have been calculated upon a value assented to by counsel on both sides, the court will not interfere to reduce the amount of the verdict, on affidavits that counsel were mistaken in that which they assumed as the basis of their calculation (*r*). The proper time for explanations of this kind is at the trial (*s*).

When Reduced.

When reduced.] In what cases the court will *reduce* the damages, see *Vol. II. Book IV. Part I. Ch.* 27, *tit.* "*New Trial.*"

(*m*) 43 G. 3, c. 141: see *post*, Vol. II. Book III. Part II. Ch. 11.

(*n*) *Buckle* v. *Bewes*, 4 B. & C. 154; 6 D. & R. 1, *S. C.* See Vol. II. Book IV. Part I. Ch. 30, tit. "*Costs.*"

(*o*) *Brown* v. *Seymour*, 1 Wils. 5: *Cook* v. *Beale*, 1 L. Raym. 176; 3 Salk. 115, *S. C.*

(*p*) *Austin* v. *Hilliers*, Hardres, 408: *Cook* v. *Beale*, 1 L. Raym. 176; 3 Salk. 115, *S. C.*

(*q*) *Jackson* v. *Williamson*, 2 T. R. 281: and see *Cann* v. *Facey*, 5 N. & M. 405; 4 A. & E. 68, *S. C.*: *Baker* v. *Brown*, 2 M. & W. 199; 5 Dowl. 313, *S. C.* In *Baldwin* and *Gwinn's case*, (Godbolt, 245), where the plaintiff being entitled to treble damages, the verdict was taken for single damages only, the court afterwards increased the amount accordingly; but there the court only gave the finding of the jury its legal effect.

(*r*) *Hilton* v. *Fowler*, 5 Dowl. 312.

(*s*) *Jackson* v. *Williamson*, 2 T. R. 281.

CHAPTER V.

PROCEEDINGS FROM THE POSTEA TO THE ENTRY OF SATISFACTION ON THE RECORD, INCLUSIVE.

SECT. 1.

Book I. Part I.

The Postea.

The Postea. What.

THE *postea* is the endorsement on the *Nisi Prius* record, purporting to be the return of the judge before whom a cause is tried, of what had been done in respect of such record. It states the day of trial, before what judge the cause is tried, and also who is, or who was, the associate of such judge. It also states the appearance of the parties by their respective attornies, or their defaults; it also states the summoning and choice of the jury, whether those who were originally summoned, or those who were *tales*, or taken from amongst the standers-by; it then states the finding of the jury upon oath; and, according to the description of action, it further states the assessment of the damages, together with the occasion thereof, and the costs. Except in special jury causes, it is seldom necessary to state in the *postea* that part of the jury was taken from the standers-by; but in special jury causes this is not unfrequently the case (*a*).

How made out, &c.

At the trial of *Nisi Prius*, the associate makes a minute of the verdict or nonsuit on the pannel, from which minute this *postea* is afterwards made out. If the cause were tried in London or Middlesex, *the associate will deliver the record of* Nisi Prius, *with the distringas or habeas corpora and pannel annexed, to the attorney of the party for whom the verdict was given, or to the defendant's attorney, if the plaintiff were nonsuited; and the attorney must afterwards indorse the* postea *upon it, from the associate's minutes on the pannel.* But if the cause were tried at the assizes, (and the judge do not certify that the party recovering shall be forthwith entitled to execution, in pursuance of 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 2), *the associate will, himself, endorse the* postea, *and deliver it, at the commencement of the following term, to the attorney or agent of the party entitled to it, as above mentioned.* If, however, the judge does so certify in pursuance of that statute, *then the associate will immediately deliver the record of* Nisi Prius, *and the attorney will endorse the* postea *on it, as in causes tried in London or Middlesex.* It may be here observed, that if the plaintiff recover damages as to any part of his cause of action, he is entitled to the *postea*, even though the judge certify to deprive him of costs, under 43 *El.* *c.* 6 (*b*).

In London or Middlesex.

At Assizes.

When Judge certifies under 11 G. 4 & 1 W. 4, c. 70.

(*a*) See Lee, P. Dict., tit. "Postea."

(*b*) *Smith* v. *Edwards*, 4 Dowl. 621.

How proceeded on.

The attorney should take the *postea* to one of the masters, and get it marked "*deliberatur;*" pay him his fee. This may be done at any time before the costs are taxed (*c*). There was formerly a rule in the Common Pleas, that where final judgment was signed upon *posteas*, or inquisitions upon writs of inquiry, such *posteas* or inquisitions should immediately be left with the clerk of the judgments, and should not afterwards be taken out of the office without leave of the court (*d*). The clerk of the judgments, (now one of the masters), however, is authorized, by a rule of that court (*e*), to permit the *posteas* and inquisitions to be taken out of the office, for the purpose of being produced to the sealer of the writs, in order to obtain a writ of execution; but the attorney or agent who procures such *posteas* or inquisitions from the office of the clerk of the judgments, is required by the rule to cause the same to be returned again to the same officer during the office-hours of that day (*f*).

Postea on Trial before the Sheriff.

If the trial was had before the sheriff or his deputy, or the judge of an inferior court, in pursuance of the 3 & 4 *W.* 4, *c.* 42 (*g*), in a cause wherein the demand did not exceed 20*l.*, instead of a *postea*, the verdict will be indorsed on the writ upon which the trial is had, and signed and sealed in the name of the sheriff or judge, and by the jurors; and the sheriff or judge will, on the return of the writ, deliver it so indorsed to the successful party on his applying for it.

Form of Amendment, &c., of.

The *postea* is directed by the late statutory rules of pleading to be in the usual form (*h*). It may be amended, if erroneous (*i*). Where the *postea* was lost, the court ordered a new one to be made out from the issue roll and from the associate's notes (*k*). If an amendment was allowed on the trial, under the 3 & 4 *W.* 4, *c.* 42, *s.* 23 (*l*), the order for such amendment must be indorsed on the *postea* or the writ on which the trial was had, and returned with the record or writ; and thereupon the papers, rolls, and other records of the court, which it may be necessary to amend, should be amended accordingly. And if the trial was had in a court of record, then the order for the amendment must be entered on the roll or other document upon which the trial was had (*m*).

How Recorded in case of Certificate under 1 W. 4, c. 7, s. 2.

By the stat. 1 *W.* 4, *c.* 7, *s.* 2, for having more speedy judgment and execution, it is enacted, that "in all cases where the judge before whom the cause is tried, certifies under his hand, on the back of the record, that, in his opinion, execution ought to issue forthwith, or at some day to be named in such certificate, and subject or not to any condition or qualification, &c., the *postea*, with such a certificate as a part thereof, shall and may be entered of record as of the day on which the judgment shall be signed, although the writ of *distringas juratores*, or *habeas corpora juratorum*, may not be returnable until after such day."

(*c*) See the various forms of *posteas*, Chit. Forms, 92 to 101.

(*d*) R. T., 13 G. 2, r. 2: R. T., 29 Car. 2, r. 5.

(*e*) R. E., 2 W. 4: 8 Bing. 466.

(*f*) See Tidd, New Prac. 537.

(*g*) *Ante*, 292.

(*h*) R. H., 4 W. 4, Sched. No. 2.

(*i*) See Vol. II. Book IV. Part I. Ch. 28.

(*k*) *Dayrell* v. *Bridge*, 2 Str. 1264.

(*l*) *Ante*, 281, 282.

(*m*) 3 & 4 W. 4, c. 42, s. 13.

Sect. 2.

The Judgment.

What.

The judgment is the sentence of the law, pronounced by the court, upon the matter contained in the record; *viz.* in the case of a verdict for the *plaintiff*, the judgment is that he recover his damages and costs, in an action of *assumpsit*, covenant, case, trespass, and replevin; or his debt, damages, and costs, in an action of debt; or his goods, or their value, and damages and costs, in an action of detinue, together with the costs of increase. The judgment as to the *increased costs* is grounded on the statute of Gloucester, 6 *Ed.* 1, *c.* 1, *s.* 2; and as to the *damages*, &c., and *common costs*, it is founded on the verdict (*n*).

Or, if the verdict be for the *defendant*, then that the plaintiff take nothing by his writ, and that the defendant go thereof without day, and also that the defendant recover against the plaintiff the costs and charges he has expended in his defence; and in *replevin*, the judgment at common law for the defendant is, also, that he have a return of the goods; or on the statute 17 *Car.* 2, *c.* 7, for the arrears of the rent and costs.

The practice as to judgments will now be considered under the following heads; *viz.*:—

1. *Time and Mode of Signing and Entering it.*
    - *In what Time after Trial at* Nisi Prius, *where no Certificate for immediate Execution*, 330.
    - *In what Time when there is such Certificate*, 331.
    - *When Signed after Trial before the Sheriff, &c.*, 333.
    - *How Signed, id.*
    - *Form of*, 334.
    - *When and How Entered, &c.*, 337.
    - *Amendment of*, 338.

2. *Docketting and Registering Judgment to affect Lands, &c.*
    - *Generally*, 338.
    - *In Middlesex and Yorkshire*, 341.

3. *Relation and Effect of Judgments.*
    - *Relation of, &c.*, 341.
    - *Judgment, a Charge on Real Property*, 342.
    - *Judgment, a Charge on Public Stock, and Shares in Companies by Order of Judge*, 343.
    - *Interest on Judgments*, 344.
    - *Ca. Sa. a Waiver of Charge, and Securities not realized, id.*
    - *Decrees, Rules, and Orders for Money, have the effect of Judgments*, 345.

1. *Time and Mode of Signing and Entering it.*

In what Time Signed where no Certificate for immediate Execution.

In what Time Signed after a Trial at Nisi Prius, *where no Certificate for immediate Execution.*] Formerly, in the Q. B. it was necessary, in some cases, for the party who obtained a general verdict at *Nisi Prius* to enter a rule *for judgment nisi causâ*, and wait the four days limited by it before he could sign final judgment (*o*). But now, by a rule of all the courts of *H. T.*, 2 *W.*

(*n*) See the various forms of judgment for plaintiff, Chit. Forms, 102 to 109; and for a judgment for defendant, Id. 108.

(*o*) See *Roberts* v. *Stacey*, 13 East, 21: *Thomas* v. *Ward*, 2 B. & P. 393: *Hayward* v. *Ribbans*, 4 East, 310.

4, *r.* 67, "after the return of a writ of inquiry, judgment may be signed at the expiration of four days from such return, and, after a verdict or nonsuit, on the day after the appearance day (*p*) of the return of the *distringas* or *habeas corpora*, without any rule for judgment."

How prevented by Motion for New Trial, &c.

At any time within the four days after the day in *banc*, that is to say, within the first four law-days on which the court actually sit, after the return day of the *distringas* or *habeas corpora* (*q*), if there be so many in term, and if not, then on or before the last day of the term, the party against whom the verdict is given may move to set aside the verdict or nonsuit, and have a new trial (*r*); and if that be refused, he may then move in arrest of judgment, provided indeed he so move within four days after the trial, if there be so many days in the term, and at all events within the term in which the *distringas* or *habeas corpora* is returnable (*s*); but if he do not so move, or if he move and a new trial be refused, or judgment be not arrested, the prevailing party may, *at any time after the fourth day*, sign judgment, tax his costs, and proceed to sue out execution (*t*). The unsuccessful party may also, within this time, move for judgment *non obstante veredicto*, or for a repleader, or *venire facias de novo*. The defendant may also, within the same time, after a point reserved, move that a nonsuit be entered. Where the cause is put in the new trial motion paper, judgment may be signed on the fifth day, unless notice be given (*u*).

May be postponed, and Term's Notice of Signing it unnecessary.

The party entitled to the judgment may postpone the signing it as long as he pleases. And it is not, it seems, necessary to give a term's notice previous to signing the judgment where four terms or more have elapsed since the trial; the rule requiring a term's notice applying only to cases where the plaintiff's neglect to proceed in the cause has occurred before verdict (*v*).

In what Time where Judge certifies for immediate Execution.

In what Time where Judge certifies for immediate Execution.] Formerly, as we have just seen, if the cause was tried and a verdict obtained in vacation, the judgment and execution were, in all cases, delayed by reason of the interval between the terms. Also, in the case of a nonsuit in vacation, judgment could not in any case have been signed until on or after the first day of the next term. But now, by the 1 *W.* 4, *c.* 7, *s.* 2, it is enacted, "that in all actions brought in either of the

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(*p*) The fourth day after the return.

(*q*) *Per Buller*, J., *Lee* v. *Carlton*, 3 T. R. 642: *Kirkman* v. *Marten*, 2 B. & Ald. 613; 1 Chit. Rep. 382, *S. C.*: and see *Mason* v. *Clarke*, 1 Dowl. 288; 1 C. & J. 411, *S. C.* Under particular circumstances, the court may allow a new trial to be moved for after this time, if judgment has not been actually signed. (See *R.* v. *Gough*, 2 Doug. 797: and see R. v. *Holt*, 5 T. R. 436. and further, *post*, Vol. II. Book IV. Part I. Ch. 27).

(*r*) *Post*, Vol. II. Book IV. Part I. Ch. 27.

(*s*) R. H., 2 W. 4, r. 65. By that rule "no motion in arrest of judgment, or for judgment *non obstante veredicto*, shall be allowed after the expiration of four days from the time of the trial, if there are so many days in term; nor in any case after the expiration of the term, provided the jury process be returnable in the same term." (See *Lee* v. *Carlton*, 3 T. R. 642).

(*t*) R. E., 5 G. 2, r. 3 a. See *Blanchenay* v. *Vandenburgh*, 1 B. & B. 298; 3 J. B. Moore, 643, *S. C.*; in which case the plaintiff's attorney obtained a *postea* from the associate in C. P. on the morning of the *quarto die post*, under the pretence of having it stamped, but, instead thereof, signed judgment immediately, and issued execution thereon; the court set aside the judgment and execution, and ordered that the associate should not in future deliver over the *postea* until the morning after the *quarto die post*.

(*u*) *Doe* d. *Duncan* v. *Edwards*, 7 Dowl. 547.

(*v*) *May* v. *Wooding*, 3 M. & Sel. 500.

said courts, by whatever form of process the same may be commenced, it shall be lawful for the judge before whom any issue joined in such action shall be to be tried, in case the plaintiff or demandant therein shall become nonsuit, or a verdict shall be given for the plaintiff or demandant, defendant or tenant, to *certify under his hand* (*y*), *on the back of the record, at any time before the end of the sittings or assizes, that, in his opinion, execution ought to issue in such action forthwith*, or at some day to be named in such certificate, and subject, or not, to any condition or qualification; and in case of a verdict for the plaintiff, then either for the whole or for any part of the sum found by such verdict; in all which cases a rule for judgment may be given, costs taxed, and *judgment signed forthwith*, and *execution may be issued forthwith*, or *afterwards, according to the terms of such certificate*, on any day in vacation or term; and the *postea* (*y*), with such certificate as a part thereof, shall and may be entered of record as of the day on which the judgment shall be signed, although the writ of *distringas juratores* or *habeas corpora juratorum*, may not be returnable after such day: provided always, that it shall be lawful for the party entitled to such judgment to postpone the signing thereof."

Such Judgment may be entered and recorded in Vacation.

Sect. 3 enacts, "that every judgment to be signed by virtue of this act may be entered and recorded (*z*) as the judgment of the court wherein the action shall be depending, although the court may not be sitting on the day of the signing thereof; and every execution issued by virtue of this act shall and may bear *teste* on the day of issuing thereof (*a*); and such judgment and execution shall be as valid and effectual as if the same had been signed and recorded and issued according to the course of the common law."

Staying such Judgment and Execution, and New Trial, &c.

Sect. 4 provides, "that, notwithstanding any judgment signed or recorded, or execution issued, by virtue of this act, it shall be lawful for the court in which the action shall have been brought, to order such judgment to be vacated, and execution to be stayed or set aside, and to enter an arrest of judgment, or grant a new trial or new writ of inquiry, as justice may appear to require; and thereupon the party affected by such writ of execution shall be restored to all that he may have lost thereby, in such manner as upon the reversal of a judgment by writ of error, or otherwise, as the court may think fit to direct" (*b*). The practice as to moving the court to vacate the judgment, or stay or set aside the execution or arrest the judgment, or gran ta new trial, is the same in this as in other cases (*c*).

Rule for Judgment necessary.

Notwithstanding the *R. G. H.*, 2 *W.* 4, *s.* 67, *ante*, 330, it has been held by *Coleridge*, J., that in the Queen's Bench a four-day rule for judgment must be given before final judgment is signed under the above statute (*d*).

(*y*) See a form, Chit. Forms, 100.

(*z*) See *Engleheart* v. *Eyre*, 5 B. & Ad. 70.

(*a*) By stat. 3 & 4 W. 4, c. 67, s. 2, all writs of execution may be *tested* on the day on which the same are issued, and be made *returnable* immediately after the execution of the same. (See *post*, Book I. Part I. Ch. 4, Sect. 4).

(*b*) See *Baddley* v. *Oliver*, 1 Dowl. 598; 1 C. & M. 219, *S. C.*: in which case it was held, that, where a judge at the assizes, pursuance of the above provisions of the 1 W. 4, c. 7, orders that the plaintiff shall have execution within a limited time, and judgnent is thereupon entered up, and execution issued, the defendant is not precluded from applying in the next term to the court above, to enter a suggestion to deprive the plaintiff of costs.

(*c*) See *ante*, 331, 332.

(*d*) *Governors of Poor of Exeter* v. *Livell*, 7 Dowl. 624: but see Jervis's Rules, 30, n.: *Anon.*, E. T. 1832.

When Signed after Trial before the Sheriff.

When signed after Trial before the Sheriff, &c.] By the 18th section of 3 & 4 *W.* 4, *c.* 42, it is enacted, "that, *at the return* of any such writ of inquiry, or writ for the trial of such issue or issues as aforesaid, costs shall be taxed, judgment signed, and execution issued *forthwith;* unless the sheriff or his deputy before whom such writ of inquiry may be executed, or such sheriff, deputy, or judge, before whom such trial shall be had, shall *certify under his hand upon such writ* that judgment ought not to be signed until the defendant shall have had an opportunity to apply to the court for a *new inquiry or trial,* or a *judge* of any of the said courts shall think *fit to order that judgment or execution shall be stayed till a day to be named in such order;* and the verdict of such jury on the trial of such issue or issues shall be as valid and of the like force as a verdict of a jury at *Nisi Prius;* and the sheriff, or his deputy, or judge, presiding at the trial of such issue or issues, shall have the like powers with respect to amendment on such trial as are hereinafter given to judges at *Nisi Prius.*" If, therefore, the sheriff, &c., does not grant this certificate, and no order is made by a judge to delay the judgment, *costs may be taxed, and judgment signed, directly after the verdict, even on the same day* (*e*). If the sheriff grant this certificate, *the defendant must move the court within the first four days of the term after the trial, if it was had in vacation, or, if it was had in term, then within the next four days in the term, if there be so many, and if not, then on or before the last day, for a new trial; and in default of his doing so, the plaintiff may then sign his judgment, and issue execution.* If a judge order the judgment to be stayed until a day named by him, then, of course, it cannot be signed until after that day.

How Signed; Where Judge does not certify for immediate Execution.

How Signed.] If the judge does not certify for immediate execution, under the 1 *W.* 4, *c.* 7, then, on or after the appearance day of the return of the *distringas or habeas corpora, get the record of* Nisi Prius *from the associate, and enter the* postea *on it, in a* town *cause.* Or, *in a* country *cause, the associate will enter the* postea *before he gives you the record, as already mentioned* (*f*). *Take it together with all the briefs and papers in the cause to the master, who will mark the* postea "deliberatur" (*g*), *and afterwards tax the costs and sign judgment.*

Where he does so certify.

If the judge certifies for immediate execution, *then, on or after the expiration of the four days above named, get the record of* Nisi Prius *from the associate, and enter the* postea *on it. Take it with all the papers and briefs, &c., in the cause to one of the masters, who will mark the* postea, *tax the costs, and sign judgment as in other cases.* The statute 1 *W.* 4, *c.* 7, *s.* 6, provides, that the master shall not be compelled to attend and tax costs at any time between the last day of August and the 21st October, in cases where the judge thus certifies for immediate execution.

In case of Trial before Sheriff, &c.

If the trial was had before the sheriff or a judge of an inferior court for a demand not exceeding 20*l.*, according to

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(*e*) *Nicholls* v. *Chambers*, 2 Dowl. 693: 1 C., M. & R. 385, *S. C.*

(*f*) *Ante*, 328.

(*g*) Formerly, the attorney was obliged to get the *postea* marked within two days after he received it: (R. T., 2 J. 1, r. 2); but this rule is not observed at present, and it is usually marked any time before the costs are taxed.

the 3 & 4 *W.* 4, *c.* 42, ante, 292, *then, on the same day the verdict is given, or at any time afterwards*(*h*), (or *in case of the sheriff or other officer having certified, or a judge having made an order to prevent your having immediate judgment, then, on or after the expiration of the time allowed for your signing judgment*), *call at the sheriff's office, and he will deliver to you the writ and his return, with the finding of the jury indorsed thereon. Take the writ and return, together with all the papers and briefs, &c., in the cause, to one of the masters, who will tax the costs, and sign judgment.*

Taxation of Costs.

The subject of taxation of costs is treated of in the Second Volume, *Book IV. Part I. Chap.* 30.

WaivingCosts so as to hasten Execution.

If the plaintiff's attorney will *waive* the recovery of costs from the defendant, it seems that the plaintiff might, at the expiration of the time allowed for that purpose, without giving any notice of taxation, sign judgment, and issue execution; and this, when the debt is large, and the delay arising from the taxation might occasion the loss of it, is sometimes expedient (*i*).

Attending Taxation waives Irregularity.

If the attorney of the opposite party attend the taxation, he thereby waives all irregularity as to the time of signing judgment (*k*); and also as to the due notice of taxation (*l*).

Judgment when complete.

When the costs are taxed and inserted, final judgment is said to be signed (*m*); and the prevailing party may then proceed to sue out execution.

Form of Judgment.

Form of Judgment.] The rule of *H. T.*, 4 *W.* 4, prescribes the form of the judgment in an action on promises commenced by the process prescribed by the Uniformity of Process Act, as follows :—

"[Copy the issue to the end of the award of the *venire*, and proceed as follows :] *Afterwards the jury between the parties is respited until the* [return of *distringas* or *habeas corpora*] *day of* ——, *unless* ——— *shall first come on the* [day of sittings or *Nisi Prius*] *day of* —— *at* ——, *according to the form of the statute in that case made and provided for default of the jurors, because none of them did appear.*"

"*Afterwards, on the* —— [day of signing final judgment] *day of* —— *come the parties aforesaid, by their respective attornies aforesaid,* [or as the case may be], *and* ———, *before whom the said issue was tried, hath sent hither his record had before him in these words.* [Copy *postea*.] *Therefore, it is considered that the said A. B. do recover, against the said C. D., his said damages, costs, and charges by the jurors aforesaid, in form aforesaid, assessed; and also £——— for his costs and charges by the court here adjudged of increase to the said A. B. with his assent, which said damages, costs, and charges in the whole amount to £——; and the said C. D. in mercy, &c.*"

The form thus prescribed for an action on promises may be readily made applicable to other actions.

On Verdict for Plaintiff.

In the case of a verdict for the *plaintiff*, the judgment, as we

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(*h*) *Nicholls* v. *Chambers*, 2 Dowl. 693.

(*i*) See *Somerville* v. *White*, 5 East, 146: *Doe Messiter* v. *Dyneley*, 4 Taunt. 289: *Booth* v. *Parker*, 3 M. & W. 54; Tidd, 994.

(*k*) Tidd, 9th ed. 930.

(*l*) *Wilkins* v. *Perkins*, 2 M. & W. 315; 5 Dowl. 461, *S. C.*

(*m*) *Butler* v. *Bulkeley*, 8 Moore, 104: see 3 N. & M. 724, 713.

have seen (*ante*, 330), is, that he recover his *damages* and costs in an action of *assumpsit*, covenant, case, trover, trespass, and replevin; or his debt, damages, and costs in an action of debt; or his *goods* or their value, and damages and costs, in an action of detinue; and in either case also his costs of increase: or, if the verdict be for the *defendant*, then that the plaintiff take nothing by his writ, and that the defendant go thereof without day, and also that the defendant recover against the plaintiff the costs and charges he has expended in his defence; and in replevin, the judgment at common law, for the defendant, is also that he have a return of the goods, *or*, on the statute 17 *Car.* 2, *c.* 7, for the arrears of the rent and costs. The judgment as to the *increased costs* is grounded on the statute of Gloucester, 6 *Ed.* 1, *c.* 1, *s.* 2; and as to the *damages*, &c., and *common costs*, it is grounded on the verdict (*n*).

For Defendant.

Miscalculation of Damages in.

A mere miscalculation of the damages recovered will not avoid the judgment (*o*).

Capiatur pro Fine or Misericordiâ in.

A *capiatur pro fine* or *misericordiâ* also forms a part of the judgment. If the verdict be for the defendant, the plaintiff (*p*) is adjudged to be amerced (nominally) for his false claim: but if the verdict be for the plaintiff, then—in all actions *vi et armis*, or where the defendant in his pleading has falsely denied his own deed, the judgment contains an award of a *capiatur pro fine* (*q*); in all other cases the defendant is adjudged to be amerced (*r*). This *capiatur* or *misericordia* always formed a part of the judgment at common law; and the produce of it formed no inconsiderable proportion of that part of the queen's revenue arising from her courts of justice. But this has long ceased to be the case. The *misericordia* or *amercement* has long been merely nominal, and not enforced. In actions of trespass and ejectment a *capias pro fine* used to issue in pursuance of the *capiatur*, and the defendant was obliged to compound the fine, by paying some small sum to the master, until, by stat. 5 *W.* & *M.* *c.* 12, it was enacted that no *capias pro fine* should thereafter issue in actions of "*trespass*, *ejectment*, *assault*, or *false imprisonment*," brought in any of the courts at Westminster; but that the plaintiff should pay 6*s.* 8*d.* to the master in satisfaction of the said fine, at the time of signing the judgment, and should be allowed the same in his costs. Since this statute, the *capiatur* is omitted altogether in the judgment in the actions mentioned in the above statute (*s*); but, in all other cases where it was necessary at common law, it should now in strictness be added in the judgment (*t*). At common law, also, the omission of a *capiatur* or *misericordia*

(*n*) See *per Littledale*, J., in *Guest* v. *Elwes*, 5 A. & E. 124. See *post*, Vol. II. Book IV. Part I. Ch. 30, as to costs in general. See the various forms of judgment for plaintiff, Chit. Forms, 102 to 109; and of judgment for defendant, Id. 108. Sometimes the jury expressly award a given sum for costs, and which they may do; but these are wholly distinct from the increased costs which are awarded by the court.

(*o*) *Dunn* v. *Crump*, 7 Moore, 137; 3 B. & B. 309, *S. C.*

(*p*) Pledges for the plaintiff are now wholly dispensed with and omitted in actions commenced by process under 2 W. 4, c. 39. These pledges were also, when in existence, adjudged to be amerced with the plaintiff.

(*q*) 8 Co. 59: 11 Co. 43: *Linsey* v. *Clerk*, 5 Mod. 285; 1 Salk. 54, *S. C.*: F. N. B. 121: Co Lit. 131: 1 Ro. Abr. 219.

(*r*) See *Myddleton* v. *Wynn*, Willes, 600: *Humble* v. *Bland*, 6 T. R. 255.

(*s*) *Linsey* v. *Clerk*, 1 Salk. 55; Carth. 390, *S. C.*: *Westbrooke* v. *Andrews*, 2 L. Raym. 927.

(*t*) *Sed quære*, as it is not in the form (*ante*, 334) prescribed by the recent rules of H. T., 4 W. 4.

was error; but by stat. 16 & 17 *Car.* 2, *c.* 8, the omission of either or the entering of one for the other, shall not be cause for reversing any judgment in the courts of Westminster, or counties palatine, after verdict, or confession by *cognovit actionem* or *relicta verificatione*, or (by stat. 4 *A. c.* 16, *s.* 2), on *nil dicit* or *non sum informatus*, and writ of inquiry executed thereon; and these statutes have been holden to extend to the case of adding a *capiatur*, where there should have been none (*u*). Also it has been holden, that where the plaintiff was by mistake adjudged to be in *misericordia* instead of the defendant, it was no cause of error (*x*).

Entry of Costs in.

If the costs assessed by the jury be omitted in the entry of the judgment, either party may, it seems, assign it as error, even although the omission be to his advantage. And if the costs of increase be in the entry of the judgment said to be assessed by the jury, instead of by the court, it will be error (*y*); but if the judgment be given for the damages, and costs assessed by the jury, the want of judgment for costs of increase is not error (*z*). And by 16 & 17 *C.* 2, *c.* 8, no judgment after verdict in any action, or after a nonsuit in *replevin*, shall be reversed, because the increased costs are not entered to be at the request of the party for whom the judgment is given, or that the costs in any action are not entered to be by consent of the plaintiff. As to costs, generally, see *Vol. II. Book IV. Part I. Ch.* 30.

Of what Day to be Entered of Record.

By rule of all the courts of *H. T.*, 4 *W.* 4, *r.* 3, "all *judgments*, whether interlocutory or final, shall be *entered* of *record* of the *day* of the month and year, whether in term or vacation, when signed, and shall *not have relation* to any other day. Provided that it shall be competent for the court or a judge to order a judgment to be entered *nunc pro tunc*." The latter part of this rule, enabling the court or judge to order a judgment to be entered up *nunc pro tunc*, applies only, as formerly, to cases where it is delayed by the act of the court, as where a case has been argued, and some delay has arisen thereby (*a*).

Pleadings, how Entered in.

"Every *pleading*, as well as the *declaration*, shall be *intituled* of the day of the month and year when the same was pleaded, and shall bear no other time or date; and every *declaration*, and other *pleading*, shall also be *entered* on the *record* made up for trial, and on the judgment roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, *unless* otherwise *specially ordered* by the court or a judge" (*b*).

No Entry of Continuance in.

"No *entry* of *continuances* by way of imparlance, *curia advisari vult*, *vicecomes non misit breve*, or *otherwise*, shall be made upon any record or roll whatever, or in the pleadings, except the *jurata ponitur in respectu*, which is to be retained. Provided that such regulation shall not alter or affect any

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(*u*) *Hackett* v. *Marshall*, 1 Str. 313.

(*x*) *Pullin* v. *Stokes*, 2 H. Bl. 312.

(*y*) Hullock, 650 b: *Hemes* v. *Guie*, Yelv. 107: and see *Ward* v. *Snell*, 1 H. Bl. 10; 1 Ro. Abr. 759, pl. 1—4; 760, pl. 5: *Busby and Milfield's case*, 4 Leon, 61; Jenk. 211, pl. 48: *Guest* v. *Elwes*, 5 A. & E. 127.

(*z*) See the various forms of judgments, Chit. Forms, 102, &c.: and see *Spicer* v. *Teasdale*, 2 B. & P. 49.

(*a*) *Lanman* v. *Lord Audley*, 2 M. & W. 535. And see further as to the construction of this rule, *post*.

(*b*) R. H., 4 W. 4, r. 1. See *ante*, *post*.

existing rules of practice as to the *times* of *proceeding* in the cause" (*c*).

No entry of Warrants in.

"No *entry* shall be made on *record* of any *warrants of attorney* to sue or defend" (*d*).

When, and how Entered, &c.

When, and how entered, &c.] As soon as judgment is signed by the master, the party in whose favour it is given may immediately sue out execution, before the judgment is entered on the roll or docketted. The judgment, however, must be entered on the roll, docketted, and carried to and filed (*e*) in the treasury of the court—1, in order to enable the plaintiff to bring debt or *scire facias* on the judgment ;—2, to proceed against the bail on their recognisance ;—and 3, in case a writ of error is brought.

Formerly, it was requisite to enter the proceedings of record in order to charge the defendant in execution ; but this is no longer the case (*f*).

Rules as to bringing in and Docketing Judgments.

In all other cases, also, by *R. E.*, 17 *J.* 1 ; *E.*, 1657, *r.* 1 ; *M.*, 5 *A. r.* 1, the judgments are ordered to be docketted ; and by *R. M.*, 5 *A. r.* 1 ; *E.*, 5 *W.* 3 ; *E.*, 9 *W.* 3 ; *M.*, 9 *W.* 3 ; *T.*, 10 *W.* 3 ; *E.*, 5 *W.* & *M. r.* 3 ; *E.*, 34 *Car.* 2, *r.* 5 ; 29 *Car.* 2, the rolls of Trinity, Michaelmas, and Hilary terms are ordered to be brought in before the *essoign* (*g*) days of the subsequent terms respectively, and the rolls of Easter term before the first day of Trinity ; after which they are not to be received without the special leave of the court ; and the masters usually attend two days before every term to receive and file the rolls which ought to be so carried in. No great attention, however, seems to be paid to these rules, as they are merely directory ; and rolls are now received after the time mentioned in them, without the leave of the court, upon paying a *post terminum* fee to the master. In one case the court refused to order a judgment roll to be taken off the file, although it had not been carried in for twenty-four years after the judgment, it appearing that the judgment had been marked by the proper officer at the time of signing the same, and had been then regularly docketted, so as to affect purchasers ; but, though the motion was refused, the court, in order to mark their disapprobation of the negligence and delay of the plaintiff's attorney, discharged the rule without costs (*h*). And if the attorney neglect to enter and docket the judgment in due time, by which a loss arises to his client, it seems he would be liable to an action (*i*). The opposite party may also, in most cases, by rule or summons before a judge and his order thereon, compel the attorney for the prevailing party to enter the judgment on the roll, and docket it. The rule for this purpose should, it seems, be addressed to the party in the cause, and not to his attorney (*k*).

It may be as well here again to advert to the recent rules (*l*),

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(*c*) R. H , 4 W. 4, r. 2. See *ante*, 300.

(*d*) Id. r. 4.

(*e*) See *Barrow* v. *Croft*, *infra*.

(*f*) R. H., 2 W. 4, r. 95.

(*g*) Since the 11 G. 4 & 1 W. 4, c. 70, s. 6, *ante*, 90, 91, it should seem, if the rolls be brought in before the *first day* of the term, it would now, in all cases, suffice.

(*h*) *Barrow* v. *Croft*, 4 B. & C. 388; 6 D. & R. 386, *S. C.*: and see *Lord Mohun's case*, 6 Mod. 59.

(*i*) See *Flower* v. *Earl of Bolingbroke*, 1 Str. 639: *Douglas* v. *Yallop*, 2 Bur. 722.

(*k*) *Engler* v. *Twisden*, 4 Bing. N. C. 714.

(*l*) *Ante*, 335, 336. See practice before as to stating in the entry of the judgment the day when it was signed, also the days of the respective deliveries of the pleadings, with a dispensation of any entry of continuances, &c.

Entering nunc pro tunc.

The court will, in general, permit a judgment to be entered *nunc pro tunc*, where it is delayed by the act of the court; but not where it is delayed by a proceeding in the common course of law, as by a writ of error, or the like (*m*).

No entry prior to N. P. Record or Judgment Roll.

By rule of all the courts of *H. T.*, 4 *W.* 4, *r.* 15, "the *entry* of *proceedings* on the *record for trial*, or on the *judgment roll*, (*according to the nature of the case*), shall be taken to be, and shall be, in fact, the first entry of the proceedings in the cause, or of any part thereof, upon record; and no fees shall be payable in respect of any *prior entry* made or supposed to be made on *any roll* or *record* whatever." This rule has abolished the issue roll (*n*).

Judgment, how Entered.

The mode of entering the judgment is thus:—If you have already carried in and docketted your roll, *then all you have to do is to take the* Nisi Prius *record*, (*or the writ for the trial before the sheriff*, &c., *if there was one*), *with the master's allocatur, to the master, who will continue the proceedings and enter the judgment on the roll.* You must also, before 2 & 3 *V.* c. 11, have *docketted the entry of* the judgment in pursuance of 4 & 5 *W.* & *M.* c. 20, in order to bind the defendant's lands or assets in the hands of his heir, executor, or administrator (*o*). But that act, as will presently be more fully noticed, has done away with docketting judgments under 4 & 5 *W.* & *M.* c. 20, and has introduced a substitute in the case of lands, but none in the case of assets in the hands of real or personal representatives.

If the trial was had at *Nisi Prius*, or if the trial was had before the sheriff, &c., and you have not carried in and docketted your roll, *you must enter the issue*, &c., *on the roll, and then in a new paragraph continue the proceedings to the judgment* (*p*).

After the entry of the judgment, the roll is thenceforward called the "judgment roll."

Amendment of Judgments.

Amendment of Judgments.] As to the amendment of judgments, see *Vol. II. Book IV. Part I. Ch.* 28. Where the judgment roll was lost, the court allowed it to be supplied by a new entry (*q*).

2. *Docketting and registering Judgments, to affect Lands, &c.*

The legislative changes made in this branch of law, during sessions 1 & 2 *V.* and 2 & 3 *V.*, are so important, that it will be expedient here to state the statutes on the subject under a separate head, as follows:—

Docketting Judgments under 4 & 5 W. & M. c. 20.

By the second section of 4 & 5 *W.* & *M.* c. 20, (made perpetual by 7 & 8 *W.* 3, c. 36, but which has been repealed as to

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those rules. (*Mohun's case*, 6 Mod. 59: *Bragner* v. *Langmead*, 7 T. R. 20: and see *Calvert* v. *Tomlin*, 2 Moo. & P. 1; 5 Bing. 1, *S. C.*: *Price* v. *Hughes*, 1 Dowl. 448: *ante*, 97).

(*m*) *Bates* v. *Lockwood*, 1 T. R. 637. See the rule of H. T., 4 W. 4, r. 3, *post*, 341. See *Lawrence* v. *Hodgson*, 1 Y. & J. 368, and cases there cited: *Marr* v. *Quin*, 6 T. R. 1.

(*n*) *Hodges* v. *Daly*, B. C., E. T., 1839, Jurist, 287, *Patteson*, J.

(*o*) See *Braithwaite* v. *Watts*, 2 C. & J. 318; 2 Tyrw. 293, *S. C.*: *Hopwood* v. *Watts*, 5 B. & Ad. 1056; 3 Nev. & M. 146: *Hall* v. *Tapper*, 3 B. & Ad. 655.

(*p*) See forms, Chit. Forms, 102 *et seq.*

(*q*) *Douglas* v. *Yallop*, 2 Bur. 722: *Evans* v. *Thomas*, 1 Str. 833.

judgments not docketted before the 4th June, 1839, by 2 & 3 *V.* c. 11, (*infra*), the clerk of the dockets was ordered to docket all judgments entered of Easter and Trinity terms before the last day of Michaelmas term, and those entered of Michaelmas and Hilary terms before the last day of the ensuing terms, respectively, under the penalty of 100*l.* And these dockets were to be entered and kept in books of parchment, and to be searched and viewed by all persons at reasonable times, paying for every term's search 4*d.* and no more. And by the third section of the same act, a judgment which was not *docketted* was not to affect any lands or tenements, as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators in their administration of the ancestor's, testator's, or intestate's estate (*r*). Docketting of the *issue* was not a sufficient docketting of a judgment within the provisions of that act (*s*); and where there was an omission to enter the docket, the court would not allow the entry to be made, *nunc pro tunc* (*t*). It seems that if the judgment were signed and docketted immediately afterwards, then, although the judgment were not carried in, it would be sufficient under 4 & 5 *W.* & *M. c.* 20, to bind the defendant's lands, or assets in the hands of the defendant's heir, executor, or administrator (*u*).

No Judgment, Decree, &c., to affect Real Estate, otherwise than as before the Act, until registered.

Also, by the 19th section of 1 & 2 *V. c.* 110, "No judgment of any of the said superior courts, nor any decree or order in any court of equity, nor any rule of a court of common law, nor any order in bankruptcy or lunacy, shall by virtue of this act affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute, containing the name, and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the court and the title of the cause or matter in which such judgment, decree, order, or rule shall have been obtained or made, and the date of such judgment, decree, order, or rule, and the account* of the debt, damages, costs, or monies thereby recovered or ordered to be paid, shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the same particulars in a book in alphabetical order by the name of the person whose estate is intended to be affected by such judgment, decree, order, or rule; and such officer shall be entitled for any such entry to the sum of five shillings; and all persons shall be at liberty to search the same book on payment of the sum of one shilling."

* *Sic.* in act.

No Judgments to be hereafter Docketted under the Provisions of 4 & 5 W. & M. c. 29.

And by 2 & 3 *V. c.* 11, after reciting that "it is desirable that further protection should be afforded to purchasers against judgments, crown debts, and *lis pendens*," it is enacted, "that no judgment shall hereafter (4th June, 1839) be docketted under [4 & 5 *W.* & *M. c.* 20], (*ante*, 338), but that all such dockets shall be finally closed immediately after the passing of this act, without prejudice to the operation of any judgment already docketted and entered under the said recited

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(*r*) See *Hickey* v. *Haylor*, 1 Esp. 313; 6 T. R. 384, *S. C.*: *Steel* v. *Rorke*, 1 B. & P. 307: *Wait* v. *Garth*, Barnes, 261.

(*s*) *Braithwaite* v. *Watts*, 2 C. & J 318; 2 Tyrw. 293, *S. C.*

(*t*) *Hopwood* v. *Watts*, 5 B. & Ad. 1056; 3 Nev. & M. 146.

(*u*) See *Barrow* v. *Croft*, 4 B. & C. 388; 6 D. & R. 386, *S. C.*

act, except so far as any such judgment may be affected by the provisions hereinafter contained."

Judgment already Docketted must also be Registered.

And section 2, enacts, "that no judgment already docketted and entered under the said recited act of their late majesties King William and Queen Mary [4 & 5 *W. & M. c.* 20] shall after the first day of August, One thousand eight hundred and forty-one, affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until such memorandum or minute thereof as is prescribed in an act passed in the first and second years of her present majesty Queen Victoria, intituled, 'An act for abolishing arrest on mesne process in civil actions, except in certain cases; for extending the remedies of creditors against the property of debtors; and for amending the laws for the relief of insolvent debtors in England,' (1 *V. c.* 110, *s.* 19), shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the same in manner thereby directed in regard to judgments; and such officer shall be entitled for any such entry to the sum of five shillings."

The Date when the Memorandum of Judgment is left to be entered in a book.

And section 3 directs, "that, in addition to the entry by the said last-mentioned act [1 & 2 *V. c.* 110] or by this act required to be made in a book by the senior master, of the particulars to be contained in every memorandum or minute left with him of any judgment, decree or order, rule or order, he shall insert in such book the year and the day of the month when every such memorandum or minute is so left with him."

Judgment void after Five Years from Entry, unless registered afresh.

And section 4 makes judgments, though registered under 1 & 2 *V. c.* 110, or 2 & 3 *V. c.* 11, void, after five years from registration, as against purchasers, mortgagees, and creditors, unless a fresh registry be made "within five years before the execution of the conveyance, settlement, mortgage, lease, or other deed or instrument vesting or transferring the legal or equitable right, title, estate, or interest in or to any such purchaser or mortgagee for valuable consideration, or as to creditors, within five years before the right of such creditors accrued, and so, *toties quoties*, at the expiration of every succeeding five years." Re-entry fee, 1*s.*

Judgments, though registered, not to affect Purchasers or Mortgagees without Notice, more extensively than Judgments would hitherto have done.

And the 5th section provides and enacts, "that as against purchasers and mortgagees *without notice* of any such judgment, decrees or orders, rules or orders, as aforesaid, none of such judgments, decrees or orders, rules or orders, shall bind or affect any lands, tenements, or hereditaments, or any interest therein, further or otherwise or more extensively in any respect, *although duly registered*, than a judgment of one of the superior courts aforesaid would have bound such purchaser or mortgagee before the said act of the first and second years of the reign of her present majesty [1 & 2 *V. c.* 110], where it had been duly docketted according to the law then in force."

Not to revive Judgments already extinguished or barred.

And the 6th section provides and enacts, "that nothing in the said recited act of her present majesty nor in this act contained shall extend to revive or restore any judgment which shall be extinguished or barred, nor shall the same extend to affect or prejudice any judgment as between the parties thereto, or their representatives, or those deriving as volunteers under them."

When and how to be registered in Middlesex or Yorkshire.

When and how to be registered in Middlesex or Yorkshire.] Also, in order to bind lands in Middlesex or Yorkshire, it is necessary to file a memorial of the judgment in the registry office of such counties respectively; before which, the lands shall not be affected or bound by the judgment (*r*). For this purpose, *engross a memorial of the judgment upon a* 10*s. stamped piece of parchment* (*s*), *and write at the bottom of it a certificate of judgment having been signed* (*s*). *Take this to one of the masters, who, upon seeing the* postea (*or the writ and sheriff's return, &c., if the trial was had before the sheriff*) *and allocatur, will sign the certificate. Then write an affidavit of the master's having signed the certificate, upon the same parchment,* (*for which purpose the parchment has also a* 2*s.* 6*d. stamp*), *and swear it before a judge of the court in which the judgment was obtained, or before a master in Chancery; pay* 1s. *And, lastly, take the parchment thus containing the memorial, certificate, and affidavit, and file it with the registrar at the registry office in Bell-yard* (*if the lands be in Middlesex*); *pay him* 5*s.*

3. *Relation and Effect of Judgments.*

3. Relation &c of Judgments.

Relation and Effect of Judgments.] By the common law, the judgment had relation to the first day of the term whereof it was entered, unless from the record itself it appeared that it could not have that relation (*t*). But now by a statutory rule of *H. T.*, 4 *W.* 4, *r.* 3, "all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, *and shall not have relation to any other day*. Provided, that it shall be competent for the court or a judge to order a judgment to be entered *nunc pro tunc*" (*u*). Previously to the rule of *H. T.*, 4 *W.* 4, the courts would, in certain cases, have allowed judgment to be entered *nunc pro tunc* where a delay was occasioned by the act of the court, but not where it was occasioned by the act of the party, or by a proceeding in the common course of law, and this seems to be the principle by which they are still governed (*x*).

As to Freehold Property.

As to freehold land by statute 29 *C.* 2, *c.* 3, *ss.* 13, 14, 15, it is provided that, as far as relates to *purchasers bonâ fide for a valuable consideration*, a judgment shall affect the lands, tenements, and hereditaments of the party only from the time it is signed; to ascertain which, the master, in signing the judgment, must mention on the record the time of signing it; and the same shall be stated in the margin of the judgment roll when the judgment is entered (*y*). As to how the relation of judgments is affected by the several statutes requiring them to be docketted and registered in certain cases, see the last division of this section (*ante*, 338 to 341).

As to Chattels.

As to chattel property, the judgment does not, at law, affect

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(*r*) 5 A. c. 18, s. 4: 6 A. c. 35, s. 19: 7 A. c. 20, s. 18: 8 G. 2, c. 6. ss. 1, 18.

(*s*) See the form, Chit. Forms, 109.

(*t*) See *Swan* v. *Broome*, 3 Bur. 1596: *Littleton* v. *Cross*, 3 B. & C. 317; 5 D. & R. 175, *S. C.*: *Whitaker* v. *Whitaker*, 8 B. & C. 768: *Greenway* v. *Fisher*, 7 Id. 436: *Haswell* v. *Thorogood*, Id. 705.

(*u*) Although the rule mentions judgments only, the effect of it is that there is now no relation back in other proceedings, such as appearances, &c. (*Watson* v. *Dore*, 2 M & W. 386: see *Colbron* v. *Hall*, 5 Dowl. 534).

(*x*) *Lanman* v. *Lord Audley*, 2 M. & W. 345: *Vaughan* v. *Wilson*, 4 Bing. N. C. 116: 6 Dowl. 201, *S. C.*: *Lamberth* v. *Barrington*, 2 Bing. N. C. 149; 4 Dowl. 150, *S. C.*

(*y*) This enactment is extended to the counties palatine by 8 G. 1, c. 25, s 6: see *Hugh* v. *Robinson*, 1 T. R. 118: *Savil* it in the hands of the defendant, chattel property being bound only by the delivery of the writ of execution to the sheriff (*z*). And even the delivery of the writ to the sheriff does not change the property in goods, but merely binds them so as to enable the execution creditor to pursue his claim; but subject to that, the defendant may deal with the goods as he pleases, and if he dispose of them in market overt, the right of the execution creditor ceases altogether (*a*). But in equity, chattels real are in some cases affected by the judgment if duly registered (*infra*).

As to the relation of judgments in the case of a charge upon public stock, or shares in a company, see *post*, 343.

Action does not waive Lien.

It may as well be here observed, that, by bringing an action of debt on a judgment, the lien created by the judgment is not thereby waived (*b*).

The subject of relation is incidentally noticed in several parts of title "Execution" (*post*, *Book I. Part I. Chap.* 5, *Sect.* 4).

Judgment, a Charge on real Property.

Judgment a Charge on Real Property.] By the act for abolishing imprisonment for debt, which came into force on 1st October, 1838, (1 & 2 *V. c.* 110, *s.* 13,) it is enacted, "that a judgment already entered up, or to be hereafter entered up, against any person in any of her majesty's superior courts at Westminster, shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments (including lands and hereditaments of copyhold or customary tenure) of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might without the assent of any other person exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body and all other persons whom he might without the assent of any other person cut off and debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents, and hereditaments; and that every judgment-creditor shall have such and the same remedies in a court of equity against the hereditaments so charged by virtue of this act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had by writing under his hand agreed to charge the same with the amount of such judgment-debt and interest thereon: provided that no judgment-creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment, or in cases of judgments already

Charge not to be enforced till after the Expiration of a Year.

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v. *Wiltshire*, Willes, 428, n

(*z*) 29 C. 2, c. 3, s. 16: see Godb. 161; 8 Co. 171.

(*a*) *Samuel* v. *Duke*, 6 Dowl. 536; 3 M. & W. 622, S. C.

(*b*) *Erby* v. *Erby*, 1 Salk. 80.

entered up, or to be entered up before the time appointed for the commencement of this act, until after the expiration of one year from the time appointed for the commencement of this act; nor shall such charge operate to give the judgment-creditor any preference in case of the bankruptcy of the person against whom judgment shall have been entered up, unless such judgment shall have been entered up one year at least before the bankruptcy: provided also, that as regards purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this act, such judgment shall not affect lands, tenements, or hereditaments, otherwise than as the same would have been affected by such judgment if this act had not passed: provided also, that nothing herein contained shall be deemed or taken to alter or affect any doctrine of courts of equity whereby protection is given to purchasers for valuable consideration without notice."

Proviso as to Purchasers, &c.

In order to obtain the benefit of this section as against purchasers, mortgagees, or creditors, it is necessary that the judgment should be registered as pointed out *ante*, 339.

Judgment, a Charge on Public Stock and Shares in Companies by Order of a Judge.] The 14th section of the same act (1 & 2 *V. c.* 110) enacts, "that if any person against whom any judgment shall have been entered up in any of her majesty's superior courts at Westminster shall have any Government stock, funds, or annuities, or any stock or shares of or in any public company in England, (whether incorporated or not), standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior courts, on the application of any judgment-creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment-creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment-debtor; provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order."

Judgment, a Charge on Public Stock and Shares in Companies by Order of a Judge.

And "in order to prevent any person, against whom judgment shall have been obtained, from transferring, receiving, or disposing of any stock, funds, annuities, or shares, thereby authorized to be charged for the benefit of the judgment-creditor under an order of a judge," it is further enacted by sect. 15, "that every order of a judge charging any Government stock, funds, or annuities, or any stock or shares in any public company, under this act, shall be made in the first instance *ex parte*, and without any notice to the judgment-debtor, and shall be an order to shew cause only; and such order, if any Government stock, funds, or annuities, standing in the name of the judgment-debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain the Governor and Company of the Bank of England from permitting a transfer of such stock in the meantime and until such order shall be made absolute or discharged; and if

Order of Judge to be made in the first instance ex parte, and on Notice to the Bank or Company to operate as a Distringas.

any stock or shares of or in any public company, standing in the name of the judgment-debtor in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall in like manner restrain such public company from permitting a transfer thereof; and that if, after notice of such order to the person or persons to be restrained thereby, or in case of corporations to any authorized agent of such corporation, and before the same order shall be discharged or made absolute, such corporation or person or persons shall permit any such transfer to be made, then and in such case the corporation or person or persons so permitting such transfer shall be liable to the judgment-creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and that no disposition of the judgment-debtor in the meantime shall be valid or effectual as against the judgment-creditor; and further, that, unless the judgment-debtor shall within a time to be mentioned in such order shew to a judge of one of the said superior courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment-debtor, his attorney or agent, be made absolute: provided that any such judge shall, upon the application of the judgment-debtor, or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit."

Order may be discharged or varied.

What Case within this Section.

As to the construction of this section, it has been decided that money deposited in the hands of a third party for the defendant, as the price of land sold by him to a public company, cannot be attached by the order of a judge, and *Parke*, B., in refusing the rule, said, "The purchase-money is not a part of the funds of the company within the 14th section, and the 12th clause refers only to money, &c., in the hands of the debtor himself, and not in the custody of a trustee on his behalf" (*a*).

Application, how made.

The application for this purpose may be made to any judge of the superior courts. No previous demand or application to the defendant is necessary (*b*).

Interest on Judgments.

Interest on Judgments.] The 17th section enacts, "that every judgment-debt shall carry interest at the rate of £4 per centum per annum from the time of entering up the judgment, or from the time of the commencement of this act, (1st October, 1838), in cases of judgments then entered up and not carrying interest, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment." As to allowing interest where a writ of error is brought, see *post*, 378.

Ca. Sa. a Waiver of Charges or Securities not realized.

Ca. Sa. a Waiver of Charges or Securities not realized.] By the 16th section of 1 & 2 *V. c.* 110, a creditor who causes his debtor to be taken or charged in execution thereby relinquishes all claim to any charge or security to which he may be entitled under that act. See this subject more fully noticed *post, Book I. Part 1, Chap.* 5, *Sect.* 4.

(*a*) *Robinson* v. *Peace*, 7 Dowl. 93.

(*b*) *Blake* v. *White*, Equity Exch. 1839; *Alderson*, B., 3 Jurist, 749.

Decrees, Rules, and Orders for Money, have the Effect of Judgments.

Decrees, Rules, and Orders for Money, have the Effect of Judgments.] The 18th section of the act by which this change is effected, together with the law on the subject, will be found stated in *Vol. II.*, title, "Motions and Rules."

◆

Sect. 3.

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1. *Writ of Error generally.*

What.] A writ of error is an original writ issuing out of the Court of Chancery, in the nature as well of a *certiorari* to remove a record from an inferior to a superior court, (excepting in the case of error *coram nobis*, or *vobis*), as of a commission to the judges of such superior court to examine the record, and to affirm or reverse the judgment according to law (*c*). The writ is grantable *ex debito justitiæ* in all cases except in treason or felony (*d*); and, in general, lies for some error or defect in substance, that is, not aided, amendable, or cured at common law, or by some of the statutes of amendment or jeofails (*e*); and it lies to the *same* court in which the judgment was given, or to which the record was removed by writ of error, or to a superior court (*e*).

In what Cases it lies.

In what Cases it lies.] A writ of error lies, where a person is aggrieved by an error in the foundation, proceeding, judgment, or execution of a suit (*f*), provided it be an error in substance, not aided at common law or by some of the statutes of jeofail: (as to the defects so aided, see *Vol. II. Book IV. Part I. Ch.* 28). It can be brought only on a judgment, or an award in nature of a judgment (*g*), given in a court of record, acting according to the course of common law (*h*): but when the court acts in a summary manner, or in a new course different from the common law, a *certiorari*, and not a writ of error, lies (*i*). And if the court where the judgment is given be not a court of record, the judgment can be reviewed by a superior court, only by virtue of a writ of false judgment (*k*). The judgment, however, upon which error is brought, must be final, and not merely interlocutory (*l*). Yet this, it should seem, must be understood with some qualification; for from the old cases it may be collected, that wherever by common law the plaintiff might have the effect of his action by a judgment by default, (as, for instance, in real actions), if a statute afterwards give damages in such an action, so as to make it a mixed action, the plaintiff may bring a writ of error on a judgment by default (*m*), or on demurrer (*n*). And error may be brought on a judgment of nonsuit (*o*).

In what Cases granted.

In what Cases granted.] A writ of error is grantable *ex debito justitiæ*, and not *ex merâ gratiâ*, in all cases except treason and felony (*p*).

When to be brought.

When to be brought.] No judgment in any real or personal

(*c*) 2 Saund. 100, n. : 2 Bac. Abr., 448.

(*d*) *Regina* v. *Paty*, 2 Salk. 504: *Christie* v. *Richardson*, 3 T. R. 78: *Bleasdale* v. *Darby*, 9 Price, 606.

(*e*) Tidd, Prac. 9th ed. 918, 116; Tidd, New Prac. 591.

(*f*) Co. Lit. 289, b.

(*g*) Ib.: 2 Bac. Abr., Error, (A 2): and see Style, 265.

(*h*) *Groenvelt* v. *Burwell*, 1 Salk. 263; 2 Bac. Abr., Error, (A 1).

(*i*) Id.: 1 L. Raym. 213, 252, 454: Carth. 494: Comyns, 80.

(*k*) Finch, L. 484. And see as to the writ of false judgment, 2 Sellon, 410, 411, 423—427: *Scott* v. *Bye*, 2 Bing. 344; 9 Moore, 649, *S. C.*: 10 Went. 2, 3, 271. See forms, Chit. Forms, Index, tit. "False Judgment."

(*l*) *Samuel* v. *Judin*, 6 East, 333; 3 Salk. 145: but see 19 Ass. 8; Ro. Abr. 675. See as to judgment of *respondeas ouster*, *Smith* v. *Milles*, 2 Tidd, 1195: see also *Walsh* v. *Andrews*, 1 Jebb & Symes, Rep. Q. B., Ireland, 111.

(*m*) 17 E. 3. 21, 33: Ro. Abr. 749, 750, 751.

(*n*) Ro. Abr. 750, 751: and see March, 89; Noy, 66; Palm. 1, 2.

(*o*) Ro. Abr. 744, 742: *Newell* v. *Pidgeon*, 1 Str. 235: *Box* v. *Bennett*, 1 H. Bl. 432: *Kempland* v. *Macaulay*, 4 T. R. 436: see *Mee* v. *Hopkins*, 2 D. & R. 208: *Evans* v. *Swete*, 2 Bing. 326; 9 Moore, 609, *S. C.*

(*p*) *Reg.* v. *Paty*, 2 Salk. 504: and see 1 Sid. 69: 3 Bulst. 71; 2 Leon. 194; 1 Ro. Rep. 175: *Bleasdale* v. *Darby*, 9 Price, 606.

action shall be reversed or avoided for any error or defect therein, unless the writ of error be brought and prosecuted with effect within twenty years after such judgment signed and entered of record; provided the party against whom the judgment is given be not an infant, *feme covert*, *non compos mentis*, or in prison or beyond sea; in which cases the writ of error must be brought within twenty years after such disability ceases (*q*). On account of the exceptions in this statute as to infants, &c., the defendant can have advantage of it only by pleading it, even although the objection appear upon the record (*r*); and therefore the court have refused to quash a writ of error, upon motion, although it appear to have been brought twenty-nine years after the judgment was signed (*s*).

Before Judgment signed.

The writ, however, may be brought and bear *teste* even before the judgment is signed (*t*); and this is the usual practice, in order to prevent execution. It may be returnable at any time after the judgment is given (*u*), but not before it (*v*); yet where the plaintiff purposely deferred signing judgment until the writ of error was spent, the court ordered a new writ of error at the expense of the plaintiff's attorney (*x*); and had execution been sued out, the court would have set it aside (*y*).

By and against whom to be brought.

By and against whom to be brought.] A writ of error can be brought by him only who was party or privy to the record, or injured by the judgment, and who, consequently, will derive advantage from its reversal (*z*). It may, therefore, be brought either by the parties themselves, or by their heirs, executors, or administrators (*a*). If lands descend to a man *ex parte maternâ*, and he lose them by an erroneous judgment, and die, his heir *ex parte maternâ*, not *ex parte paternâ*, shall have the writ of error (*b*). So the younger son, when entitled to land by the custom of borough English, shall have the writ of error, and not the heir at common law; for this remedy descends with the land (*c*). So, if tenant in tail female lose his lands by an erroneous judgment, and die, the writ of error must be brought by the issue female, and not by the son (*d*). If tenant in tail lose his estate by an erroneous judgment, and die without issue, the immediate remainder-man or reversioner may bring error (*e*); and if the remainder-man or reversioner were in any manner made a party to the record, he may bring the writ of error even during the life of

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(*q*) 10 & 11 W. 3, c. 14.

(*r*) *Street* v. *Hopkinson*, Hardw. 345; 2 Str. 1055, *S. C.*: *Higgs* v. *Evans*, 2 Str. 837.

(*s*) *Higgs* v. *Evans*, 2 Str. 837.

(*t*) March, 140: *Baker* v. *Bulstrode*, 1 Vent. 255: *Perrie's case*, Moore, 461: *Jaques* v. *Nixon*, 1 T. R. 280: *Somerville* v. *White*, 5 East, 145: *Emanuel* v. *Martin*, 2 M. & Sel. 334.

(*u*) Before the doctrine of relation to the term was abolished by the rule, *ante*, 336, it might be made returnable at any time in the term of which the judgment was given. (See *Cluther* v. *Thinn*, 2 Sid. 104; 1 Str. 632).

(*v*) *Prydyerd* v. *Thomas*, 1 Vent. 96; Latch, 133: and see *Bridier* v. *Thomas*, 1 Sid. 466: *Roy* v. *Tunmer*, Id. 311.

(*x*) *Arden* v. *Lamley*, Barnes, 250.

(*y*) *Jaques* v. *Nixon*, 1 T. R. 280: see *post*, 359.

(*z*) Ro. Abr. 747: Dy. 90: *Randall's case*, 2 Mod. 308.

(*a*) See Godb. 377: 1 Leon. 261: but see *Randall's case*, 2 Mod. 308.

(*b*) 1 Leon. 261: 2 Sid. 56: and see Owen, 68: Godb. 377.

(*c*) Owen, 68: 1 Leon. 261: 4 Id. 5: and see Bridg. 79: 1 Ro. Rep. 311.

(*d*) Ro. Abr. 747: 1 Leon. 261: Dy. 90:

(*e*) 3 Co. 3 b: and see *Sheepshanks* v. *Lucas*, 1 Bur. 410: Ro. Abr. 755, 796: *Lord Norris* v. *Marquis of Winchester*, Cro. El. 2: and see *Sir R. Champernowne* v. *Sir R. Godolphin*, Cro. Jac. 160, 161.

the tenant in tail (*f*). In cases, however, where he was not a party to the record, and cannot therefore bring the writ of error until after the death of the tenant in tail without issue, yet the writ of error, it seems, must be brought (if at all) within twenty years from the time of the judgment, and not merely from the time of the accruing of the remainderman's or reversioner's title to possession (*g*). If lessee for life lose his lands by an erroneous judgment, the immediate remainderman or reversioner may bring a writ of error: at common law, it could not be brought until after the lessee's death; but, by stat. 9 *R.* 2, *c.* 3, it may be brought during the continuance of the estate for life (*h*). If there be judgment against the principal, and also judgment against the bail, the principal cannot have error on the judgment against the bail (*i*), nor the bail on the judgment against the principal (*k*), nor can they join in a writ of error (*l*), because the judgments are several, and affect distinct persons (*m*).

By Party for whom Judgment is given.

A writ of error is usually brought by the party against whom the judgment is given; but a plaintiff may bring error to reverse his own judgment, if he be dissatisfied with it, in order that he may be enabled to bring a new action (*n*).

By Husband and Wife.

Also, if an action be brought against a *feme covert* as a *feme sole*, and she plead to issue as a *feme sole*, if judgment be given against her, and she be taken in execution, she and her husband may bring a writ of error, for otherwise he might be prejudiced by the loss of her society (*o*); indeed, if she were to sue out the writ in her own name, without joining her husband, the court, upon application, would quash it (*p*). So, if an action be brought against a *feme covert* and others, they may all join with the husband in a writ of error (*q*).

By one of several Parties.

Where a judgment is given against several, any of them may bring a writ of error; but it must be in the names of all, otherwise the court will quash it (*r*); for otherwise this inconvenience would ensue, that every defendant might bring a writ of error by himself, and by that means delay the plaintiff from having the benefit of his judgment, though it should be affirmed once or oftener. And so strict are the courts in this respect, that, although one of the parties may have died, yet he must be named in the writ, and his death stated, though the writ may be brought by the survivors alone (*s*). The death in such a case may be alleged in the writ thus: "*Be-*

(*f*) 3 Co. 4: 8 H. 4, 5: Bro. Error, 39.

(*g*) *Lloyd* v. *Vaughan*, 2 Str. 1257.

(*h*) 3 Co. 4 a: *Anon.*, 5 Mod. 397: 2 Saund. 46 a.

(*i*) Ro. Abr. 749: 2 Leon. 4: *Bushell* v. *Yallar*, Cro. Car. 408: *South* ats. *Griffith*, Id. 481.

(*k*) Ro. Abr. 749: Style, 39: *Bushell* v. *Yallar*, Cro. Car. 408: *Atherton* v. *Hole*, 1 Lev. 137.

(*l*) *Lancaster* v. *Keyleigh*, Cro. Car. 300, 408: *Anon.*, Id. 561: *Healings* v. *Mayor, &c., of London*, Id. 574: *Sir J. Sandelow* v. *Deverton*, Cro. Jac. 384: *Forest* v. *Sir J. Sandland*, Hob. 72; 1 Ro. Rep. 294: *Atherton* v. *Hole*, 1 Lev. 137: Lit. 93.

(*m*) See *South* ats. *Griffith*, Cro. Car. 481; Style, 174; *Burr* v. *Attwood*, Carth. 447.

(*n*) *Johnson* v. *Jebb*, 3 Burr. 1772.

(*o*) Ro. Abr. 749, 759: 2 Ro. Rep. 53: Style, 254, 280: see *per Parke*, B., in *Evans* v. *Chester*, 2 M. & W. 847: and *per Lord Ellenborough*, C. J., in *Cooper* v. *Hunchin*, 4 East, 520.

(*p*) *M'Namara* v. *Fisher*, 8 T. R. 302.

(*q*) Ro. Abr. 747.

(*r*) MS., E. 1814: *Laroche* v. *Wasbrough*, 2 T. R. 738: *Knox* v. *Costello*, 3 Bur. 1789: *Brewer* v. *Turner*, 1 Str. 233: *Cooper* v. *Ginger*, Id. 606: *Vavasor* v. *Faux*, 1 Wils. 88: *Gerrard* v. *Arnold*, 1 L. Raym. 405: *Burr* v. *Attwood*, Id. 328: *Walter* v. *Stokoe*, Id. 71; Ro. Abr. 747; Dy. 89; 3 Leon, 176: *Bishop of Gloucester and Saracre's case*, Cro. El. 65; Style, 406: *Hacket* v. *Herne*, Carth. 7; 3 Mod. 134: *Spencer* v. *Rutland*, Yelv. 209: *Rous* v. *Etherington*, 2 L. Raym. 870: *Ginger* v. *Cowper*, Id. 1403: 1 Stra. 606, *S. C.*: *Ratcliff* v. *Burton*, Hardw. 135: Palm. 151.

(*s*) *Brewer* v. *Turner*, 1 Str. 233.

cause, in the record and proceedings, and also in the giving of judgment, in a plaint which was in our court before you and your companions, our justices of the bench, by our writ, between J. N. [for whom the judgment was given] *and J. S., late of* ——, *and G. H.* [those against whom it was given], *which said G. H. is since deceased, &c., to the great damage of the said J. S., who hath survived the said G. H. &c.*" (*t*). If, after error brought by one of several plaintiffs or defendants in the names of all, the others refuse to come in and join with him in the assignment of errors, they must be summoned and severed; after which he may proceed in the writ of error alone (*u*), and the court will give him time to assign errors, until the others can be summoned and severed (*x*). But if, in trespass against three, there be judgment against two of them by default, and the third justifies, and it is found for him, the two against whom judgment was given can alone join in a writ of error; for the other cannot say that the judgment was to his prejudice (*y*); and the same if the two had been found guilty by verdict, and the other acquitted (*z*). The writ, however, in these cases should describe the record as it really is, including all the parties to it, alleging the error to be to the "great damage" of those who bring the writ of error (*a*). Also, where an action was brought against two, one of whom was outlawed, and judgment passed against the other, and the latter thereupon brought a writ of error in his own name; an objection being taken that the writ should have been brought in the names of both, the court overruled it, saying that the writ, as to one of the defendants, was determined by the outlawry (*b*). And in all cases where a writ of error is brought by some of several defendants, notwithstanding it may be liable to be quashed on this account, it still has the effect of removing the record, and is a *supersedeas* of execution as to all the defendants (*c*).

Where all the parties should have joined, and have not, if the defendant in error proceed without quashing the writ, and the judgment be affirmed, he can sue out execution against those only who were parties to the writ (*c*).

Agreement not to bring Error.

And it must be observed, that, if a party or his attorney enter into an agreement not to bring a writ of error, he is afterwards precluded from bringing it, though there be manifest error in the record (*d*); or, if he bring it, the court on motion will order him to *nonpros* it (*e*). And the court are so strict in this respect, that, where the defendant's attorney agreed not to bring a writ of error in the *action*, they held that the defendant's executors were thereby precluded from bringing error on a judgment in a *scire facias* which was brought against them to revive the judgment upon the death of the defendant (*f*).

(*t*) 2 Saund. 101 e.

(*u*) Lord *Cromwell* v. *Andrews*, Yelv. 3, 4; Cro. El 891, *S. C.*: *Lancaster* v. *Lowe*, Cro. Jac. 94: and see *Shepherd* v. *Orchard*, 6 Mod. 40: *Winne* v. *Lloyd*, 1 Lev. 146.

(*x*) *Frescobaldi* v. *Kinaston*, 2 Str. 783. See a form of the writ of summons, Thes. Brev. 301.

(*y*) *Cannon* v. *Abbott*, 1 Lev. 204: *Parker* v. *Lawrence*, Hob. 70: but see Style, 190.

(*z*) *Verelst* v. *Rafael*, Cowp. 425.

(*a*) *Lady Cass* v. *Title*, 2 Str. 682.

(*b*) *Oliver* v. *Hunning*, 1 L. Raym, 691: and see Palm. 151.

(*c*) *Laroche* v. *Wasbrough*, 2 T. R. 737.

(*d*) *Camden* v. *Edie*, 1 H. Bl. 21: *Cates* v. *West*, 2 T. R. 183: *Brown* v. *Lord Granville*, 2 Dowl. 796.

(*e*) *Executors of Wright, Bart.*, v. *Nutt*, 1 T. R. 388.

(*f*) Ib.: see *post*, 360.

Against whom to be brought.

As to the defendants in error the general rule is, that the writ of error must be brought against him only who was party or privy to the first judgment, or his heirs, executors, or administrators (*g*); and as to the number of defendants, the rule is the same as that relating to plaintiffs. However, where one only of two defendants in error appeared, and sued out a *sci. fa. quare executionem non*, and the plaintiff thereupon assigned errors; this was deemed a waiver of the objection that the other defendant should have joined (*h*).

By what Attorney.

You may sue out and prosecute a writ of error by a different attorney from that employed by you in the original action, without obtaining a judge's order to change your attorney (*i*).

In what Court to be brought.

In what Court to be brought.] The writ of error is brought either in the same court in which the judgment was given, or to which the record has before been removed by a former writ of error, or in another and a superior court.

Coram Nobis, for Errors in Process.

If, upon a judgment in the Court of Queen's Bench, there be error in the process, or through the default of the clerks, it shall be reversed by writ of error returnable in the same court (*k*). This writ is called "error *coram nobis*;" because the record and process upon which it is founded are stated in the writ to remain "*before us*," that is, in the Court of Queen's Bench; the writ (as is the case with all original writs) running in the Queen's name.

Coram Vobis in C. P.

So, if, upon a judgment in the Common Pleas, there be error in the process, or through the default of the clerks, it shall be reversed for error returnable there. The writ in this case is called "error *coram vobis*;" because the record and process upon which it is founded are stated in the writ to remain "*before you* and your associates," that is, in the Court of Common Pleas; the writ being directed to the chief justice of that court (*l*).

Error in Fact.

Also, where the error is in fact and not in law, a writ of error *coram nobis* in the Queen's Bench, or *coram vobis* in the Common Pleas, lies in the same court; as where the defendant, being under age, appeared by attorney (*m*); but a defendant in ejectment cannot assign this for error (*n*). So, where the plaintiff or defendant was a married woman at the commencement of the suit (*o*), or died before verdict or interlocutory judgment (*p*), or the like.

When Writ of Error on Record removed, quashed.

Also, if a record be removed into the Queen's Bench by writ of error, and the writ of error be quashed for insufficiency (*q*), or for any fault but variance between it and the record (*r*), a writ of error *coram nobis* may then be sued out of that court upon the record so removed; and if this latter writ be also quashed for insufficiency, you may have a second writ of

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(*g*) 9 H. 6, 46: Bro. Error, 9: Ro. Abr. 749: and see 1 Ro. Rep. 302.

(*h*) *Knox* v. *Costello*, 3 Bur. 1789.

(*i*) *Batchelor* v. *Ellis*, 7 T. R. 337. See further, upon the subject of parties to a writ of error, Bac. Abr., Error (B): 2 Saund. 101 e, 101 f.

(*k*) F. N. B. 21: Poph. 181: Ro. Abr. 746: *Hopkins* v. *Wiegglesworth*, 2 Lev. 38: *Prior* v. ——, Vent. 207: *Coxe* v. *Cropwell*, Cro. Jac. 5.

(*l*) F. N. B. 21: Poph. 181: Roll. Abr. 746: 2 Lev. 38.

(*m*) Style, 406: Danver's Abr. vol. 2, Error, pl. 13: and see 21 J. 1, c. 13, s. 2: and see *Bird* v. *Pegg*, 5 B. & Ald. 418.

(*n*) *Goodright* v. *Wright*, 1 Str. 33.

(*o*) See Ro. Abr. 747, 748, 752: Style, 254, 280: 2 Ro. Rep. 53.

(*p*) 2 Saund. 101.

(*q*) *Walker* v. *Stokoe*, Carth. 368, 369.

(*r*) *Cooper* v. *Ginger*, 1 Str. 607; 2 L. Raym. 1408, *S. C.*

error *coram nobis* (*s*). And the same practice prevails in the Common Pleas. So, if a writ of error in the Court of Queen's Bench, after the removal of the record, abate, either by the judgment of the court, or by plea, death, or otherwise, a writ of error *coram nobis* lies to that court (*t*). And it has been decided that if plaintiff in error die pending the writ, and the Court of Queen's Bench, notwithstanding, proceed to reverse the judgment, the defendant in error may bring error *coram nobis* there upon this judgment of reversal, and assign the death of the plaintiff to the former writ as error (*u*). But error *coram nobis*, it seems, does not lie in that court, upon a judgment of affirmance given there (*x*), nor after affirmance in the Exchequer Chamber (*y*), nor does it lie in the Exchequer Chamber after a writ of error from the Court of Queen's Bench has abated there by death or otherwise, a transcript only, and not the record itself, being always removed there; consequently, there must be a new writ of error (*z*). Also, it may be observed that no writ of error for error in *fact* can be brought either in the Exchequer Chamber or House of Lords (*a*).

But if the error be in the judgment itself, and not in the process, a writ of error does not lie in the same court (*b*), but must be brought in another and superior court.

For Error in Law from Q. B.

From the Queen's Bench a writ of error at common law lay in all cases immediately to the House of Lords, whether upon judgments in causes originally commenced in the Queen's Bench, or brought there by writ of error (*c*). But now a writ of error upon any judgment (not being the reversal or affirmance of the judgment of an inferior Court (*d*), and not being a case in which the Queen is a party), given by the Queen's Bench, must be made returnable before the judges of the Common Pleas, and the barons of the Exchequer in the Exchequer Chamber; and from the judgment thereupon given in the Exchequer Chamber there is no writ of error except to the House of Lords (*e*). A writ of error, therefore, still lies to the house of Lords, first, after a reversal or affirmance of a judgment of the Queen's Bench in the Exchequer Chamber; secondly, without a previous writ of error to the Exchequer Chamber, upon the reversal or affirmance by the Queen's Bench of the judgment of an inferior Court; and thirdly, where the Queen is a party. *Qui tam* actions do not fall within the exception as to the Queen (*f*).

From C. P. and Exchequer.

From the Common Pleas a writ of error lies to the Exchequer Chamber, before the judges of the Queen's Bench and the barons of the Exchequer, and afterwards to the House of Lords; from the law side of the Exchequer to the Exchequer

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(*s*) *Walker* v. *Stokoe*, Carth. 369, 370; 1 L. Raym. 564.

(*t*) 2 Saund. 101 a.

(*u*) Ro. Abr. 747: Cro. El. 105: 4 Leon. 60.

(*x*) *Burleigh* v. *Harris*, 2 Str. 975: but see *Winchurch* v. *Belwood*, 1 Salk. 337.

(*y*) *Lambell* v. *Pretty John*, 2 Str, 690.

(*z*) 2 Saund. 101 a.

(*a*) Ib.: *Castledine* v. *Mundy*, 4 B. & Ad. 97: *Roe* v. *Moore*, Com. Rep. 597: *Hopkins* v. *Weigglesworth*, 2 Lev. 38: *Prior* v. ——, 1 Vent. 207, 208: *Rew* v. *Long*, Cro. Jac. 5: *Knoll's case*, 2 Salk. 145: but see *Prior's case*, Cro. El. 731: *Wilkes* v. *Jorden*, Hob. 5: *Sir J. Fitzherbert* v. *Sir E. Leach*, Cro. Car. 514: W. Jones, 410, 411.

(*b*) 7 H. 6, 30: Ro. Abr. 749.

(*c*) 37 H. 6, 13: 11 E. 4, 9: Ro. Abr. 745.

(*d*) *Ricketts* v. *Lewis*, 1 C. & J. 11.

(*e*) 11 G. 4 & 1 W. 4, c. 70, s. 8.

(*f*) *Lloyd* v. *Skutt*, 1 Doug. 353, and n. (91); T. Raym. 275: *Whitton* v. *Preston*, 1 Sid. 240.

Chamber, before the judges of the Queen's Bench and the Common Pleas, and afterwards to the House of Lords (*g*). Also, from the law side of the Exchequer, in cases where the Queen is a party, to the Exchequer Chamber, before the Lord Chancellor and Lord Treasurer, calling to their assistance the judges of the Courts of Queen's Bench and Common Pleas, or some of them (*h*), and from thence to the House of Lords (*i*); from the Exchequer in Scotland to the House of Lords (*k*); and from the Queen's Bench and Court of Exchequer Chamber in Ireland, also to the House of Lords (*l*). But, for error in *fact*, a writ of error will not lie from the Common Pleas to the Exchequer Chamber, but only in the Court of Common Pleas *or* to the Queen's Bench (*m*).

From Inferior Courts of Record.

To the Queen's Bench, either for error in fact (*n*), or error in law, a writ of error lies from all inferior courts of record in England, proceeding according to the rules of the common law (*o*), (with the exception of those in London, and in some other places, which shall be noticed presently (*p*); and after judgment of affirmance or reversal in the Queen's Bench, a writ of error lies to the House of Lords. A writ of error lies in the Queen's Bench upon a judgment in the County Palatine (*q*).

From Cinque Ports.

Upon a judgment given in the Cinque Ports, no writ of error lies to the Court of Queen's Bench; but by custom such judgment is examinable by bill, in nature of a writ of error, before the Lord Keeper or Warden in the Cinque Ports, in his Court of Shepway (*r*). So, upon a judgment given in the Court of Stannaries of the Duchy of Cornwall, no writ of error lies to the Queen's Bench; but the error is examinable upon appeal to the Warden of the Stannaries, and from him to the Prince, or, if there be no Prince, to the King's Council (*s*); provided the judgment have been for a matter touching the Stannaries (*t*).

From Stannaries Courts.

From Courts of London.

Upon a judgment in the sheriff's court, or at the law side of the Mayor's Court of the city of London, a writ of error lies to the Court of Hustings, and from thence to commissioners appointed for that purpose by commission under the Great Seal (usually five of the judges); and from thence to the House of Lords (*u*).

In what Cases Amendable.

In what Cases Amendable.] A writ of error was not amendable at common law (*x*). But now, by 5 *G.* 1, *c.* 13, all writs of error, wherein there shall be any variance from the original record, or other defect, may and shall be amended and made agreeable to such record, by the respective courts where such

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(*g*) 11 G. 4 & 1 W. 4, c. 70, s. 8.

(*h*) 31 Ed. 3, c. 12.

(*i*) 2 Bac. Abr. 213: 4 Inst. 105.

(*k*) 6 Ann. c. 26, s. 12.

(*l*) 39 & 40 G. 3, c. 67.

(*m*) See *Castledine* v. *Mundy*, 4 B. & Ad. 90, 97: *Roe* v. *Moore*, Com. 597.

(*n*) *Binns* v. *Pratt*, 1 Chit. Rep. 369.

(*o*) If the court proceeds summarily, or a new mode not known to the common law, the proper writ for removing its judgment is *certiorari*, not writ of error. (2 Saund. 101, n. (1)).

(*p*) 4 Inst. 21, 22: Finch. L. 480: Dy. 250.

(*q*) 4 Inst. 214, 223: Ro. Abr. 745: but see as to Durham, 4 Inst. 218.

(*r*) 4 Inst. 224.

(*s*) Ro. Abr. 745.

(*t*) 3 Bulst. 183: see Owen, 8: *Aike* v. *Hunkin*, 1 Sid. 233.

(*u*) 6 Bro. Parl. Ca. 181: *Ballard* v. *Bennett*, 2 Bur. 777: *Cole* v. *Greene*, 1 Lev. 309; 2 Saund. 253, 101 b.

(*x*) *Thomson* v. *Crocker*, 1 Salk. 49: *Walter* v. *Stokoe*, 1 L. Raym. 564, 71.

writs of error shall be made returnable. Therefore, where a writ of error was brought jointly with one who should not have been joined, the court allowed the writ to be amended by striking out his name (*y*). So, a mistake in the name of one of the parties has been amended (*z*); in another case the writ was amended by adding parties (*a*); and in another by altering even the description of the form of action (*b*). But when the writ is returnable before judgment is given, this is a fault which cannot be amended (*c*).

The amendment in this case is now allowed, as a matter of course, without costs (*d*); but if the rule be also to amend the assignment of errors, it is upon payment of costs (*e*). According to the statute, the writ is to be amended by the court in which it is returnable: yet this seems to be only in cases where the original record, and not a transcript merely, is removed into such court; and therefore, upon a writ of error from the Queen's Bench to the Exchequer Chamber, it was holden that the writ should be amended in the Court of Queen's Bench, where the original record lay (*f*). Upon amending a writ of error, new bail must be put in to the amended writ, in the court below (*g*).

In what Cases Quashed, &c.

In what Cases Quashed, and Costs on.] After the transcript has been returned and filed (*h*), the defendant in error may move the court in which the writ of error was returnable (*i*), to quash it, for some fault not amendable within the stat. 5 *G.* 1, *c.* 13, above mentioned: as, for having been returnable before the judgment was given (*k*); but where the defendant had ruled the plaintiff in error to assign, and the latter had assigned, and the defendant joined in error, which had been argued, and the judgment of the Common Pleas reversed, the Queen's Bench refused at that stage to quash the writ of error on account of its having been returnable in the term before that of which the judgment of the Common Pleas was signed (*l*). The writ also may be quashed as to one judgment, and stand good for another; as, where upon a judgment in *scire facias*, against bail, the defendants brought a writ of error *tam in redditione judicii quam in adjudicatione executionis*, the court quashed the writ as far as it related to the original judgment, (the bail having no right to bring error upon the judgment against their principal), and ruled it to stand good *quoad* the judgment against the bail on the *scire facias* (*m*).

(*y*) *Sword Blade Company* v. *Dempsey*, 2 Str. 892; Fitz. 201; 1 Barnard, 405, 421: *Verelst* v. *Rafael*, Cowp. 425; 2 W. Bl. 1067, *S. C.*

(*z*) *Barnard* v. *Guy*, 2 Smith, 259.

(*a*) *Lady Cass* v. *Title*, 2 Str. 682: see *Baker and Another, Assignees &c.* v. *Neaver*, 1 C. & M. 112; 1 Dowl. 618, *S. C.*: but see *Cooper* v. *Ginger*, 1 Stra. 606; 2 L. Raym. 1403, *S. C.*: *Walter* v. *Stokoe*, 1 Id. 71: *Hackett* v. *Herne*, Carth. 8: *R.* v. *Inhabitants of All Saints, Derby*, 2 Str. 1110: *M'Namara* v. *Fisher*, 8 T. R. 308.

(*b*) *Sampayo* v. *De Payba*, 5 Taunt. 82.

(*c*) *Wright* v. *Canning*, 2 Str. 807; 2 L. Raym. 1531, *S. C.*: 1 Barnard, 62, 65: *Rejindoz* v. *Randolph*, 2 Str. 834: *Vice* v. *Burton*, Id. 891: *Wilson* v. *Ingoldsby*, 2 L. Raym. 1179: see *ante*, 347: *sed vide infra*.

(*d*) *Gardner* v. *Merrett*, 2 Str. 902; 2 L. Raym. 1587, *S. C.*: Fitz. 268.

(*e*) Fitz. 268.

(*f*) *Ratter* v. *Redstone*, 2 Str. 837: *Tully* v. *Sparkes*, Id. 869. The transcript may be amended. (*Danvers* v. *Pinder*, 1 Wils. 337).

(*g*) *Rafael* v. *Verelst*, 2 W. Bl. 1067.

(*h*) *A'Court* v. *Swift*, 1 L. Raym. 329.

(*i*) *Lloyd* v. *Skutt*, 1 Doug. 350—353: see *Foster* v. *Laidler*, 6 D. & R. 174, and the note.

(*k*) *Stevens* v. *Ingram*, 3 Taunt. 384.

(*l*) *Nowell* v. *Roake*, 5 B. & C. 735; 1 M. & R. 175, *S. C.*

(*m*) *Burr* v. *Attwood*, Carth. 447; 1 L. Raym. 328, *S. C.*; and see *South* v. *Griffiths*, Cro. Car. 481.

So, if a writ of error be sued out against good faith—for instance, if a defendant obtain time to plead upon the condition of giving judgment of the term; as this must be deemed an undertaking to give an available judgment, if the defendant bring error, the court upon application will quash the writ (*n*). Notwithstanding the defect in the writ of error, for which it is quashed, still the record, if therein properly described, is removed by it, and remains in the superior court after the writ is quashed (*o*).

Costs on.

Costs are payable by the plaintiff in error, in all cases, upon quashing a writ of error (*p*), even where none were recoverable in the original action (*q*); it being enacted by stat. 4 *A.* *c.* 16, *s.* 25, that, upon quashing a writ of error for variance from the original record, or other defect, the defendant in error shall recover against the plaintiff issuing out such writ his costs, as he should have had if the judgment had been affirmed. And this includes the costs of quashing the writ of error (*r*). But if the writ were rendered defective by the defendant's own acts, as by entering continuances on the judgment, or by delaying to sign it until the writ of error was spent, the defendant in error will not be allowed his costs (*s*): but, on the contrary, the court will oblige him to pay the costs of the plaintiff (*t*).

In what Cases it Abates.

In what Cases it Abates.] A writ of error abates where the plaintiff in error (*u*) dies *before* error assigned; in which case the defendant in error must sue out a *scire facias executionem non* against the executors to revive the judgment before he can sue out execution (*x*). But if he die *after* errors assigned, the writ does not abate, but the defendant must join in error, and proceed to have the judgment affirmed, if not erroneous, and, if there had been only one plaintiff in error, should afterwards revive the judgment by *scire facias* against his executors (*y*). Where, however, there are several plaintiffs in error, the writ does not abate by the death of one (*z*).

By Death of Plaintiff in Error.

Not by Death of Defendant in Error.

But the death of the defendant in error does not abate the writ; and much less the death of one of several defendants (*a*). If a sole defendant, or all the defendants die, the executors or administrators may be made parties by *scire facias ad audiendum errores* (*b*), and be thereby compelled to join in

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(*n*) *Cave* v. *Massey*, 4 D. & R. 624; 3 B. & C. 735, *S. C.*: *Cates* v. *West*, 2 T. R. 183: see *ante*, 347.

(*o*) MS., E. 1814: *Laroche* v. *Wasbrough*, 2 T. R. 737: *Ginger* v. *Cowper*, 2 L. Raym. 1403; 1 Str. 606, *S. C.*: *Ratcliff* v. *Burton*, Hard. 135; 2 Saund. 100, n.: *Prydyerd* v. *Thomas*, 1 Vent. 97: and see 2 Bac. Abr., Error, (D. 1): see *Sampayo* v. *De Payba*, 5 Taunt. 82: *Craswell* v. *Thompson*, 4 D. & R. 153: *Lloyd* v. *Skutt*, Doug. 353.

(*p*) *Ginger* v. *Cowper*, 2 L. Raym. 1403; 1 Str. 606, *S. C.*: *M'Namara* v. *Fisher*, 8 T. R. 302.

(*q*) *Archbishop of Dublin* v. *Dean of Dublin*, 1 Str. 262.

(*r*) *Ginger* v. *Cowper*, 2 L. Raym. 1403: 1 Str. 606, *S. C.*

(*s*) *Gould* v. *Conethurst*, 1 Str. 139.

(*t*) *Rejindoz* v. *Randolph*, 2 Str. 834.

(*u*) 7 East, 207: *Spenser* v. *Rutland*, Yelv. 208: *Anon.*, 1 Vent. 34.

(*x*) 2 Saund. 101 n.: and see *Spenser* v. *Rutland*, Yelv. 208: *Howard* v. *Pitt*, Carth. 236: *Penoyer* v. *Brace*, Id. 404: *Ld. Kinnaird* v. *Lyall*, 7 East, 296.

(*y*) 2 Saund. 101 n. (o): and see *Lord Kinnaird* v. *Lyall*, 7 East, 296.

(*z*) *Clarke* v. *Rippon*, 1 B. & Ald. 586: but see *Penoyer* v. *Brace*, 1 L. Raym. 244: 1 Salk. 319, *S. C.*: *Parker* v *Harris*, Id 261.

(*a*) 1 Salk. 319: 1 L. Raym. 244: *Ludlow* v. *Lennard*, 2 Id. 1295: *Anon.*, 1 Vent. 34: *Wicket* v. *Creamer*, 1 Salk. 264; 1 L. Raym. 439; 1 Show. 180, *S. C.*: see *Bates* v. *Lockwood*, 1 T. R. 637.

(*b*) The rule of H. T., 4 W. 4, r. 13, does not dispense with such a writ of *scire facias* in such a case.

error (*c*); or if one of several defendants die, upon suggesting the death upon the roll, you may proceed against the survivor (*d*). The plaintiff, in such a case, must assign errors as in other cases (*post*, 369). If the defendant die, after errors assigned, the survivors or the executors, &c., may proceed till judgment is affirmed, as if the defendant were living; and then, in case of the death of a sole defendant, his executors must revive the judgment by *scire facias* (*e*).

By Death of Chief Justice.

By the death of the chief justice before he has made and signed his return, the writ of error becomes ineffectual (*f*), and the defendant, with the leave of the court, may sue out execution (*f*). But if the return have been signed by the chief justice, it may be certified after his death (*g*).

By Marriage.

The writ may also abate by the act of the party; as where a *feme sole*, plaintiff in error, married pending the writ, the writ thereby abated, and the court gave the defendant leave to sue out execution, although the plaintiff and her husband had brought a second writ of error (*h*). Also, where a *feme sole*, defendant in error, married, and the plaintiff pleaded this matter in abatement to the *scire facias quare executionem non*, (when that writ was in force), the court allowed the defendant's writ of *sci. fa.* to be quashed without costs (*i*). But bankruptcy is no abatement of a writ of error; and the proceedings after it by the assignees shall be in the bankrupt's name (*k*).

Bankruptcy.

By Prorogation or Dissolution of Parliament.

A writ of error in parliament is not abated by a prorogation (*l*) or dissolution (*m*); but the proceedings continue in the same state in which they were at the time of such prorogation or dissolution.

Effect of Abatement.

The effect of abatement of a writ of error is, that the plaintiffs or their representatives may sue out and prosecute a new writ (*n*); yet, if it has abated by the act or default of the party, the second writ is no *supersedeas* (*o*); and the defendant may sue out execution even without the leave of the court (*p*); but if it have abated by the act of God, or by act of law, the second writ will be a *supersedeas* (*q*); and the defendant in error, even if no second writ be brought, cannot sue out execution without the leave of the court (*r*).

Remittitur unnecessary.

Formerly, when a writ of error in the Exchequer Chamber abated, or was discontinued, the transcript must have been remitted, and a *remittitur* entered, before the defendant could sue out execution. And the same, it should seem, of a writ of error in parliament. But this *remittitur*, as will be seen, *post*, 380, is no longer requisite, and execution may be sued out without it.

When Discontinued.

When Discontinued.] If the plaintiff in error make default

(*c*) *Wicket* v. *Creamer*, 1 Salk. 264; 1 L. Raym. 439; 1 Show. 186, *S. C.*; 2 Saund. 101 (*o*): *Wright* v. *Treweeke*, Barnes, 432.

(*d*) See a form of the suggestion, Lill. Ent. 217.

(*e*) *Wright* v. *Treweeke*, Barnes, 432; 2 Saund. 101 (*o*).

(*f*) *Olorenshaw* v. *Staignforth*, Barnes, 201, *bis*: *Hayes* v. *Thornton*, Id.; 2 Saund. 101 (*o*).

(*g*) *Allen* v. *Shaw*, 1 Sid. 268.

(*h*) *Jenkins* v. *Bates*, 2 Str. 1015: *Buller* v. *Lusitano*, Id. 880.

(*i*) *Pocklington* v. *Peck*, 1 Str. 638.

(*k*) *Kretchman* v. *Beyer*, 1 T. R. 463.

(*l*) T. Raym. 383: *Gofton* v. *Sedgwick*, 2 Lev. 93.

(*m*) Ord. Dom. Proc. 18 March, 1678.

(*n*) See *Hartop* v. *Holt*, 1 Salk. 263: 1 L. Raym. 97; 5 Mod. 238, *S. C.*: Comb. 393, 19; 12 Mod. 105, *S. C.*

(*o*) *Sir F. Duncombe's case*, 1 Mod. 285: *Anon*, 1 Vent. 100, *S. C.*: *Hartop* v. *Holt*, 1 Salk. 263; 1 L. Raym. 97, *S. C.*

(*p*) *Birch* v. *Triste*, 8 East, 412.

(*q*) 1 Keb. 658, 686: *Anon.*, 1 Vent. 335.

(*r*) *Ld. Kinnaird* v. *Lyall*, 7 East. 296.

after errors assigned, the writ of error will thereby be discontinued. Formerly, if he did not assign errors within the term next after the record was certified, it would have been a discontinuance (*s*); but it has since been determined otherwise (*t*). Upon a discontinuance, the defendant in error is entitled to costs (*u*).

2. *Writ of Error from the Court of Queen's Bench, Common Pleas, and Exchequer of Pleas, to the Exchequer Chamber.*

The cases in which a writ of error lies from the Queen's Bench, Common Pleas, and Exchequer of Pleas, to the Exchequer Chamber, have already been noticed, *ante*, 351.

The Writ.

The Writ.] The writ runs in the Queen's name, and is directed to the chief justice or chief baron of the court in which the judgment was given; it being a general rule, that a writ of error must be directed to the person before whom the judgment was given (*x*), or his successor, and in whose custody the record then is (*y*). It is tested on the day on which it is sued out; and which need not be a seal day (*z*). It may bear teste even before the judgment is signed, and this is the usual practice, in order to prevent execution (*a*). It states the plaint below, and, in general, recites shortly the 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 8, and commands the chief justice or chief baron, that he send before the judges, or judges and barons, as the case may be, of the two other superior courts of law, in the Exchequer Chamber, on a particular day, a transcript of the record, &c. It may be made returnable at any time in the term of which the judgment is given, but not before it (*a*). It is not necessary that there should be fifteen days between the teste and return of it (*b*).

Must agree with Record.

Care must be taken, in all cases, that the writ corresponds with the record intended to be removed, in the names and additions of the parties (*c*), in the description of the court in which the judgment was given (*d*), and in the description of the action (*e*); for the court can proceed only on that record, which the writ authorizes them to examine.

As to the cases in which the court will amend the writ of error, when it varies from the record, see *ante*, 351.

If there be several records in the court below, between the same parties, with which the description in the writ of error agrees, the court below may remove which of them they please (*f*).

(*s*) F. N. B. 20.

(*t*) 3 Salk. 145: Tidd, 1070.

(*u*) 3 H. 7, c. 10: 8 & 9 W. 3, c. 11: and see *post*, 379.

(*x*) Godb. 44: 1 Salk. 264, 265.

(*y*) 4 Inst. 105.

(*z*) *Hill* v. *Tebb*, 1 New Rep. 298.

(*a*) *Ante*, 347.

(*b*) *Laidler* v. *Foster*, 4 B. & C. 116; 6 Dowl. & R. 174. See the form, Chit. Forms, 110.

(*c*) See 2 Ro. Rep. 210: Palm. 152: *Dashwood* v. *Cooper*, 2 Mod. 285: *Walter* v. *Stokoe*, 1 L. Raym. 71; Carth. 368, *S. C.*: *Cooper* v. *Ginger*, 1 Str. 606: *Wraight* v. *Kitchingman*, Id. 200: *Hunt* v. *Lawson*, 1 L. Raym. 347: *Sherley* v. *Underhill*, Hob. 327: Hut. 41: *Mason* v. *Fox*, Cro. Jac. 633: Style, 153: *Williams* v. *Jenkins*, 1 Sid. 104: *Booth* v. *Beard*, Id. 193: *Ingoldsby* v. *Martin*, 1 Str. 316: *Laroche* v. *Wasbrough*, 2 T. R. 737: *Prydyerd* v. *Thomas*, 1 Vent. 97.

(*d*) See *Gibbons* v. *Saunders*, 2 L. Raym. 819: Style, 344: 2 Saund. 291: Ro. Abr. 752: Style, 191, 203: *Lord Cromwell* v. *Andrews*, Yelv. 3 b; Cro. El. 891, *S. C.*: Noy, 44; Godb. 248: 2 Ro. Rep. 15; Dy. 77.

(*e*) *Darby* v. *Aneley*, 2 L. Raym. 1170; 2 Salk. 660, *S. C.*: *Sampayo* v. *De Payba*, 5 Taunt. 82; 2 Ro. Rep. 22: *Rhodam* v. *Watson*, 2 L. Raym. 1220: *Collins* v. *Sevington*, 3 Salk. 398.

(*f*) *Prydyerd* v. *Thomas*, 1 Vent. 96: 1 Sid. 466, *S.C.*: *Rinch* v. ——, T. Raym. 189.

Writ Tam Quam.

Where the error is supposed to be as well in giving the judgment as in awarding execution upon it, as in *scire facias* to revive a judgment, the writ of error is said to be *tam quam*, or, in the words of the writ, *tam in redditione judicii, quam in adjudicatione executionis* (*g*).

How Sued out.

How sued out.] *Make out a præcipe for the writ, stating the names of the parties, the form of action, and whether the judgment were upon verdict, or inquiry, &c., and stating where and when the writ is to be made returnable* (*h*). *Take this to the cursitor of the county in which the venue was laid in the original action, who will make out the writ, and get it sealed at the next general seal, or (if expedition be requisite) at a private seal. If it be sealed at a general seal, pay him* 1*l.* 10*s.* 6*d.* ; *if at a private seal,* 8*s.* 6*d. more.*

Allowance of it, and how far a Supersedeas of Execution.

Notice of Allowance.

Allowance of it, and how far a Supersedeas of Execution.] *Take the writ to one of the masters of the court in which the judgment was given without delay* (*i*), *and he will allow it, and give you a note of allowance* (*k*). *Make a copy of this note, (stating at the foot some particular ground of error) and serve it upon the attorney of the opposite party, at the same time shewing him the original* (*k*). By general rule of all the courts of *H. T.*, 4 *W.* 4, *r.* 9, "no *writ of error* shall be a *supersedeas* of *execution* until service of the *notice* of the *allowance* thereof, *containing a statement of some particular ground of error* intended to be argued: provided, that if the error stated in such notice shall appear to be *frivolous*, the court or a judge, upon summons, may order execution to issue" (*l*). This note of allowance may be served before the plaintiff is entitled to sign final judgment (*m*) ; and it is usual to serve at the time of taxing the costs, in order to prevent the other party from suing out execution. The sheriff and his officers, if he execute a *fi. fa.* &c., after this notice of allowance, would be liable in trespass (*n*). The note of the allowance must properly describe the form of action ; if it mis-describe, it is no stay whatever of plaintiff's proceeding to execution (*o*). *Also, if the ground of error specified in the notice of allowance appears to be frivolous, the party on whom the notice is served should take out a summons, or apply to the court, calling on the opposite party to shew cause why execution should not issue, notwithstanding the allowance. Proceed on the summons or application to the court as in ordinary*

(*g*) 2 Saund. 101 g: *Street* v. *Hopkinson*, 2 Str. 1055: Hardw. 345, *S. C.*

(*h*) See the form, Chit. Forms, 110.

(*i*) R. E., 36 C. 2.

(*k*) See the form, Chit. Forms, 111.

(*l*) Before the above rule of M. T., 4 W. 4, the allowance itself was a *supersedeas*, (see R. H., 2 W. 4, r. 83), and the service of the copy of the note of allowance only was necessary in order to bring the opposite attorney into contempt, should he afterwards sue out execution. (*Jacques* v. *Nixon*, 1 T. R. 280: Ro Abr. 492: *Capron* v. *Archer*, 1 Bur. 340: *Bickerton* v. *Lewis*, Barnes, 275. *Smith* v. *Cave*, 3 Lev. 312: *Morfoot* v. *Chivers*, 1 Str. 632: *Meriton* v. *Stevens*, Willes, 271: *Lane* v. *Bacchus*, 2 T. R. 44: *Gravall* v. *Stimpson*, 1 P. & P. 478: *Meagher* v. *Vandyck*, 2 Id. 370: *Hawkins* v. *Jones*, 5 Taunt. 204: see *Thorpe* v. *Beer*, 2 B. & Ald. 373). The rules of M. T., 4 W. 4, and H. T., 2 W. 4, do not apply to errors in fact; a writ of error, therefore, *coram nobis* or *vobis*, is a *supersedeas* from the time of notice that it is sued out, not from the time of allowance only. (*Levy* v. *Price*, 2 M. & W. 533).

(*m*) *Payne* v. *Whaley*, 2 B. & P. 137: see *Somerville* v. *White*, 5 East, 145: *Stevens* v. *Ingram*, 3 Taunt. 384.

(*n*) *Belshaw* v. *Marshall*, 4 B. & Ad. 336: and see *Bleasdale* v. *Darby*, 9 Price, 606: *Meriton* v. *Stevens*, Willes, 271.

(*o*) *Green* v. *Okill*, 1 Dowl. 422: *Hills* v. *Spilsbury*, Id. 421.

cases, and endeavour to obtain the desired rule or order, which will be made if the judge or court think that the ground of error is frivolous, and merely for delay. If the notice of allowance contains no statement of a ground of error, *the defendant in error may at once sue out execution, without any application to the court or a judge;* but if the notice contains any statement of the ground of error, however frivolous or insufficient, the attorney for the defendant in error must not take upon himself to treat it as a nullity, and issue execution; if he did, he would be guilty of a contempt punishable by attachment (*p*). In a recent case, a notice of the allowance of a writ of error in an action of *slander*, stating the grounds of error to be, that the declaration and count thereof was bad, the words not being actionable without special damage, and that the *innuendoes* were bad in law, was considered a sufficient statement of the ground of error (*q*). Where the point stated in the notice of the allowance had been argued, and decided on a rule granted to arrest the judgment, the Court of Exchequer refused to allow execution to issue as upon a frivolous ground of error (*r*).

Putting in and perfecting Bail.

Besides this notice of the allowance of the writ of error, it is requisite, in order that the writ should operate as a *supersedeas* of execution, that the plaintiff in error should *put in and perfect bail*, in all cases in which the judgment in the original action was for the plaintiff, unless the court or a judge shall otherwise order (*s*). As to the cases where bail in error is not requisite, and when a judge may dispense with it, see *post*, 358, 359. As to the time for putting in the bail, if the writ of error is sued out, and allowed *before* final judgment, (or even before interlocutory judgment (*t*),) and the judgment is afterwards signed either before the writ of error is returnable, or in the same term, or if it is signed in the following vacation as of the term in which the writ was returnable, the writ and notice of allowance will be *supersedeas* of execution (*u*); provided bail in error be put in and notice thereof given (*x*) within four clear days after the judgment is signed (*y*); the writ in this case having effect, and the allowance and notice thereof operating, only from the time of signing the judgment (*z*). But if the writ is returnable in a term previous to that of which the judgment is signed, it is no *supersedeas* (*a*); yet, where the party, in such a case, purposely refrained from signing his judgment until the writ of error was spent, the court made his attorney sue out a new writ of error at his own expense (*b*); and if execution had been also sued out, the court would have set it aside (*c*).

(*p*) Bagley's Prac. 344: 1 Bur. 340: 1 T. R. 280.

(*q*) *Robinson* v. *Day*, 2 Dowl. 501.

(*r*) *Gardner* v. *Williams*, 3 Dowl. 796; 1 Gale, 91, *S. C.*

(*s*) 6 G. 4, c. 96, s. 1.

(*t*) *Emanuel* v. *Martin*, 2 M. & Sel. 334.

(*u*) *Somerville* v. *White*, 5 East, 145: *Hill* v. *Tebb*, 1 New Rep. 298; Barnes, 189: *Curd* v. *Eastmead*, Id. 260: *Hannot* v. *Farettes*, Id. 376: *Williams* v. *Jenkins*, 1 Sid. 104: 2 Bac. Abr., Error, (C): R. H., 2 W. 4, r. 83.

(*x* *Attenbury* v. *Smith*, MS., E. 1821: 2 D. & R. 85, *S. C.*

(*y*) *Lane* v. *Bacchus*, 2 T. R. 44: *Gravall* v. *Stimpson*, 1 B. & P. 478: *Jaques* v. *Nixon*, 1 T. R. 279: *Bennett* v. *Nicholls*, 4 T. R. 121: and see *Blackburn* v. *Kymer*, 5 Taunt. 672: *Smith* v. *Howard*, 2 D. & R. 85.

(*z*) *Jaques* v. *Nixon*, 1 T. R. 279.

(*a*) *Canning* v. *Wright*, 2 L. Raym. 1531; 2 Str. 807, *S. C.*: *Wilson* v. *Ingoldsby*, 2 L. Raym. 1179: *Witty* v. *Polehampton*, 3 Salk. 398: *Hill* v. *Tebb*, 1 New Rep. 298.

(*b*) *Arden* v. *Lamley*, Barnes, 250.

(*c*) *Jaques* v. *Nixon*, 1 T. R. 279, 280.

From what Time it operates as a Supersedeas.

If the writ of error is sued out *after* judgment, and before execution executed, it operates as a *supersedeas* from the time of the allowance and notice thereof, provided such notice contain a statement of some particular ground of error intended to be argued (*d*), and provided bail in error be put in, and notice thereof given (*e*), within four clear days after the allowance (*f*). If, after the writ sued out and before allowance, actual notice of it were given to the opposite party, and of its being delivered to one of the masters, it formerly operated as a *supersedeas* from the time of such notice (*g*). Even where a prisoner, after a *habeas corpus* lodged for the purpose of bringing him up to be charged in execution, sued out and obtained an allowance of a writ of error, it was holden that he could not, after that, be charged in execution, but should be remanded to his former custody (*h*). But we have seen that now the writ does not operate as a *supersedeas* until service of notice of *the allowance*, stating some particular ground of error.

After service of the notice of allowance as directed *ante*, p. 357, 358, if the defendant in error (where bail is requisite) take out execution before the time for putting in bail have expired, he does it at his peril; for, if bail be afterwards regularly put in, the execution will be set aside (*i*).

Effect of Writ of Error as a Supersedeas.

A writ of error, after allowance and the above notice thereof served, is so entirely a *supersedeas* of execution, that the plaintiff below cannot afterwards sue out a *ca. sa.*, even for the purpose of proceeding against the bail (*k*). Or even if the *ca. sa.* had been sued out before the allowance of the writ of error, the plaintiff below cannot, after the allowance and notice thereof served, proceed against the bail, although the writ have previously lain four days in the sheriff's office (*l*); nor can he call even for a return of the writ (*m*); or if the writ be returned after notice of the allowance, (though on the same day), and a *scire facias* be afterwards sued out against the bail, the court will set aside the proceedings with costs (*n*); or the bail, in such a case, may plead to the *scire facias*, that, after the issuing and before the return of the *ca. sa.* against the principal, a writ of error issued and was duly allowed, and notice of allowance served, without stating the writ of error to have been returned (*o*); and if bail in error, when requisite, were not put in, the plaintiff must shew that in his replication (*p*). And where the writ of error is not sued out until after a *scire facias* brought against the bail, the court, notwithstanding, will stay the proceedings upon the *scire facias* until the determination of the writ of error, upon the bail undertaking to render the defendant, or pay the sum recovered,

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(*d*) R. H., 4W. 4, r. 9: *Sampson* v. *Brown*, 2 East, 439: *Meager* v. *Vandyck*, 2 B. & P. 370: *Meriton* v. *Stevens*, Willes, 271: *Hawkins* v. *Jones*, 5 Taunt. 204: R. M., 5 W. & M. a: R. H., 2 W. 4, r. 83.

(*e*) *Attenbury* v. *Smith*, MS., E. 1821; 2 D. & R. 85, *S. C.*

(*f*) *Lane* v. *Bacchus*, 2 T. R. 45: *Gravall* v. *Stimpson*, 1 B. & P. 478: and see *Jaques* v. *Nixon*, 1 T. R. 280.

(*g*) R. M., 5 W. & M. a: *Meriton* v. *Stevens*, Willes, 271: *Perkins* v. *Woolaston*, 1 Salk. 321, 2 L. Raym. 1256, *S. C.*: but see R. H., 4 W. 4, r. 9, *ante*.

(*h*) *Stonehouse* v. *Ramsden*, 1 B. & Ald. 676.

(*i*) See a case before the rule of H. T., 4 W. 4, r. 9: *Lane* v. *Bacchus*, 2 T. R. 44.

(*k*) *Dudley* v. *Stokes*, 2 W. Bl. 1183: *Sweetapple* v. *Goodfellow*, 2 Str. 867: and see *Stonehonse* v. *Ramsden*, 1 B. & Ald. 676.

(*l*) *Perry* v. *Campbell*, 3 T. R. 390.

(*m*) *Smith* v. *Nicholson*, 2 Str. 1186; 1 Wils. 16, *S. C.*: see *Parkins* v. *Wilson*, 2 L. Raym. 1256.

(*n*) *Miller* v. *Newbald*, 1 East, 662.

(*o*) *Sampson* v. *Brown*, 2 East, 439.

(*p*) 2 East, 445.

(if judgment should be affirmed), within four days after affirmance, and also agreeing not to file a bill in equity (*q*), provided the time granted by the indulgence of the court to the bail to render their principal have not expired at the time of the application (*r*). But, if the bail be fixed, and there be no bail in error, the court, in such a case, will oblige the bail to the action to undertake to pay the condemnation money, and the costs of the writ of error, in the event of the judgment being affirmed (*s*). A writ of error by the bail, however, is no *supersedeas* of execution against the principal (*t*).

Execution partly executed, must be proceeded with.

If a writ of execution *have issued* upon the judgment in the original action, and a writ of error be afterwards sued out and allowed, and notice thereof served, as long as the writ of execution is executable and not executed, the writ of error will operate as a *supersedeas* of execution (*u*). But after the sheriff has partly executed the writ, he must proceed in the execution, notwithstanding a writ of error; as, where the sheriff had seized under a *fieri facias*, and then a writ of error was brought and allowed, the court held that he should sell the goods, and pay the money into court to abide the event of the writ of error (*x*).

Action on Judgment pending Writ of Error.

If an action is brought upon the judgment pending a writ of error, it is entirely in the discretion of the court to stay the proceedings or not. But, although an application for this purpose is not acceded to as a matter of course, the court usually grant it, unless the conduct of the plaintiff in error appear to be vexatious, or intended merely for delay (*y*). The plaintiff in error cannot make this application until after he have put in and perfected bail (*z*); and if the action be brought in the Queen's Bench on a judgment of the Common Pleas, the court will oblige the defendant to give the plaintiff judgment in the second action (*a*). What has now been said relates to proceedings in the action on the judgment; but it seems in all cases, where the writ operates as a *supersedeas*, the court will stay the issuing or executing of a writ of execution in such second action, until the writ of error be determined; for, otherwise, it would be allowing the defendant in error to do that indirectly which he could not do directly (*b*). But where a writ of error on the first judgment was not brought until after the plaintiff had recovered in an action on the judgment, and had obtained judgment therein, the court refused to set aside the execution of a writ of inquiry and a writ of execution, although sued out and executed after the allowance of the writ of error (*c*).

Where Writ of Error

Where it appears from the admission of the plaintiff in

(*q*) R. T., 1 Ann. r. 1, a: see Ro. Abr. 491: and see *Buchanan* v. *Alders*, 3 East, 546: *Sprang* v. *Monprivatt*, 11 East, 316.

(*r*) R. H., 2 W. 4, r. 84: *Sprang* v. *Monprivatt*, T., 49 G. 3: MS., B. 1607-8: 11 East, 316.

(*s*) *Riston* v. *Francis*, 2 Str. 877: *Copous* v. *Blyton*, 1 New Rep. 67.

(*t*) Ro. Abr. 491.

(*u*) *Perkins* v. *Woolaston*, 1 Salk. 321; 2 L. Raym. 1236, *S. C.*: *Milstead* v. *Coppard*, 5 T. R. 272. *Lord Kinnaird* v. *Lyall*, 7 East, 296: 2 Ro. Abr 491.

(*x*) *Meriton* v. *Stevens*, Willes, 271, 280: see *Doe Messiter* v. *Dineley*, 4 Taunt. 289.

(*y*) *Christie* v. *Richardson*, 3 T. R. 78: *Entwistle* v. *Shepherd*, 2 T. R. 78: and see *Gribble* v. *Abbott*, Cowp. 72: *Hanbury* v. *Guest*, 14 East, 401. The finding of the writ of error cannot be pleaded to action or sci. fa. on the judgment. (*Snook* v. *Mattock*, 5 Ad. & El. 248).

(*z*) *Bicknell* v. *Longstaffe*, 6 T. R. 455: *Smith* v. *Shepherd*, 5 T. R. 9: *Abraham* v. *Pugh*, 5 B. & Ald. 903.

(*a*) *Bates* v. *Lockwood*, 1 T. R. 638: and see *Wade* v. *Rogers*, 2 W. Bl. 780.

(*b*) *Benwell* v. *Black*, 3 T. R. 643: *Taswell* v. *Stone*, 3 Bur. 2454: see *Robinson* v. *Tuckwell*, Willes, 183: 2 Bac. Abr., Error, (H).

(*c*) *Bishop* v. *Best*, 3 B. & Ald. 275.

brought for Delay or against good Faith.

error (*d*), or his attorney (*e*), (the admission of the attorney's clerk being insufficient) (*f*), or from the admission of his bail (*g*), or from expressions equivalent to a confession (*h*), that the writ of error is brought for the purpose of delay (*i*); or where the writ is brought against good faith (*k*), or a positive agreement (*l*); or if bail be not put in within the time limited for that purpose (*m*); or if the writ of error be returnable in a term previous to that of which the judgment is signed (*n*): in all these cases the writ of error neither operates as a *supersedeas* of execution, nor will proceedings in an action on the judgment, or proceedings against bail (*o*), be stayed; and the court, or a judge, upon application, will allow the party who obtained the judgment below to proceed by suing out execution, &c.: and in some cases he may so proceed without such leave. But where the defendant, *before any action brought*, said that he should bring a writ of error, and delay the plaintiff, the court did not conceive this to be sufficiently indicative that the writ of error afterwards brought was merely for the purpose of delay, and therefore refused to allow the plaintiff to sue out execution (*p*). Nor is it sufficient to prevent a writ of error being a *supersedeas* of execution, that the defendant's attorney declared the debt would be settled, and that time was all the defendant wanted (*q*): or that the plaintiff swears that the writ of error was brought for delay, and that he offered to the defendant's attorney to waive the judgment, if he would point out any error in it, who refused to do so (*r*). But where, *after* action brought, the defendant threatened to bring a writ of error and ruin the plaintiff by law proceedings, unless he complied with certain terms, the defendant suggesting no ground of error, the court allowed the plaintiff to take out execution (*s*). Where the defendant obtained time to plead, upon condition of his giving judgment of the term, the court held that as his undertaking was, in substance, to give an *available* judgment, he could not afterwards bring a writ of error (*t*). The court have refused to allow execution to be sued out, merely because the defendant suffered judgment to be affirmed in the Exchequer Chamber without objection, and then brought error in parliament (*u*).

On Judgment of Nonsuit.

A writ of error brought upon a judgment of nonsuit does

(*d*) *Pool* v. *Charnock*, 3 T. R. 79: *Hawkins* v. *Snuggs*, 2 M. & Sel. 476: see *Gribble* v. *Abbott*, Cowp. 72.

(*e*) *Law* v. *Smith*, 4 T. R. 436, n.: *Spooner* v. *Garland*, 2 M. & Sel. 474: *Miller* v. *Cousins*, 2 B. & P. 329: *Mitchell* v. *Wheeler*, 2 H. Bl. 30: *Barber et Al.* v. *Bolt*, T. 32 G. 3; MS., B. 1659.

(*f*) *Bygrove* v. *Bolland*, 2 Chit. Rep. 193.

(*g*) *Kempland* v. *Macauley*, 4 T. R. 436, n.

(*h*) *Masterman* v. *Grant*, 5 T. R. 714: *Miller* v. *Cousins*, 2 B. & P. 329: see 2 Bing. 326: *Mee* v. *Hopkins*, 2 D. & R. 208: and *Eicke* v. *Sowerby*, 1 B. & C. 287.

(*i*) See *Levett* v. *Perry*, 5 T. R. 670.

(*k*) *Cates* v. *West*, 2 Id. 183: *Best* v. *Gompertz*, 2 Dowl. 395.

(*l*) *Camden* v. *Edie*, 1 H. Bl. 21: *Executors of Wright* v. *Nutt*, 1 T. R. 388: and see *Cave* v. *Massey*, 5 D. & R. 624; 3 B. & C. 735, *S. C.*: *Brown* v. *Lord Granville*, 2 Dowl. 796: as an agreement in a *cognovit*, *Best* v. *Gompertz*, 2 Dowl. 395: *Brown* v. *Lord Granville*, 2 Dowl. 796; 4 M. & Scott, 333, *S. C.*

(*m*) R. E., 36 Car. 2.

(*n*) *Wright* v. *Canning*, 2 Str. 807; 2 L. Raym. 1531, *S. C.*: *Wilson* v. *Ingoldsby*, Id. 1179: *Witty* v. *Polehampton*, 3 Salk. 398: see *Somerville* v. *White*, 5 East, 145: and *ante*, 347.

(*o*) *Pool* v. *Charnock*, 3 T. R. 79.

(*p*) *Baskett* v. *Barnard*, 4 M. & Sel. 331: *Redford* v. *Garrod*, 7 Taunt. 537.

(*q*) *Rawlins* v. *Perry*, 1 New Rep. 307.

(*r*) *Christie* v. *Richardson*, 3 T. R. 78: *Kempland* v. *Macauley*, 4 T. R. 437: see *Eicke* v. *Sowerby*, 1 B & C. 287.

(*s*) *Berdoe* v. *Bloomfield*, 6 D. & R. 509.

(*t*) *Cave* v. *Massay*, 5 D. & R. 624; 3 B. & C. 735, *S. C.*

(*u*) *Harrison* v. *Grote*, 6 T. R., 400: but see *Entwistle* v. *Shepherd*, 2 T. R. 78.

not, unless error be pointed out, operate as a *supersedeas*, on the ground that the writ could only be brought for delay (*x*).

Second Writ of Error where a Supersedeas.

If a writ of error *abate* by the act or default of the party, a second writ of error will not operate as a *supersedeas*, and the defendant in error may sue out execution without the leave of the court (*y*); but if it have abated by the act of God, or by act of law, the second writ will be a *supersedeas* from the allowance of it, as in ordinary cases (*z*).

Defective Writ.

It may be necessary perhaps to add, that, although a writ of error be so defective that the court would quash it upon motion; as, for instance, if it be brought by some only of several defendants, yet, until quashed, it operates as a *supersedeas* as to all the defendants (*a*).

Bail in Error.

Bail.] As bail in error differs in many respects from bail to the action, it will be necessary to state the practice of the court upon the subject with particularity. We shall therefore consider it under the following heads:—1. In what cases bail in error is requisite;—2. At what time it must be put in; and—3. How put in and justified.

1. Cases in which Bail is requisite.

3 Jac. 1, c. 8.

19 G. 3, c. 70.

7 & 8 G.4, c.71.

1st. *Cases in which Bail in Error is requisite.*] No bail in error was required at common law, although the writ of error was not formerly allowed until error was shewn (*b*). The statute, however, of 3 *Jac.* 1, *c.* 8, (made perpetual by 3 *Car.* 1, *c.* 4, *s.* 4), enacts, "that no execution shall be stayed or delayed upon or by any writ of error, or *supersedeas* thereupon to be sued for the reversing of any judgment in any action or bill of *debt*, upon any *single bond* for debt, or upon any obligation with condition for *the payment of money only*, or upon any action or bill of *debt* for rent, or upon any *contract* sued in any of the courts of record at *Westminster*, or in the counties palatine of *Lancaster* or *Durham*; [nor (by the 19 *G.* 3, *c.* 70, *s.* 5) for the reversing of any judgment given in any *inferior* court of record (*c*), where the damages were under 10*l.* (since extended to 20*l.* by the statute 7 & 8 *G.* 4, *c.* 71, *s.* 6) (*d*)], unless the person or persons in whose name or names such writ of error shall be brought, with two sufficient sureties, (such as the court wherein the judgment was given shall allow of), shall first be bound unto the party for whom the judgment was given, by recognisance to be acknowledged in the same court, in double the sum adjudged to be recovered by the former judgment, to prosecute the said writ of error with effect, and also to satisfy and pay, if the said judgment should be affirmed, or the writ of error *nonprossed*, all and singular the debts, damages, and costs adjudged upon the former judgment, and all costs and damages to be awarded for the delaying of execution" (*e*).

(*x*) *Keeling* v. *Austin*, 1 Dowl. 228; 5 Moo. & P. 599; 7 Bing. 601, *S. C.*: *Box* v. *Bennett*, 1 H. Bl. 432: *Kempland* v. *Macauley*, 4 T. R. 436: *Mee* v. *Hopkins*, 2 D. & R. 208: *Evans* v. *Swete*, 2 Bing. 326: overruling *Levett* v. *Perry*, 5 T. R. 669.

(*y*) *Birch* v. *Triste*, 8 East, 412.

(*z*) *Ante*, 355, 356.

(*a*) *Laroche* v. *Wasbrough*, 2 T. R. 737: *Lloyd* v. *Skutt*, Doug. 153: and see *ante*, 353.

(*b*) Tidd, 9th ed. 1149.

(*c*) See *Crookes* v. *Longden*, 5 Bing. N. C. 410.

(*d*) See *Furnish* v. *Swan*, 10 B. & C. 458.

(*e*) As to what actions this statute is confined, and to what judgments it extends, and in what cases bail in error are required in debt on bond, and in actions on contracts, &c., according to this statute, see Tidd. 9th ed. 1150.

This statute, 3 *Jac.* 1, *c.* 8, is extended to other actions by the 13 *Car.* 2, *stat.* 2, *c.* 2, *s.* 9; by which it is enacted, "that no execution shall be stayed in any of the courts mentioned in the former statute, by any writ or writs of error, or *supersedeas* thereupon after *verdict* and *judgment*, in any action of debt grounded upon the statute 2 & 3 *Ed.* 6, *c.* 13, *s.* 1, for not setting forth tithes; nor in any action upon the case upon any promise for payment of money, actions *sur trover*, actions of covenant, *detinue*, and trespass, unless such recognisance, and in such manner as by the former act is directed, shall be first acknowledged in the court in which judgment was given." And by 16 & 17 *Car.* 2, *c.* 8, *s.* 3, (made perpetual by 22 & 23 *Car.* 2, *c.* 4), "no execution shall be stayed in any of the last-mentioned courts, by writ of error or *supersedeas* thereupon after *verdict and judgment in any action personal whatsoever*, unless a recogniasnce, with condition according to the statute 3 *Jac.* 1, shall be first acknowledged in the court where such judgment shall be given. And further, that in writs of error to be brought upon any judgment after verdict, in any writ of *dower*, or in any action of *ejectione firmæ*, no execution shall be stayed unless the plaintiff or plaintiffs in such writ of error shall be bound to the plaintiff in such writ of *dower* or action of *ejectione firmæ* in such reasonable sum as the court in which such writ of error shall be directed shall think fit, with condition, that if the judgment shall be affirmed, or the writ of error discontinued in default of the plaintiff or plaintiffs therein, or the said plaintiff or plaintiffs be nonsuited in such writ of error, that then the said plaintiff or plaintiffs shall pay such costs, damages, and sum and sums of money, as shall be awarded upon or after such judgment affirmed, discontinuance, or nonsuit" (*f*). And to the end that the same sum and sums and damages may be ascertained, it is further enacted, that "the court wherein such execution ought to be granted, upon such affirmation, discontinuance, or nonsuit, shall issue a writ to inquire as well of the mesne profits as of the damages by any waste committed after the first judgment in *dower*, or in *ejectione firmæ:* and upon the return thereof, judgment shall be given, and execution awarded, for such mesne profits and damages, and also for costs of suit" (*g*).

13 Car. 2, stat. 2, c. 2.

16 & 17 Car. 2, c. 8, s. 3.

And now, by stat. 6 *G.* 4, *c.* 96, *s.* 1, for preventing the delays occasioned to creditors by frivolous writs of error brought on judgments given in his majesty's courts of record at Westminster, and in the counties palatine, it is enacted, "that, upon any judgment hereafter to be given in any of the said courts, in any personal action, execution shall not be stayed or delayed by writ of error or *supersedeas* thereupon, without the special order of the court, or some judge thereof, unless a recognisance with condition according to the statute made in the third year of the reign of his majesty King James the First, intituled, 'An Act to avoid unnecessary delays of execution,' (*vide supra*), be first acknowledged in the same court."

6 G. 4, c. 96.

Bail in error therefore is now necessary in all cases after judgment for the *plaintiff* in any *personal* action, whether after

After Judgment for Plaintiff in any Personal Action.

(*f*) See as to ejectment, *post*, Vol. II. Book III. Part I. Ch. 1.

(*g*) 16 & 17 Car. 2, c. 8, s. 3. As to what judgments these statutes of Charles are confined to, see Tidd, 9th ed. 1153.

verdict or default, unless it be otherwise ordered by the court or a judge; and it should seem, that such order could not be made in any of those actions in which the statutes previous to the above act of 6 *G.* 4 require bail in error. And bail in error is requisite by that act, although there be real error in form on the face of the record; unless the court or a judge order it to be dispensed with (*h*). The application to a judge for an order dispensing with bail in error is founded on a special affidavit of facts to satisfy the judge, not only that the writ has been sued out *bonâ fide*, and not merely for the purpose of delay; but also that it is for the furtherance of justice that the security of bail should not be insisted on (*i*); and money cannot be paid into court in lieu of bail in error, unless by consent (*j*).

Not required where same person Plaintiff, below and in Error.

But the statutes requiring bail in error are confined to cases where judgment has been given for the original *plaintiff*, and do not apply to judgments given for the defendant below; and a party, therefore, who is *plaintiff* both below and above, need not give bail in error (*k*). The statutes prior to the 6 *G.* 4, *c.* 96, do not, nor does that act (*l*), extend to the writ of error *coram nobis* (*m*), or *vobis;* which is or is not a *supersedeas* of execution, according to circumstances (*n*); but where the writ of error *coram nobis* or *vobis* does not operate as a *supersedeas*, the court will require bail as a condition of staying proceedings on the judgment until the writ of error be determined. (*See post*).

On second Writ.

Where the court affirm a judgment, and another writ of error is brought upon the judgment of affirmance, bail must be again put in upon the second writ (*o*). Also, where a writ is amended, fresh bail must be put in to the amended writ (*p*). The bail upon a new writ must be put in in the court where the record is supposed to remain; upon an amended writ, it is put in in the court in which the writ of error has been allowed.

2. Time at which Bail must be put in.

2ndly. *Time at which Bail must be put in.*] This has in part been considered, *ante*, 358. The general rule is, that, if the writ of error be allowed *before* the judgment is signed, the plaintiff in error has four clear days, after the signing of the judgment, to put in bail; as, if judgment be signed on Monday, he shall have all Friday to put in bail; and in default of his doing so, the defendant in error cannot sue out execution until the Saturday (*q*). But if the writ be sued out *after* judgment, the plaintiff in error has four clear days to put in bail from the time of the allowance of the writ of error (*r*). If the plaintiff in error do not put in bail within the time here specified, the defendant may immediately sue out execution (*s*), and it is not necessary to obtain previously a certifi-

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(*h*) See *Wadsworth* v. *Gibson*, 1 Moo. & P. 501; 4 Bing. 572, *S. C.* See form of summons for judge's order to dispense with bail, Chit. Forms, 113.

(*i*) See Bagley's Prac. 345.

(*j*) *Collins* v. *Gwynne*, 2 M. & Scott, 775.

(*k*) *Duvergier* v. *Fellowes*, 1 Dowl. 224: 5 Moo. & P. 403: 7 Bing. 463, *S. C.*: *Treeman* v. *Garden*, 1 D. & R. 184; *Cone* v. *Bowles*, 4 Mod. 7; *Baring* v. *Christie*, 5 East, 545.

(*l*) *Levy* v. *Price*, 2 M. & W. 563.

(*m*) 2 Crom. 3rd ed. 377.

(*n*) *Post*, 390.

(*o*) *Tilly* v. *Richardson*, 1 Salk. 97; 2 L. Raym. 840, *S. C.*: *Colebrook* v. *Diggs*, 1 Str. 527.

(*p*) *Rafael* v. *Verelst*, 2 W. Bl. 1067.

(*q*) *Lane* v. *Bacchus*, 2 T. R. 44: *Jaques* v *Nixon*, 1 T. R. 279: *Bennett* v. *Nicholls*, 4 T. R. 121: *Gravall* v. *Stimpson*, 1 B. & P. 478: and see *Blackburn* v. *Kymer*, 5 Taunt. 672; 1 Marsh. 278, *S. C.*

(*r*) *Lane* v. *Bacchus*, 2 T. R. 45: *Gravall* v. *Stimpson*, 1 B. & P. 478: R. F. 36, C. 2: and see *Jaques* v. *Nixon*, 1 T. R. 279.

(*s*) —— v. *Nichols*, 2 Chit. Rep. 106.

cate from the master that no bail has been put in (*t*). The only effect, therefore, of not putting in bail will be, that the defendant will sue out execution; but the writ of error may still be prosecuted in the same manner as if no bail were required. Under special circumstances, the court or a judge will allow further time to put in the bail (*u*). Notice of bail must be given within the time above mentioned for the putting it in, otherwise the plaintiff in the original action may sue out execution.

The Mode of putting in and justifying Bail.

3rdly. The mode of putting in and justifying Bail.] *Make a note or memorandum of the bail upon a piece of paper* (*x*); *intitle it in the original cause, and take it to one of the masters of the court in which the judgment is, who will enter the same in his book. Appoint with him to meet you at the chambers or house of a judge of the court in which the judgment is, in order to take the recognisance. Take the bail with you, at the time appointed, and the master or his deputy will take their recognisance* (*y*). *Bail in error may also, it seems, be put in before a commissioner, as in other cases, in the country* (*z*). It does not seem necessary, nor is it the usual practice, for the plaintiff in error to join in the recognisance (*a*). By a general rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 1, *s.* 26, "a recognisance of bail in error shall be taken in double the sum recovered, except in case of a penalty; and in case of a penalty, in double the sum really due, and double the costs" (*b*). The recognisance is absolute, if the judgment should be affirmed, or the writ of error nonprossed, to pay the amount adjudged upon the former judgment, and all costs and damages to be awarded.

Who and how many may become Bail.

As to who and how many may become bail, see *post*, *Book I. Part II. Ch.* 1, *s.* 12. Where two persons of no property, who were in the habit of allowing their names to be used as bail at Serjeants' Inn for hire, were put in as bail in error, and, no rule for better bail being given, justified; the plaintiff in the action having treated them as a nullity, and issued execution, the court refused to set the execution aside, saying, that the putting in of such bail was a fraud upon the court (*c*). But the same persons, who were bail in the original action, may be bail in error, if they be able to justify (*d*). And members of a corporation may be bail in error for the corporation (*e*).

Notice of Bail.

After bail has been put in, notice thereof should be given without delay to the defendant in error or his attorney, in the

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(*t*) *Incledon* v. *Clarke*, Barnes, 212.

(*u*) See *post*, 366; and *post*, "Bail."

(*x*) See the form, Chit. Forms, 111: and see as to the form of the bail piece in other cases, *post*, "Bail."

(*y*) See a form of recognisance, Chit. Forms, 111.

(*z*) *Manningford* v. *Parker & Another*, *cor. Bayley*, B., at chambers, 27th Nov. 1833. It has been said that bail in error cannot be put in before a commissioner, the stat. 4 W. & M. c. 4, s. 1, which authorizes the appointment of commissioners, relating only to bail in actions *depending* in the court in which the acknowledgment of the bail is taken; but this seems a mistake, because the bail is not put in in the court in which the writ of error is brought. (See Tidd, 9th ed., citing *Lushington & Doe* d. *Godfrey*, Barnes, 78).

(*a*) See *Dixon* v. *Dixon*, 2 B. & P. 443.

(*b*) See the former practice, Tidd, New Prac. 604.

(*c*) *Ward* v. *Levi*, 2 D. & R. 421; 1 B. & C. 268, *S. C.*: *Crown* v. *Kitchen*, Ib.: *Sutcliffe* v. *Eldred*, 2 Dowl. 184: and see *Fuller* v. *Coombe*, 1 Dowl. 207; 4 Moo. & P. 792, *S. C.*: *Browne* v. *Browne*, 4 Bing. 38; 12 Moore, 172, *S. C.*: *Phillipson* v. *Browne*, 2 Chit. Rep. 105.

(*d*) *Martin* v. *Justice*, 8 T. R. 639

(*e*) *Henley* v. *Mayor of Lynn Regis*, 6 Bing. 195.

same manner as in ordinary cases is given to the plaintiff (*f*); and care must be taken that this notice is given *before the expiration of the four days* above mentioned, otherwise the plaintiff in the original action may sue out execution (*g*). A notice of more than two bail would, it seems, be irregular, unless by leave of the court or a judge (*h*).

Time of justifying Bail.

The plaintiff in error putting in bail as defendant in the action, it should seem that he may, by *R. T.*, 1 *W.* 4, *r.* 1, justify bail at the same time at which they are put in; and as to the notice for the purpose, and the plaintiff's obtaining time to inquire as to bail, &c., see *post*, *Book I. Part II. Ch.* 1, *s.* 12. And it should seem that, in such case, if the notice of bail be accompanied by an affidavit of each of the bail, as noticed *post*, *Book I. Part II. Ch.* 1, *s.* 12, and the bail be excepted to, costs will be allowed as upon the justification or rejection of bail to the action. Also, if the plaintiff in the action do not give one day's notice of exception to the bail by whom the affidavit is made, the recognisance may be taken out of court upon such affidavit (*i*).

Accepting and excepting to Bail.

After notice of bail without such affidavit, the defendant in error has twenty days allowed him to accept of or except to them; and if he do not except to them within that time, the recognisance will be allowed of course (*k*). If you except to them, it is not necessary to give notice of exception; *obtain from one of the masters of the court in which the judgment was obtained a rule for better bail* (*l*), *and serve a copy upon the plaintiff's attorney or agent.*

Time to justify after Service of Rule for better Bail.

After service of the rule for better bail, the plaintiff in error has four days to justify; or, if it be in vacation, he has until the first day of the next term (*m*); but if the notice of exception require them to justify before a judge, the bail shall justify within *four* days from the time of such notice, otherwise on the first day of the ensuing term (*n*); and if he do not justify within the respective times here mentioned, the defendant may consider the bail as a nullity, and sue out execution (*o*). Two days' notice of justification given before the time of justification, is, it seems, in all cases sufficient (*p*). The court will not give a further time to justify, if no real error can be pointed out to them (*q*), unless under very particular circumstances (*r*), and the amount of the judgment be deposited in the hands of the master (*s*).

Adding Bail.

Bail are added with one of the masters of the court in which the judgment was given, in the same manner that bail are added in the original action (*t*). It should seem that the bail of whom notice has been given, cannot be changed without leave of the court or a judge (*u*). As to the mode in which such leave is obtained, see *post*, *Book I. Part II. Ch.* 1, *s.* 12.

Mode of justifying.

The mode of justifying is nearly the same as in the original

(*f*) R. M., 5 W. & M.: and see fully *post*, "Bail."

(*g*) *Attenbury* v. *Smith*, MS., E. 1821. See the form of notice, Chit. Forms, 112.

(*h*) R.H., 2 W. 4, r. 18: see *post*, "Bail."

(*i*) R. T., 1 W. 4, r. 4: see *post*, "Bail."

(*k*) R. M., 5 W. & M.: *Gibbons* v. *Dove*, 3 Salk. 56: Id. 98.

(*l*) See the form, Chit. Forms, 113.

(*m*) *De Revose* v. *Hayman*, Barnes, 211.

(*n*) R. R., 2 W. 4, r. 17: *post*, "Bail."

(*o*) *Gould* v. *Holmstrom*, 7 East, 580.

(*p*) R. H., W. 4, r. 16: *post*, "Bail."

(*q*) *Handasyde* v. *Morgan*, 2 Wils. 144.

(*r*) See *Dyott* v. *Dunn*, 1 D. & R. 9: *Sparrow* v. *Sir W. Lewes*, 8 Taunt. 126: but see *Anon.*, 1 Dowl. 32.

(*s*) *Anon.*, 1 Dowl. 32.

(*t*) See *post*, "Bail:" and see the form, Chit. Forms.

(*u*) R. T., 1 W. 4, r. 5: *post*, "Bail."

action:—*Give notice of justification to the attorney or agent of the defendant in error, in the same manner as in the original action* (*x*). *Make an affidavit of service of the notice of justification, and of the affidavits of sufficiency having been made, if indeed they were so* (*y*); *get one of the masters to attend at Westminster with the Bail-book: attend there with the bail; and give the affidavit and a motion paper to counsel, who will move to justify. Draw up the rule of allowance with the master the same evening* (*z*); *and serve a copy of it on the attorney of the defendant in error* (*a*). It has been already remarked, that the plaintiff himself does not usually join in the recognisance (*b*); or, if he does, he cannot be examined as to his sufficiency, but his sureties alone are required to justify (*c*). The sureties justify in double the amount adjudged to be recovered by the former judgment (*d*): excepting in a case of a penalty, in which case they are not required to justify in more than double the sum really due, and double the costs (*e*). If either of the sureties do not justify, his name may be struck out, upon application to the court or a judge (*f*). They are considered, however, as bail, and may be proceeded against as such, until they are exonerated; and if proceedings have been had against them on their recognisance, the court or a judge will relieve them only upon the terms of paying the costs (*g*). And in a case where the plaintiff in error *nonprossed* his writ, after the bail were excepted to, but before they justified, and the defendant then sued the bail on their recognisance, the court refused to allow an *exoneretur* to be entered (*h*). So, where notice of justification was given, but the bail did not justify, it was holden, that they were not entitled to have an *exoneretur* entered on the bail-piece (*i*).

Liability of.

The liability of bail in error, and the modes of proceeding against them, are fully discussed in a subsequent part of this volume (*Book I. Part II. Ch.* 2, *ss.* 4, 5).

Certifying the Record.

Certifying the Record.] In order to proceed with the writ of error, the record must be certified or transcribed to the court above; in order to which a transcript or copy of the record must be made out by one of the masters, which is afterwards, with the writ of error and return, to be left in the court above, the record itself being in no case left there (*k*). When no bail is required, this is the first step that is taken by the plaintiffs after the service of the allowance of the writ of error. When bail is required, this is the next step that is taken by the plaintiff after the bail is complete. The

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(*x*) See *post*, "Bail." And see the form of the notice, Chit. Forms, 113; of adding and justifying, Id. Index, "Bail"; of adding one bail and justifying, Ib.

(*y*) See *post*, "Bail." See the form, Chit. Forms, Index, "Bail."

(*z*) See the form, Ib.

(*a*) See *post*, "Bail."

(*b*) See *ante*, 365: and *Dixon* v. *Dixon*, 2 B. & P. 443.

(*c*) *Keene* v. *Dearden*, 8 East, 299.

(*d*) *Reed & Others, Assignees*, v. *Cooper*, 5 Taunt. 323: see 3 J. 1, c. 8.

(*e*) R. H., 2 W. 4, r. 26: See *Serra* v. *Munez*, 2 Str. 821: *Moor* v. *Lynch*, 1 Wils. 213. As to the amount in which they justify in ejectment, see R. H., 2 W. 4, r. 27: *post*, Vol. II. Book III. Part I. Ch. 1.

(*f*) *Jones* v. *Tubb*, 1 Wils. 337: *Tubb* v. *Tubb*, Say. 58.

(*g*) *Good* v. *Holmstrom*, 7 East, 580.

(*h*) *Dickenson* v. *Heseltine*, 2 M. & Sel. 210.

(*i*) *Adnam* v. *Wilks*, 6 B. & C. 237.

(*k*) 2 Saund. 101, 1, m: and see 11 G. 4, & 1 W. 4, c. 70, s 8, by which it is enacted, "that a transcript of the record only shall be annexed to the return of the writ." See forms of the return, Chit. Forms, 114.

defendant in error cannot transcribe the record (*l*). Before the rule of *H. T.*, 4 *W.* 4, *r.* 10, if the plaintiff in error did not procure the record to be certified by the time the writ of error was returnable, the defendant, if he wished to hasten the proceedings, had to *rule* the plaintiff to transcribe the record; and if he did not do so within the time limited by the rule, (which was eight days), he might have signed judgment of *nonpros.* But now, by that rule, "*no rule to certify or transcribe the record shall be necessary; but the plaintiff in error shall, within twenty days after the allowance of the writ of error, get the transcript prepared and examined with the clerk of the errors* [now, by 7 *W.* 4 & 1 *V. c.* 30, one of the masters] *of the court in which the judgment is given, and pay the transcript money to him; in default whereof the defendant in error, his executors or administrators, shall be at liberty to sign judgment of* nonpros (*m*). *The clerk of the errors shall, after payment of the transcript money, deliver the writ of error when returnable, with the transcript annexed, to the clerk of the errors of the court of error.*" **But the offices of the clerk of the errors in all the courts, and of the clerk of the errors in the Exchequer Chamber, being abolished by the 7 *W.* 4 & 1 *V. c.* 30, *s.* 2,** and the duties of such officers being by that act executable by the masters only, the master of the court from which the error is brought will keep the writ of error and transcript. On this transcript being made out, and left with the master as above mentioned, the cause is removed into the Exchequer Chamber, and all the future proceedings, to the judgment to be pronounced on the writ of error, must be had in that court. By *R. H.*, 4 *W.* 4, *r.* 13, it is "provided, that, if in any case the time allowed as hereinbefore mentioned, for getting the transcript prepared and examined, for assigning errors, or for delivering a joinder in error, or plea, or demurrer, shall not have expired before the 10*th day of August* in any year, the party entitled to such time shall have the like time for the same purpose *after the 24th day of October*, without reckoning any of the days before the 10th of August. Provided also, that in all cases such ***time may be extended*** by a judge's order." *The master and the plaintiff's attorney examine the transcript with the roll* (*upon which the plaintiff in error must have previously entered the issue, and the other proceedings to judgment inclusive* (*n*),) *and the transcript is then annexed to the writ of error. Pay the master his fee for examining the transcript; and immediately docket your judgment and carry in the roll* (*o*). *Or, if the roll have been already carried in, then get the transcript from the master; take it to the treasury at Westminster, and examine it with the roll; you may leave the transcript there, and the bag-bearer will return it to the master.* After the transcript of the record in error has been received, the court below has no power to order judgment of *nonpros* to be signed because it was not ready in due time, although the defendant in error may have proceeded regularly (*p*). If the master by mistake omit any

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(*l*) *Anon.*, 1 Wils. 35.

(*m*) See the form of the entry of *nonpros* for not transcribing, Chit. Forms, 114: see the former practice, Tidd, New Prac. 607.

(*n*) See Chit. Forms, 114.

(*o*) See *ante*, 338.

(*p*) *Pitt* v. *Williams*, 4 Dowl. 70; 1 H. & W. 363, *S. C.*

part of the record in the transcript, he may afterwards insert it, without applying for leave to do so (*q*). Either party may have a copy of the transcript; but the defendant's attorney should bespeak one forthwith.

Nonpros.

It may be right to observe here, that the plaintiff in error may *nonpros* his own writ, without carrying over the transcript (*r*); also, that the defendant in error is not entitled to costs in error, upon a judgment of *nonpros*, before the record is certified (*s*); but if the plaintiff applies to the court for leave to *nonpros* his own writ, leave will not be granted but on payment of costs (*t*).

Where the writ of error was returnable, and no transcript removed, it was holden by *Bayley*, B., that the defendant might sue out execution upon the original judgment instead of signing judgment of *nonpros* (*u*).

A judgment of nonpros *is, since the* 7 *W.* 4 *&* 1 *V. c.* 30, *to be signed by one of the masters of the court in which the original judgment was given, who will tax the defendant his costs* (*x*). *Immediately upon judgment of* nonpros *being signed, the defendant in error may sue out execution, and for which see further, post*, 380.

Assignment of Errors, &c.

Assignment of Errors—Alleging Diminution—Scire facias quare executionem non.] Formerly, in the Queen's Bench, if the plaintiff in error neglected to proceed after the record was certified, the defendant, in order to compel him to proceed, must have sued out a *scire facias quare executionem non*, and if upon such writ the plaintiff in error did not assign errors, but suffered judgment by default, no errors afterwards assigned would have prevented execution (*y*). In the Exchequer Chamber the defendant in error must formerly have given a rule for the plaintiff in error to allege diminution, or that the record was not duly certified or transcribed (*z*). When the plaintiff in error had alleged diminution, the next step to be taken by the defendant in error was to give a rule for the plaintiff to assign errors (*a*). But now, by a general rule of all the courts of *H. T.*, 4 *W.* 4, *r.* 11, "no *rule to allege diminution*, nor *rule to assign errors*, nor *scire facias quare executionem non*, shall be necessary, in order to compel an assignment of errors; *but within eight days after the writ of error, with the transcript annexed, shall have been delivered to the clerk of the errors of the court of error*, or *to the signer of the writs in the King's Bench, in cases of error to that court*, [now, in either court, since the 7 *W.* 4 *&* 1 *V. c.* 30, one of the masters of the court in which the original judgment was given], or *within twenty days after the allowance of the writ of error in cases of error* coram nobis, *or* coram vobis, *the plaintiff in error shall assign errors*, and *in failure to assign errors, the defendant in*

(*q*) See *Randole* v. *Bailey*, 1 M. & Sel. 232.

(*r*) *Milborn* v. *Copeland*, 1 M. & Sel. 104.

(*s*) *Salt* v. *Richards*, 7 East, 110: see *College of Physicians* v. *Harrison*, 9 B. & C. 525.

(*t*) *Wilkinson* v. *Malin*, 1 Dowl. 628; 1 C. & M. 240, *S. C.*

(*u*) *Dow* v. *Clark*, 2 Dowl. 302.

(*x*) See *Salt* v. *Richards*, 7 East, 111. See form of entry of judgment of *nonpros*, Chit. Forms, 114.

(*y*) *Moseley* v. *Cocks*, Carth. 40, 41: Tidd, New Prac. 609.

(*z*) Tidd, 9th ed 1165: Tidd, New Prac. 609.

(*a*) Tidd, New Prac. 609.

error, his executors or administrators, shall be entitled to sign judgment of nonpros" (*b*).

Time for assigning Errors.

By the rule of *H. T.*, 4 *W.* 4, *r.* 13, *ante*, 368, if the period allowed for assigning errors shall not have expired before the 10th of August, the plaintiff in error shall have the like time for assigning them after the 24th of October, without reckoning the days before the 10th of August. Also, the period prescribed for the assignment of errors may be extended on application by the plaintiff to a judge.

Form of Assignment.

The assignment of errors is engrossed on plain paper, and delivered to the opposite attorney (*c*). *The assignment of common errors need not be signed by counsel* (*d*), *but a special assignment of errors should.*

Assignment of Errors in Law.

Errors in law (errors in fact cannot be assigned upon a writ of error in the Exchequer Chamber, *ante*, 350) are common or special. The *common errors* are, that the declaration is insufficient in law to maintain the action, and that the judgment was given for the plaintiff instead of the defendant, or for the defendant instead of the plaintiff, in the original action (*e*). It is not sufficient, however, to assign errors so generally as thus: "*quod in omnibus erratum est;*" for the court are not bound to inquire of the errors, unless pointed out by the party (*f*). *Special errors* are any matter appearing on the face of the record, which shews the judgment to be erroneous (*g*). Several errors may be assigned (*h*). But the plaintiff cannot assign error in law *and* error in fact, for these are distinct matters, and require different trials (*i*); the party may, however, have the benefit of this indirectly, for the court ought to give judgment of reversal if there be error in law, notwithstanding no error in law is assigned (*k*). Nor can anything be assigned for error, which contradicts the record (*l*); or which was for the advantage of the plaintiff in error (*m*), unless the error be the default of the court (*n*). So, he shall not assign that for error which he might have pleaded in abatement (*o*) or in bar of the action, as a release (*p*), or the like, or which was cured by the appearance of the party

What may be Assigned.

(*b*) See the practice before this rule, and the reasons for making it, Tidd, New Prac. 608.

(*c*) By R. H., 4 W. 4, r. 12, "the assignment of *errors* and *subsequent pleadings* thereon shall be *delivered* to the attorney of the opposite party, and not filed with any officer of the court."

(*d*) See the form of assignment of general errors, Chit. Forms, 118.

(*e*) See 2 Saund. 110 q. See the form, Chit. Forms, 118.

(*f*) 6 E. 4, 6: Ro. Abr. 761: Bro. Attaint, 86.

(*g*) Tidd, 1078.

(*h*) F. N. B. 20 E.

(*i*) Ro. Abr. 761: *Anon.*, 1 Sid. 147: 1 Leon. 105: *King* v. *Gosper*, Yelv. 28: *Burdett* v. *Wheatley*, 2 L. Raym. 883.

(*k*) *Castledine* v. *Mundy*, 4 B. & Ad. 90.

(*l*) Ro. Abr. 764, 757, 758: 1 Ro. Rep. 200: By. 89: *Wright* v. *Mayor and Commonalty of Wickham*, Cro. El. 469, 677: *Arundell* v. *Arundell*, Yelv. 33; Cro. Jac. 11, *S. C.*: *Phillips* v. *Huish*, Id. 12: *Whistler* v. *Lee*, 2 Bulst. 243: *Johns* v. *Bowen*, Cro. Jac. 597; Palm. 428: *Morris* v. *Fletcher*, Cro. Car. 53: *Molins* v. *Werby*, 1 Lev. 76: *Mullins* v. *Weldy*, 1 Sid. 94, *S. C.*: *Hippesley* v. *Tuck*, 2 Lev. 184; T. Jones, 81, *S. C.*: *Ribout* v. *Wheeler*, Hardw. 166: *Helbut* v. *Held*, 2 Str. 685; 2 L. Raym. 1414, *S. C.*: *Bradburn* v. *Taylor*, 1 Wils. 85: and see *Hippesley* v. *Tuck*, 3 Salk. 249: *Andrews* v. *Linton*, 2 Id. 884; 1 Salk. 265, *S. C.*: 2 Bac. Abr., Error, (K), 3.

(*m*) 5 Co. 39 b: 8 Id. 59: Ro. Abr. 769, 784: 1 Ro. Rep. 88: 2 Bulst. 279, 280: 11 Co. 56: 2 Saund. 45: *R.* v. *Carlisle*, 2 B. & Ad. 362, 971.

(*n*) 8 Co. 59: *Beecher* v. *Shirley*, Cro. Jac. 211: 1 Ro. Rep. 759: Ro. Abr. 759, 760: *Crow's case*, Cro. El. 84: *Kent* v. *Kent*, Hardw. 50; 2 Str. 971: 2 Barnard, 357, *S. C.*

(*o*) *Coan* v. *Bowles*, Carth. 124: *Cowne* v. *Bowles*, 1 Salk, 93: *Saville* v. *Thornton*, Cro. Jac. 651; Palm. 306, 311; 1 Ro. Rep. 450; Ro Abr. 782: *De Tastet* v. *Racket*, 3 B. & B. 65: and see *Lampton* v. *Collingwood*, 1 Salk. 262; 1 L. Raym. 27, *S. C.*: *Wright* v. *Kitchingman*, 1 Str. 197.

(*p*) 21 E. 4, 38.

below (*q*). Also, the court have, in some cases, set aside an assignment of errors when it was evidently calculated merely for delay (*r*). The want of a warrant of attorney can no longer be assigned as error; and if assigned, the court or a judge would set such an assignment aside, upon application (*s*). Nor can the want of continuances be now assigned for error (*t*).

Plaintiffs must join in.

If there be several plaintiffs in error, they must all join in the assignment of errors, unless some of them have been summoned and severed (*u*).

Where the Assignment must be special.

As to the assignment, whether it must be general or special, this distinction seems to be taken:—you may assign the common errors, if the errors complained of appear upon the face of the record itself; or if in such a case you assign any of these errors specially, counsel will not be confined, in arguing the case, to the error thus assigned, but may support the writ of error by any other error appearing upon the face of the record (*x*). And it is usual, if there really be errors in the record, to assign one of them specially, in order that the master, who sets down the cause for argument, may know that it is intended to argue it. But, where the error is in an out-branch of the record, (as formerly where there was no warrant of attorney), it must be assigned specially, (which is termed "alleging diminution"), and must also be verified upon *certiorari*, otherwise the court of error will not notice it (*y*). When the mode of proceeding by original writ or bill in personal actions existed, and the plaintiff assigned for error the want of an original writ or bill, or that it was bad in point of law, he must have regularly taken out this *certiorari* to verify his errors; but in such actions the want of these can no longer be assigned for error. The plaintiff in error can have but one *certiorari;* and although that should prove nugatory by error or mistake, the court will not allow him to sue out another (*z*). Yet the court itself may, in such a case, *ad informandam conscientiam*, award, *ex officio*, a *certiorari* at any time (*a*). The *certiorari* is a judicial writ; it is directed to the chief justice of the Queen's Bench, tested in the name of the chief justice of the Common Pleas, and is sued out with and signed by one of the masters. Get it sealed by the sealer of the writs. If the plaintiff will not sue out the *certiorari* and cause it to be returned, *you may obtain a rule from one of the masters of the court in which the original judgment was given to oblige him to do so, and serve a copy of it*

Certiorari, when necessary.

What it is.

How sued out.

(*q*) 3 H. 6, 9: Ro. Abr. 779, 780: 3 Bulst. 61: *Thoroughgood* v. *Scroggs*, Cro. El. 582: *Vaughan* v. *Flord*, 1 Sid. 406; 1 Vent. 7, *S. C.*: see *Robsert* v. *Andrews*, Cro. El. 83; Style, 237: *Read* v. *Wilmot*, 1 Vent. 220: *Anon.*, Id. 249: *Newman* v. *More*, Cro. Jac. 424; 1 Bulst. 143; Latch. 118: *Wickham* v. *Enfield*, Cro. Car. 351: Bac. Abr., Error, (K), 5.

(*r*) *Ante*. 361: *Chartres* v. *Cusaick*, 1 Str. 141: *Moore* v. *Goodright*, 2 Str. 809; 2 Saund. 101 a.

(*s*) *Ante*, 337: see *Chartres* v. *Cusaick*, 1 Str. 141.

(*t*) *Ante*, 200.

(*u*) *Ante*, 348.

(*x*) 5 Co. 37 b: *Farr* v. *Denn*, 1 Bur. 363.

(*y*) *Graddell* v. *Tyson*, 2 L. Raym. 1441.

(*z*) *Merryfield* v. *Berry*, 2 Str. 765: *Bowers* v. *Mann*, Id. 819; 2 Saund. 101 r.

(*a*) *Franklyn* v. *Reeves*, Hardw. 118: Ro. Abr. 764: *Yates* v. *Windham*, Cro. El. 281: *Winchcomb* v. *Goddard*, Id. 836; 2 Saund. 101 s. Upon a writ of false judgment from an inferior court, there is no rule to allege diminution. If the judge of the inferior court do not set out the whole of the record, the course is, to apply to the superior court to compel him to do so. (See *Overton* v. *Sweetenham*, 3 Bing. N. S. 786).

upon the plaintiff's attorney. And if the *certiorari* be not returned within the time limited by the rule, the master, upon your applying to him, will sign a *nonpros*, and you may sue out execution.

Plea, &c.

Plea, &c.] As to the mode of compelling the defendant in error to plead, it is to be observed, the Exchequer Chamber, not having the record before them, but only a transcript, never awarded a *scire facias ad audiendum errores*, but notice was given to the parties concerned (*b*). Such writ was used in the Queen's Bench on error to that court. Now, by the rule of all the courts of *H. T.*, 4 *W.* 4, *r.* 13, "*no scire facias ad audiendum errores shall be necessary* (unless in case of a change of parties); *but the plaintiff in error may demand a joinder in error, or plea to the assignment of errors; and the defendant in error, his executors or administrators, shall be bound, within twenty days after such demand, to deliver a joinder or plea, or to demur, otherwise the judgment shall be reversed: provided, that, if in any case the time allowed as hereinbefore mentioned, for getting the transcript prepared and examined, for assigning errors, or for delivering a joinder in error, or plea, or demurrer, shall not have expired before the* 10th day of August *in any year, the party entitled to such time shall have the like time for the same purpose*, after the 24th day of October, *without reckoning any of the days before the* 10*th of August, Provided also, that in all cases such* time may be extended *by a judge's order.*"

When must be pleaded.

To the assignment of errors the defendant may plead either the common joinder *in nullo est erratum*, or a special plea; or he may demur.

Common Joinder in Error.

The common joinder (*in nullo est erratum*) alleges that there is no error in the record and proceedings, and prays that the court may proceed to examine them, and affirm the judgment. It concludes with a *curia advisari vult* (*c*). Where the common errors are assigned, or where special errors are assigned in the body of the record, the effect of this plea is to deny that such errors exist, or, if they do, that they are not such as are in law sufficient to reverse the judgment. But where error out of the body of the record is assigned, this plea amounts to a confession of the fact stated, but denies that it is error; and therefore, where the want of a warrant of attorney (when assignable for error) was so assigned for error after verdict, you might immediately plead *in nullo est erratum*, the error assigned having been aided by the verdict; but if it were assigned for error after judgment by default, &c., you must have first waited until the expiration of the time for returning the *certiorari*, and then, after entering a *non misit breve*, as mentioned *post*, 382, you might plead this plea with safety, for, by not returning the *certiorari*, the special error was relinquished (*d*); or even if pleaded before the time when the *certiorari* should be returned, although in such a case it was an admission of the error assigned, yet the court might still award a *certiorari ad informandam conscientiam*, (as indeed

Effect of.

(*b*) 1 Vent. 34.

(*c*) See the form, Chit. Forms, 119.

(*d*) See Ro. Abr. 763, 764: 1 Leon. 22: 9 E. 4, 32 b: 2 Saund. 101 s: and *supra*.

they may do at any time pending the writ of error, *see ante*, 371), and if a warrant of attorney were returned, they would affirm the judgment notwithstanding the defendant's admission by his plea (*e*). Pleading *in nullo est erratum* has also this effect, that the record is then agreed by all parties to be a true and perfect record, and consequently diminution cannot afterwards be alleged (*f*).

Special Pleas. What may be pleaded.

Special pleas also confess the errors assigned, but avoid them by other matter. Thus, to the assignment of errors, the defendant may plead a release of errors (*g*); and formerly, before the rule of H. T., 4 *W.* 4, *r.* 3, (*ante*, 336), if the release were in the same instrument with a warrant of attorney, and dated on any day in the term of which the judgment was signed, although after the day to which the judgment by law had relation, it was sufficient (*h*). It may also be necessary to observe, that if there be two or more plaintiffs in error, the release of errors by one of them will not bar the others (*i*). So, a release of all suits is a good plea (*k*); or a release of actions personal, where the matter in dispute is a debt, damage, or the like; or a release of actions real, where land is in dispute; but, where the plaintiff, by a writ of error, shall not be restored to anything personal or real, a release of all actions, real or personal, is no bar (*l*). So, if the plaintiff in error have, by release, feoffment, fine, or the like, conveyed his right in the thing in dispute to another, this conveyance may be pleaded by the defendant, and will be a good bar (*m*). So, the Statute of Limitations is a good bar, and cannot be taken advantage of in any other manner than by plea (*n*). But, entry by plaintiff into the lands in dispute, pending the writ, it seems, is no plea (*o*). These pleas in bar must conclude by praying that the plaintiff may be barred of his writ of error, and not that the judgment be affirmed, for they admit the judgment to be erroneous (*p*). But although they happen to be ill pleaded, yet, if there be really no errors, the court will affirm the judgment (*q*). To the plea the plaintiff may reply or demur, as in ordinary cases.

Demurrer.

If the errors be badly assigned, the defendant may, if he will, demur; although in most cases, as we have above seen, the common joinder will answer the same purpose. But where errors in fact and in law are assigned, (which we have seen *ante*, 370, cannot regularly be done), the defendant may demur if he would take advantage of the duplicity; for the common joinder, in such a case, would be an admission of the error in fact, and the judgment would consequently be re-

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(*e*) *Ante*, 371: and see Bro. Error, 165: 7 E. 4, 16

(*f*) *Robsert* v. *Andrews*, Cro. El. 84: *Beare* v. *Beecher*, Moore, 700; 1 Leon. 22: *Meredith* v. *Davies*, 1 Salk. 270; F. N. B. 51 a.

(*g*) 9 H. 6, 48: Ro. Abr. 788: see *Davenant* v. *Raftor*, 2 L. Raym. 1046: 6 Mod. 235, *S. C.*

(*h*) *Landon* v. *Pickering*, 2 Str. 1215.

(*i*) *Razing* v. *Ruddock*, 6 Co. 25 a; Cro. El. 648, 649, *S. C.*: *Blunt* v. *Snedston*, Cro. Jac. 116: *Hackett* v. *Herne*, 3 Mod. 135.

(*k*) *Cole's case*, Latch, 110.

(*l*) Co. Lit. 228. b.: 8 Co. 152: Ro. Abr. 788: 2 Id. 403.

(*m*) 9 H. 6, 46: Ro. Abr. 788, 789: 2 Bac. Abr., Error, (L).

(*n*) *Street* v. *Hopkinson*, 2 Str. 1055; Hardw. 345, *S. C.*

(*o*) *Winn* v. *Lloid*, 1 Lev. 22.

(*p*) *Cunningham* v. *Houston*, 1 Str. 127: *Dent* v. *Lingood*, 2 Id. 683: *Street* v. *Hopkinson*, Id. 1055; 1 Show. 50.

(*q*) *Carlton* v. *Mortagh*, 1 Salk. 268; 3 Id. 399; 6 Mod. 113, 206; 2 L. Raym. 1005, *S. C.*: *Meredith* v. *Davies*, 1 Salk. 270.

versed (*r*). So, the plaintiff may demur to the defendant's plea, the defendant demur to the plaintiff's replication, &c.

How Delivered, &c.

Ingross the plea, joinder, &c., on plain paper, and deliver them to the opposite attorney (*s*). *They should be signed by counsel, unless indeed it be the common plea or joinder in error, which need not* (*t*). If a release of errors be pleaded in the Exchequer Chamber, they may try it, and award a *venire* under the seal of the Court of Exchequer Chamber.

The plaintiff in error in the Exchequer Chamber may, it seems, proceed as quickly as he pleases (*u*).

Argument.

Argument.] By the 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 8, it is enacted that on an issue in law, "the court of error, after errors are duly assigned and issue in error joined, shall, at such time as the judges shall appoint, either in term or vacation, review the proceedings, and give judgment as they shall be advised thereon."

Setting down Case for.

Formerly in the Queen's Bench, either party might have moved for a *concilium*, drawn up and served the rule, entered the cause with the clerk of the papers, and proceeded to argument as on a demurrer. In the Exchequer Chamber the clerk of the errors set down the cause at the instance of either party without a motion for a *concilium*. But now, by rule of all the courts of *H. T.*, 4 *W.* 4, *r.* 14, "*when issue in law is joined, either party may set down the case for argument with the clerk of the errors of the court of error, or the clerk of the rules in the King's Bench*, (*as the case may require*), [now in any case, since 7 *W.* 4 & 1 *V.* *c.* 30, one of the masters of the court in which the original judgment was given], *and forthwith give notice in writing thereof to the other party, and proceed to argument in like manner as on a demurrer, without any rule or motion for a concilium.*" There are but two days in each term, appointed by the Court of Exchequer Chamber, for the despatch of business: one, usually the third or fourth day of the term, called the general affirmance day; the other, a day or two before the end of the term, called the adjournment day. *The cause must be entered with one of the masters of the court, in which the original judgment was given, for argument, for either of these days;* and if it be intended to be argued, it should, in strictness, be entered ten days before argument (*x*). Care, however, should be taken to enter it at least in time for the copies of the proceedings to be delivered to the judges; and if you be too late for this, before the general affirmance day, the master will set it down for the adjournment day, upon being paid some additional fee. Regularly the cause should be set down for argument by the plaintiff; but if he do not enter it, the defendant may. By the 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 8, the court may sit in vacation.

Days for Argument.

Delivering Copies of Proceedings to the Judges.

Formerly, before the day of argument, it was necessary for the plaintiff or his attorney to deliver to the chief justice

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(*r*) *Thynn* v. *Thynn*, Style, 69: *Edmonds* v. *Probert*, Carth. 338, 339: 2 Bac. Abr., Error, (K.2). See a demurrer for this cause, 10 Went. 5.

(*s*) R. H., 4 W. 4, r. 12, *ante*, 370, n. (*c*), (*e*). See a form, Chit. Forms, 175.

(*t*) *Grant* v. *South*, 5 Dowl. 107; 1 M. & W. 740, *S. C.*: 2 H. & W. 64.

(*u*) *Home* v. *Bentinck*, 1 B. & B. 514.

(*x*) R. E., 33 C. 2.

and senior judge, and for the defendant or his attorney to deliver to the two other judges, copies of the books or proceedings in error, as on a demurrer (*y*); and, to enable the parties to make such copies, the clerk of the errors made for them a transcript of the proceedings (*z*). But now, by rule of all the courts of *H. T.*, 4 *W.* 4, *r.* 15, "*four clear days before the day appointed for argument, the plaintiff in error shall deliver copies of the judgment of the court below, and of the assignment of errors, and of the pleadings thereon, to the judges of the King's Bench, on writs of error from the Common Pleas or Exchequer, and to the judges of the Common Pleas on writs of error from the King's Bench; and the defendant in error shall deliver copies thereof to the other judges of the Court of Exchequer Chamber, before whom the case is to be heard; and in default by either party, the other party may deliver such books as ought to have been delivered by the party making default, and the party making default shall not be heard until he shall have paid for such copies, or deposited with the clerk of the errors, or the clerk of the rules in the King's Bench,* (*as the case may be*), [now in any case, since the 7 *W.* 4 & 1 *V. c.* 30, one of the masters of the court in which the original judgment was given], *a sufficient sum to pay for such copies.*"

Proceedings need not be recorded before Argument.

Formerly, on issue being joined in error, the proceedings were entered of record before the case was set down for argument. But now, by rule of all the courts of *H. T.*, 4 *W.* 4, *r.* 16, "*no entry on record of the proceedings in error shall be necessary before setting down the case for argument; but after judgment shall have been given in the court of error in the Exchequer Chamber, either party shall be at liberty to enter the proceedings in error on the judgment roll remaining in the court below, on a certificate of the clerk of the errors of the Exchequer Chamber, of the judgment given, for which a fee of* 3*s.* 4*d. and no more shall be charged.*" And since the abolition of the office of clerk of the errors of the Exchequer Chamber by the 7 *W.* 4 & 1 *V. c.* 30, *s.* 2, this certificate is perhaps no longer necessary.

Mode of Proceeding on Argument.

Each party should furnish his counsel with a brief of the proceedings and remarks, for the purpose of arguing the case. One counsel is heard for each party: the counsel for the plaintiff first; then the counsel for the defendant; and lastly, the counsel for the plaintiff in reply. If the common errors alone be assigned, the plaintiff's counsel are at liberty to support them, by objections to the record for any error whatever appearing upon the face of it; or if an error upon the face of the record be assigned specially, the counsel are not confined to it, but may make any other error, appearing upon the face of the record, the subject of objection (*a*). But where an error is an out-branch of the record, (as formerly that there was no warrant of attorney), this cannot be objected to by counsel, unless specially assigned (*b*).

As soon as the plaintiff's counsel has replied, the judges deliver their opinions *seriatim;* and, according to the opinion of

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(*y*) R. M., 17 Car. 1, Q. B.: R. E., 2 Jac. 2: R. T., 40 Geo. 3, Q. B.: 1 East, 131: R. E., 18 Car. 2, Q. B.: Tidd, 9th ed. 728.

(*z*) Tidd, 9th ed. 1177.

(*a*) 5 Co. 37 b: *Far* v. *Denn*, 1 Bur. 363.

(*b*) *Graddell* v. *Tyson*, 2 L. Raym. 1441: and see *ante*, 371.

the majority, the judgment below is either affirmed or reversed. If the court be equally divided, the judgment will be affirmed (*c*).

If not argued.

If the case be not argued, counsel must move for judgment of affirmance or reversal.

Judgment, Form and Nature of.

For Defendant in Error.

Judgment, Form and Nature of.] The common judgment for the *defendant* in error is, that the judgment be affirmed (*d*). So, on a demurrer to an assignment of errors, the judgment for defendant is *quod affirmetur* (*e*). But when the defendant has pleaded a release of errors (*f*), or the Statute of Limitations (*g*), and it is found for him, the judgment is, that the plaintiff be *barred* of his writ of error, and not *quod affirmetur*.

For Plaintiff in Error.

As to the judgment for the *plaintiff* in error: where judgment is given in the court below against the defendant, and he brings a writ of error, the judgment in the court of error, if given for him, shall be *quod judicium reversetur* (*h*). But if the judgment in the court below were given against the plaintiff, and he bring a writ of error, and succeed; in such case, the judgment below shall not only be reversed, but the court of error shall also give judgment as the court below ought to have given (*i*). On a writ of error returnable in the Queen's Bench, that court can award a writ of inquiry to assess damages, if necessary, and, upon the return of the inquiry, give final judgment (*k*). So, if judgment below were on a special verdict, and the writ of error brought in the Exchequer Chamber, or in Parliament, these courts will at once give final judgment (*l*); but where a writ of inquiry is necessary, in order to assess damages, as these courts cannot award it, the judgment given by them is *quod recuperet* only, and the court in which the original judgment was award a writ of inquiry to assess the damages; and final judgment is then given in the court in which the original judgment was given, upon the return of the inquiry (*m*).

Partial Reversal.

A judgment being an entire thing, cannot regularly be reversed for part, and affirmed for the residue (*n*). Thus, where an action is brought for a croft and a messuage, in one count, and, upon error, it is holden that the action does not lie of a croft, the judgment must be reversed both as to the croft and the messuage (*o*). So, if in an action against several, one judg-

(*c*) *Thornby* v. *Fleetwood*, 1 Str. 381.

(*d*) Bac. Abr., Error, (M), 2: 21 E. 4, 44: Ro. Abr. 805.

(*e*) *Jeffery* v. *Wood*, 1 Str. 439.

(*f*) *Dent* v. *Lingood*, 2 Str. 683: *Cunningham* v. *Houston*, 1 Str. 127: *Kerie* v. *Clifton*, 3 Salk. 214.

(*g*) *Street* v. *Hopkinson*, 2 Str. 1055: Cas. T. H. 345, *S. C.*

(*h*) *Slocomb's case*, Cro. Car. 442: Ro. Abr. 774: 2 Saund. 256: *Baker* v. *Lade*, Carth. 253, 254; 1 Salk. 262, 263.

(*i*) Ro. Abr. 774, 805: *Slocomb's case*, Cro. Car. 442; Yelv. 47: *Cole* v. *Greene*, 1 Lev. 310; 2 Saund. 256, 317: Show. 57: *Parker* v. *Harris*, 1 Salk. 262: *Butcher* v. *Porter*, Carth. 243: *Baker* v. *Lade*, Id. 254: *Phillips* v. *Berry*, 1 L. Raym. 5; 1 Salk. 403; 4 Mod. 106; Skin. 447, *S. C.*: 2 Bac. Abr., Error, (M), 2: *Ceeley* v. *Hoskins*, Cro. Car. 509: *Mulcarry* v. *Eyres*, Id. 512: *Clements* v. *Whaller*, 4 Bur. 2156: *Cuming* v. *Sibly*, Id. 2490: *Wyvil* v. *Stapleton*, 1 Str. 617.

(*k*) 2 Saund. 101 v.

(*l*) *Denn ex dem. Mellor* v. *Moore*, 1 B. & P. 30; 5 T. R. 558, *S. C.*; 1 Carth. 319: Skin. 514: *Phillips* v. *Berry*, 1 Salk. 403; 1 L. Raym. 5, *S. C.*; Id. 10.

(*m*) See the 11 G. 4 & 1 W. 4, c. 70, s. 8, *post*, 377, shewing that there is no occasion for a *remittitur* in such a case. (*Faldowe* v. *Ridge*, Cro. Jac. 206; Yelv. 74, 76, *S. C.*; Noy, 129; 1 Show. 127: *Kent* v. *Kent*, Hard. 51).

(*n*) See *Rolls* v. *Germin*, Moore, 366; Cro. Eliz. 425, *S. C.*; Noy, 117; 2 Leon. 178; 2 Ro. Rep. 136: *Parker* v. *Harris*, Carth. 235: 2 Bac. Abr., Error, (M), 1: *Cutting* v. *Williams*, 1 Salk. 24; 2 L. Raym. 825, *S. C.*

(*o*) 1 Ro. Rep. 2: 2 Bulstr. 214: Alleyn, 74: Ro. Abr., 774: *sed vide Doe Lawrie* v. *Dyeball*, 8 B. & Cres. 70; 1 Moo. & P. 330, *S. C.*

ment be given against all, and, upon error, it is holden that the judgment is erroneous as to one, it shall be reversed as against all (*p*). So, if there be but one judgment upon several issues or counts, if it be erroneous as to one issue or count, it shall be reversed as to all (*q*). But where there are more judgments than one, then, if they be distinct and independent of each other, the reversal of one will not affect the others. But if they be dependent, (as, for instance, in the case of debt or *scire facias* on a judgment), if the first judgment be reversed for error, the judgment in debt on *sci. fa.* is also thereby reversed; but if merely the judgment in the action of debt or *sci. fa.* be reversed, this does not affect the first judgment (*r*). Or even if there be but one judgment, and it consist of several distinct and independent parts, it may be reversed as to one part, and remain good for the remainder; thus, where judgment on a *sci. fa.* gives damages for delay of execution, the judgment may be reversed as to the damages alone (*s*). So, in a *qui tam* action, where judgment was given for damages as well as for the penalties, it was reversed as to the damages (*t*). So, where costs were awarded by a judgment against executors on a *sci. fa.*, the judgment was reversed as to the costs, and affirmed for the residue (*u*). So, if judgment be given for the plaintiff on one count in a declaration, and a distinct judgment for defendant on another, if the defendant bring a writ of error on the first count, the court of error cannot examine the legality of the judgment on the second count, no error being assigned on that part of the record (*x*).

Judgment, &c., Signing of, &c.

Judgment, Signing of, &c.] Four days exclusive after the affirmance, one of the masters of the court in which the original judgment was given will sign judgment and tax your costs (*y*). An entry of the affirmance, &c., must then be made on the judgment roll in the court below (*z*). By statute 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 8, "the proceedings and judgment, as altered or affirmed, shall be entered on the *original record*, and such further proceedings as may be necessary therein shall be awarded by the court in which the original record remains; from which judgment in error no writ of error shall lie or be had, except the same be made returnable in the high court of Parliament." And by *R. H.*, 4 *W.* 4, *r.* 16, *ante*, 375, either party is at liberty to enter the proceedings in error on this judgment roll, on a certificate of the clerk of the errors of the Exchequer Chamber of the judgment given, and for which certificate the clerk of the errors is entitled to 3*s.* 4*d.* But since the abolition of the office of clerk of the errors in the Exchequer Chamber, by the 7 *W.* 4 & 1 *V.* *c.* 30, this certificate is perhaps dispensed with.

(*p*) Ro. Abr. 776: *Bird* v. *Orm*, Cro. Jac. 289; Alleyn, 74, 75; Style, 121, 125, 406

(*q*) *Parker* v. *Harris*, Carth. 234; 4 Mod. 76; 1 Salk. 262; 2 Vent. 249, 270, *S. C.*: 2 Bac. Abr., Error, (M), 1: but see *Everard* v. *Patterson*, 6 Taunt. 645: *semb.*, *cont.*

(*r*) 2 Bac. Abr., Error, (M), 1; *Canning* v. *Wright*, 2 L. Raym. 1532; 2 Str. 807, *S. C.*

(*s*) *Wright* v. *Canning*, 2 Str. 807.

(*t*) *Frederick* v. *Lookup*, 4 Bur. 2018.

(*u*) *Bellew* v. *Aylmer*, 1 Str. 188.

(*x*) *Campbell* v. *French*, 6 T. R. 200.

(*y*) See 7 W. 4 & 1 V. c. 30, s. 2, 23. See a form of affirmance, Chit. Forms, 120; of reversal upon a writ of error by a defendant, Id. 122; or upon a writ of error by a plaintiff in an action of debt, Id. 122; or on any other action, Id. 122; and of the writ of inquiry in this latter case, Id. 123.

(*z*) See the form, Chit. Forms, 121.

Interest.

Interest.] Where the defendant below brings error, and the judgment is affirmed, the counsel for defendant in error should immediately move the Court of Exchequer Chamber that interest may be allowed from the time of signing the judgment below until affirmance (*a*); otherwise, the master will not, perhaps, allow it when he taxes the costs (*b*). *Notice of this motion should be previously given to the attorney for the plaintiff in error* (*c*)*; and upon producing an affidavit of the service of it, and an affidavit stating the recovery in the original action and the writ of error, the court will grant a rule absolute in the first instance* (*d*).

Formerly, it was entirely in the discretion of the court, whether interest should be allowed or not (*e*). But now, by the recent statute 3 & 4 *W.* 4, *c.* 42, *s.* 30, "if any person shall sue out any writ of error upon *any judgment* whatsoever given in any court in any action personal, and the court of error shall give judgment for the defendant thereon, then interest *shall* be allowed by the court of error for such time as execution has been delayed by such writ of error, for the delaying thereof." It will be observed, that this enactment extends to all judgments in error, and is not confined to judgments of affirmance (*f*); also, that it is imperative (*g*). The enactment does not apply to cases where the writ of error was

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(*a*) *Welford* v. *Davidson*, 2 Bur. 2127: and see *Bodily* v. *Bellamy*, 2 Bur. 1096.

(*b*) But since the late statute, which makes it imperative on the court to grant interest in certain cases, it may be doubted whether an application to the court is necessary; no objection was made for want of such application in *Burn* v. *Carvalho*, 4 N. & M. 893. The application was, however, made in *Levy* v. *Langridge*, 4 M. & W. 332, where the court held that the statute 3 & 4 W. 4, c. 42, s. 30, was imperative upon them.

(*c*) See the form, Chit. Forms, 119.

(*d*) See the form of the affidavit to ground the application, Chit. Forms, 120: see the form of the rule, Id.

(*e*) *Shepherd* v. *Macreth*, 2 H. Bl. 284. They would allow it in covenant on a charter-party for stipulated freight; (see *Martin* v. *Emmote*, 6 Taunt. 530: 2 Marsh. 230, *S. C.*); or on a contract to replace stock and pay the dividends; (*Dwyer* v. *Gurry*, 7 Taunt. 14); or on a contract to give a mortgage; (*Anon.*, 4 Taunt. 876); or on a contract to indemnify the acceptor of a bill of exchange; (*Furlong* v. *Rucker*, 4 Taunt. 250): but not on a contract to sell goods; (*Bristow* v. *Waddington*, 2 New Rep. 355); nor for goods sold, unless they were to have been paid for by a bill at a certain date, or the like; (*Middleton* v. *Gill*, 4 Taunt. 298; and see 7 Id. 244; 3 Price, 250, *S. C.*); nor in an action upon an attorney's bill; (*Walker* v. *Bailey*, 2 B. & P. 219); nor for money lent, generally; (*Gwyn* v. *Godby*, 4 Taunt. 346); but for the balance of a banker's account, upon which interest was usually charged by the banker, (Id.), or upon the balance due by the banker, if it were the custom of the banker to allow interest upon sums deposited with him, but at the rate of interest he was used to allow; (*Skin* v. *Bradley*, 8 Taunt. 250; 2 Moore, 206; 5 Price, 536, *S. C.*); or for the balance of merchants' accounts, even although interest should form one of the items in them, (*Hammell* v. *Abel*, 4 Taunt. 298), they would allow it. In an action against bail on their recognisance the court refused to allow interest; (*Anon.*, 4 Taunt. 722); so in an action on a replevin bond; (*Anon.*, 4 Taunt. 30); so upon a suggestion of breaches of the condition of a bond, under 8 & 9 W. 3, c. 11, s. 8. (*Johnes* v. *Johnes*, 5 Taunt. 656). In trover for bills of exchange, they allowed interest from the date of final judgment upon such bills as had been paid before judgment, and upon all such as had been paid afterwards, from the time when they were paid. (*Atkins* v. *Wheeler*, 2 New. Rep. 205). If the declaration contained several counts, and some were for liquidated damages, upon which interest might be allowed, yet, if there were also a count for unliquidated damages, and a general judgment were given, the court would not allow interest on either. (*Powell* v. *Saunders*, 5 Taunt. 28: *Martin* v. *Emmote*, 6 Taunt. 530; 2 Marsh. 230, *S. C.*) Besides the several cases above mentioned, in which the court would allow interest, it seems to have been a general rule that the court would allow interest in all cases where the writ of error was evidently brought for the purpose of delay, and where the court, upon application, would have allowed the defendant in error to sue out execution pending the writ. (See *Saxelby* v. *Moor*, 3 Taunt. 51: and see *ante*, 361).

(*f*) Before this enactment, the court allowed the defendant in error interest where the plaintiff was *nonprossed*, in the same way as if the judgment were affirmed, provided the original action were such as the court would allow interest upon on such affirmance. (*Sykes* v. *Harrison*, 1 B. & P. 29).

(*g*) *Levy* v. *Langridge*, 4 M. & W. 337.

sued out before the passing of the act (*h*). The interest will be calculated at four per cent (*i*).

Costs.

Costs.] By stat. 3 *Hen.* 7, *c.* 10 (*j*), where the judgment in the court below is given for the *plaintiff*, and the defendant, *before* execution had, sues out a writ of error; if the judgment be affirmed, or the writ of error be discontinued in default of the party, or the plaintiff in error be nonsuit, the defendant in error shall, at the discretion of the court, recover his costs and damages for the delay, &c. This statute has been holden not to extend to cases where the writ of error is nonprossed before the record is transcribed by the master (*k*); nor to cases where the writ of error has been sued out *after* execution (*l*). And the statute is confined to judgments recovered by the original plaintiffs below, and does not extend to judgments recovered by the defendants below; and an avowant in *replevin* is not a plaintiff within the meaning of the act (*m*). But it includes cases where no costs were recoverable in the original suit (*n*). Even before the recent stat. 3 & 4 *W.* 4, *c.* 42, *s.* 31, where an executor brought error on a judgment after a *devastavit* (*o*), or even on a judgment as to the debt *de bonis testatoris*, and as to the costs *de bonis testatoris, et si non de bonis propriis* (*p*), he had to pay costs, if the judgment were affirmed; although he was not chargeable with costs in error, where he brought error on a judgment recovered against his testator (*q*); but since that enactment he would, it seems, be so, unless the court or a judge otherwise ordered (*r*). In an action of slander, wherein the declaration consisted of *ten* counts, the jury gave 50*l*. damages on the first count, and 100*l*. damages on the other nine counts; one of which latter counts was holden bad on error, and the plaintiff having agreed to remit the 100*l*. damages, the court held that he thereby gave up all the costs on the last nine counts (*s*). The court will not give a party leave to *nonpros* his own writ of error without payment of costs (*t*). Also, by 13 *C.* 2, *st.* 2, *c.* 2, *s.* 10, if a judgment given *after verdict* be affirmed in error, the defendant in error shall have *double* costs. This statute does not leave it to the discretion of the court to award costs or not; but the court are bound to give double costs to the defendant in error, in all cases within it (*u*). It extends, however, only to cases where error is brought by the defendant below, to reverse a judgment obtained by the plaintiff (*x*). It does not apply where the defendant below obtains judgment upon a special verdict (*u*), nor where the party about to sue out a writ of error had, in order to avoid execution, paid the damages and costs to the opposite attorney, with a notice to retain them in his hands,

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(*h*) *Burn* v. *Carvalho*, 1 A. & E. 895; 4 N. & M. 893, *S. C.*

(*i*) *Levy* v. *Langridge*, 4 M. & W. 337.

(*j*) Enforced by 19 H. 7, c. 20.

(*k*) *Salt* v. *Richards*, 7 East, 111.

(*l*) See *R.* v. *Inhabitants of Madley, Staffordshire*, 2 Str. 1190: *Eardley* v. *Turnock*, Cro. Jac. 636.

(*m*) 2 Doug. 709, n.: *Goding* v. *Dias*, 10 East, 2.

(*n*) *Ferguson* v. *Rawlinson*, 2 Str. 1084; 3 Bur. 1511.

(*o*) *Caswell* v. *Norman*, 2 Str. 977.

(*p*) *Williams* v. *Riley*, 1 H. Bl. 566.

(*q*) *Saltern* v. *Wynne*, 2 Str. 1072; Hardw. 367, *S. C.*

(*r*) See *post*, Book III. Part II. Ch. 5.

(*s*) *Dann* v. *Crease*, 2 Dowl. 269; 2 C. & M. 223; 4 Tyr. 74, *S. C.*

(*t*) *Wilkinson* v. *Malin*, 1 C. & M. 240.

(*u*) *Shepherd* v. *Macreth*, 2 H. Bl. 284.

(*x*) *Baring* v. *Christie*, 5 East, 545.

and the attorney had deposited the sum in a bank, where it produced interest (*y*).

Where judgment is given for the *defendant* in a court of record, and the plaintiff thereupon brings a writ of error, if the judgment be affirmed, or the writ of error be discontinued, or the plaintiff be nonsuit, the defendant in error shall have judgment to recover his costs, and may have execution for the same by *ca. sa.*, *fi. fa.*, or *elegit* (*z*).

Where Judgment reversed.

None of these statutes extend to the *reversal* of a judgment for error in *law*. Therefore, where judgment is reversed, each party pays his own costs in error (*a*); but the prevailing party shall have his costs in the original action, as the court of error must give the same judgment which ought to have been given by the court below (*b*). But where a judgment for the plaintiff was reversed for error in *fact* brought by the defendant, the court held that the plaintiff in error was entitled to his costs of the defence of the original action, though not to the costs in error (*c*). And where the plaintiff obtained a verdict, and the Court of Exchequer arrested the judgment, which judgment was reversed on a writ of error by the Court of Exchequer Chamber, it was holden that the plaintiff was entitled to the costs of the motion in arrest of judgment, and that such costs must be taxed by the officer of the Court of Exchequer (*d*).

Execution.

Execution.] After judgment signed, and the proceedings in error are entered on the original judgment roll, the defendant in error may take out execution for the sum recovered by the original judgment, as well as the damages and costs in error; and such execution may be by *fi. fa.*, *elegit*, or *ca. sa.* Formerly, before execution issued, or, at least, before it was returnable, it was necessary that the transcript of the record which was in the court above should be remitted to the Court of Queen's Bench (*e*); and the execution being founded on the record, must have issued out of that court where the record was (*f*). But now, since the above statute of 11 *G.* 4 *&* 1 *W.* 4, *c.* 70, *s.* 8, and the above rule of *H. T.*, 4 *W.* 4, *r.* 16, there is no occasion for this *remittitur*, and the record remains in the court *below*, and execution is therefore in all cases now issued by and out of that court. The execution is sued out as in ordinary cases.

Restitution.

Restitution.] If the judgment below be reversed, the plaintiff in error shall have a writ of restitution, in order that he may

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(*y*) *Wright* v. *Fairfield*, 2 B. & Ad. 959: see *Cockerell* v. *Cholmeley*, 10 B. & C. 564, 576

(*z*) 8 & 9 W. 3, c. 11, s. 2. The words of this act are, "If at any time after judgment given for the *defendant*, in any action, plaint, or suit, in any court of record, the plaintiff or demandant shall sue any writ or writs of error, to annul the said judgment, and the said judgment shall be afterwards affirmed, the writ of error discontinued, or the plaintiff be nonsuit therein, the defendant in error, shall have judgment to recover his costs against the plaintiff or demandant, and have execution for the same, by *capias ad satisfaciendum*, *fieri facias*, or *elegit*." (See *Ricketts* v. *Lewis*, 1 B. & Ad. 197: *Golding* v. *Dias*, 10 East, 4).

(*a*) See 2 Saund. 101 x.

(*b*) *Gilhard* v. *Gladstone*, 12 East, 668: *Bell* v. *Potts*, 5 East, 49.

(*c*) *Anon.*, *per cur.*, H., 40 G. 3, K. B.: Tidd. Prac. 9th ed. 1181: Tidd. New Prac. 618.

(*d*) *Adams* v. *Meredew*, 3 Y. & J. 419.

(*e*) *Potter* v. *Turner*, Palm. 186: *Vicars* v. *Haydon*, Cowp. 843: *Howard* v. *Pitt*, 1 Salk. 261: *Laroche* v. *Wastrough*, 2 T. R. 787.

(*f*) Ib.: Tidd, 9th ed. 994, 1186: *Cost* v. *Lynch*, 1 L. Raym. 427.

be restored to all he has lost by the judgment (*g*). If execution on the former judgment have been actually executed, and the money paid over, the writ of restitution may issue without any previous *scire facias;* but if the money have not been paid over, a *scire facias quare restitutionem non*, suggesting the matter of fact, *viz.* the sum levied, &c., must previously issue (*h*).

Rule not to commit Waste.

Besides this writ of restitution, the court, upon application, will oblige the defendant to enter into a rule not to commit waste pending the writ of error, if the justice of the case require it (*i*).

3. *Writ of Error to the House of Lords, after Affirmance or Reversal in the Exchequer Chamber.*

After the judgment has been affirmed or reversed in the Court of Exchequer Chamber, a writ of error may be brought upon the judgment of affirmance, &c., returnable in the House of Lords (*k*).

The Writ, and how Sued out.

The Writ, and how Sued out.] The writ of error in this case is directed to the chief justice or chief baron of the court in which the original judgment was given, and where the record remains, and is made returnable *immediate* before the queen in her present parliament, if the parliament be then sitting (*l*), or, after a prorogation, then before the queen in her parliament at the next session (*m*), or, after a dissolution, then before the queen in her next parliament, specifying the day on which it is to be holden (*n*). *Make out a præcipe for the writ* (*o*) *; take this to the cursitor of the county in which the venue is laid in the original action, who will make out the writ, and get it sealed at the next general seal,* (*or, if expedition be requisite*), *at a private seal, having first procured a warrant from the crown for that purpose. Pay* 6*l.* 15*s.* 6*d.* ; *and* 8*s.* 6*d.* *more if the writ were sealed at a private seal* (*p*).

Allowance of it, and how far a Supersedeas

Allowance of it, and how far a Supersedeas.] *Take the writ to one of the masters of the court in which the original judgment was given, who will allow it, and give you a note of the allowance* (*q*). *Make a copy of the note, and serve it upon the attorney of the opposite party, at the same time shewing him the original. Take care that the note contain a statement of some particular ground of error, as mentioned ante*, 357, 358. How far the allowance of the writ is a *supersedeas* of execution, see *ante*, 357 *to* 362. The court have refused to allow execution to be sued out, merely because the plaintiff in error suffered

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(*g*) *Simpson* v. *Juxon*, Cro. Jac. 690; 1 L. Raym. 427; 1 Salk. 321. See the form of the writ, Chit. Forms, 125.

(*h*) *Anon.*, 2 Salk. 588. See the form, Chit. Forms, 124: and see Lil. Ent. 641, 650, and *post*, title "Execution:" and see 2 Saund. 101 y, 69: 2 Bac. Abr., Error, (M), 3.

(*i*) *Wharod* v. *Smart*, 3 Bur. 1823.

(*k*) 11 G. 4 & 1 W. 4, c. 70, s. 8, *ante*, 377: and the prior cases, 1 Vent. 334; T. Raym. 330; T. Jones, 99.

(*l*) 2 Sellon, 395.

(*m*) Lill. Ent. 248, 254.

(*n*) 1 Vent. 81, 266: *Sedgwick* v. *Gofton*, 1 Mod. 106.

(*o*) See the form, Chit. Forms, 126.

(*p*) See the form of the writ, Chit. Forms, 126.

(*q*) See the form, Chit. Forms, 111.

judgment to be affirmed in the Exchequer Chamber without objection, and then brought error in Parliament (*r*).

Bail.

Bail.] Bail must again be put in, notwithstanding bail having been already put in to the former writ of error (*s*). It is put in in this court, and justified, &c., in the manner mentioned *ante*, 362 *to* 367 (*t*).

Certifying the Record.

Certifying the Record.] *The plaintiff must transcribe the record in the time and manner pointed out ante*, 367 (*u*).

How.

When the transcript has been completed, examined, and annexed to the writ of error, the chief justice of this court goes in person, attended by one of the masters, to the House of Lords, with the record itself and the transcript. The latter, after being examined with the record, is left there; but the record is immediately brought back to this court, in order that execution may be awarded here, if the judgment be affirmed in the court above (*x*).

When.

By an order of the House of Lords, 13th July, 1678, writs of error in Parliament shall be brought in (that is, the record shall be certified) within fourteen days from the first day of the session in which such writs shall be returnable; unless it be upon judgments given during the session; in which case the writ must be brought in within fourteen days after the judgment is given; otherwise such writs shall not be received (*y*).

Assignment of Errors.

Assignment of Errors.] By an order of the House, 13th Dec. 1661, if the plaintiff do not assign errors within eight days after the removal of the record, the clerk of Parliament, upon request of the defendant, shall record that the plaintiff hath not prosecuted his writ of error; and the House will thereupon award that the plaintiff shall lose his writ, that the defendant shall go without day, and that the record be remitted. But as the remission of the record is now no longer requisite to have execution, there is no occasion for this award of it. The practice, however, in order to compel the plaintiff to assign errors, is, to *draw up a petition to the House, stating the judgment and writ of error shortly, and that plaintiff has not as yet assigned errors, and praying that the transcript may be remitted, in order that the defendant may have execution thereon* (*z*). *Get a peer to present this, and to move that a day be given the plaintiff to assign errors; upon which the House will make an order that unless the plaintiff assign errors on or before a day therein specified, (usually eight days from the date of the order), the transcript shall be remitted to the court below. Call the next day at the office of the clerk in Parliament, where*

(*r*) See *ante*, 361.

(*s*) *Tilly* v. *Richardson*, 1 Salk. 97; 2 L. Raym. 840, *S. C.*: *Colebrook* v. *Diggs*, 1 Str. 527.

(*t*) See the form of the note of bail Chit. Forms, 126; of the notice of bail, 127: of the rule for better bail, Ib.; of the notice of justification, or of adding and justifying, Ib.; of the affidavit of service of notice of justification, Ib.; and of the rule of allowance, Ib.

(*u*) See the form of the chief justice's return, Chit. Forms, 127; and of the entry of *nonpros* for not transcribing, Ib.

(*x*) 2 Saund. 101 m: 4 Inst. 21: Cro. Jac. 341: Ro. Abr. 753: 1 Bulst. 166: Godb. 249: and see *Vicars* v. *Haydon*, Cowp. 843.

(*y*) 1 Comyns, 420: Bunb. 64.

(*z*) See the form, Chit. Forms, 128.

the order will be drawn up and given to you (*a*); *serve it, without delay, on the plaintiff's attorney; and if the plaintiff do not assign errors within the time limited in the order, call at the office of the clerk in Parliament, and he will sign judgment of* nonpros, *and the defendant in error will be entitled to his costs* (*b*).

The assignment of errors is engrossed on plain paper, and should, if special, be signed by counsel (*c*). *File it in the office of the clerk of Parliament.* As to what may be assigned for error, &c., see *ante*, 369, 370, 371 (*d*).

Certiorari.

Certiorari.] If, in consequence of the error assigned being for a defect in an out-branch of the record, (as formerly the want of a warrant of attorney (*e*),) a *certiorari* become requisite, upon the plaintiff's praying a *certiorari*, the clerk of Parliament shall enter an award thereof accordingly; and the plaintiff, before *in nullo est erratum* pleaded, may sue forth the *certiorari* in ordinary course, without special petition or motion to the House for the same; and if he shall not prosecute such writ, and procure it to be returned within ten days next after his plea of diminution put in, then, unless he shall shew good cause for enlarging the time for the return of such writ, he shall lose the benefit of the same, and the defendant may proceed as if no such writ of *certiorari* was awarded (*f*). Or, if the House be about to rise, then, upon petition, (of which two days' previous notice must be given), they will order the plaintiff in error to return the *certiorari* within a less time (*g*). Also, when the *certiorari* is thus awarded, before *in nullo est erratum* pleaded, the clerk of Parliament, upon request, shall give a certificate that diminution is so alleged, and a *certiorari* prayed and awarded thereupon (*h*). The *certiorari* in this case is an original writ, and is made out by the cursitor; care should be taken that it do not bear teste before the assignment of errors (*i*). It is directed to the chief justice. It is made returnable without delay. If the *certiorari* be not returned and filed within the time given for that purpose, the defendant may enter a *non misit breve*, plead *in nullo est erratum* (*k*), and proceed to affirm the judgment, without noticing the diminution alleged (*l*).

Motion for Defendant to appear and make Defence.

As soon as errors have been assigned, and the *certiorari* (when necessary) has been sued out and returned, the plaintiff in error (if he be desirous of expediting the cause) may get a peer to move that the defendant may appear and make his defence. An order is made accordingly, and must be served upon the defendant's attorney; and the defendant must then plead or demur within the time specified in the order. This,

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(*a*) See the form, Chit. Forms, 128.

(*b*) See the form of the judgment of *nonpros*, Chit. Forms, 129.

(*c*) *Ante*, 370.

(*d*) See the form of the assignment of common errors, where the judgment in Q. B. was confirmed in the Exchequer Chamber, Chit. Forms, 130; and common joinder thereto, Id. 131; of the assignment of common errors, where the judgment of Q. B. was reversed in the Exchequer Chamber, Id. 131; and common joinder thereto, 132; of the judgment of *nonpros* for not assigning errors, Id. 129; and of the entry thereof upon the roll, Id. 129.

(*e*) See *ante*, 371, 373.

(*f*) Ord. D. P., 13th Dec. 1661.

(*g*) Tidd, 1081.

(*h*) Ord. D. P., 21st Feb. 1710.

(*i*) *Bowers* v. *Mann*, 2 L. Raym. 1554; 2 Str. 819, *S. C.*

(*k*) See the form, Chit. Forms, 131.

(*l*) 2 Sellon, 378: *Smith* v. *Stoneard*, 1 Salk. 267; 2 L. Raym. 1156, *S. C.* See the form of the entry, Chit Forms, 133.

however, is very seldom necessary; for the defendant in error usually comes in voluntarily, and pleads or demurs to the assignment of errors without being ordered to do so. To the assignment of errors the defendant pleads either the common joinder *in nullo est erratum*, or a special plea or *demurrer*, as directed *ante*, 373 (*m*). These should be filed with the clerk of Parliament, and signed by counsel: though both the assignment of common errors and the common joinder are received by him without counsel's signature (*n*).

Argument. Motion for Hearing.

Argument.] After the joinder is filed, either party may get a peer to move that the cause may be set down for hearing; which will be ordered accordingly; and it will then be set down in the list of writs of error and appeals, and called on afterwards in its turn. But if either party wish to have the cause argued out of its turn, he must petition the House for that purpose, (giving two days' previous notice to the opposite party), and get a peer to present it, and move that it be referred to a committee; whereupon, if the committee be of opinion that the reasons alleged in the petition are sufficient, and report to the House accordingly, the House will then appoint a day for the hearing (*o*). The day for hearing, once appointed, cannot be altered, nor the cause set down for argument out of its turn, unless upon petition, as here directed; and oath must be made, at the bar of the House, of the service of notice on the opposite party (*p*).

Drawing up Case, and leaving Copies

The next thing requisite is, that each party shall have his case drawn up and signed, either by the counsel who were engaged in the action in the court below, or by those who are to argue it in Parliament (*q*); and 250 printed copies of each case must be delivered at the Parliament Office for the use of the peers.

Hearing Counsel.

When the cause is called on, the senior counsel for the plaintiff is first heard; then the plaintiff's second counsel, (not more than two counsel on each side being allowed to address the House); next, the two counsel for the defendant are heard, in their order of precedence; and, lastly, the plaintiff's senior counsel is heard in reply (*r*).

Affirmance or Reversal.

As soon as the plaintiff's counsel has replied, the Lord Chancellor then delivers his opinion on the case, and moves that the judgment be either affirmed or reversed. The other peers afterwards, if they wish, deliver their opinion; and the affirmance or reversal of the judgment is decided by the votes of peers present, no proxies in this case being allowed. If the votes be equal, the judgment is affirmed (*s*).

Judgment, &c.

Judgment, &c.] As to the judgment on a writ of error, see *ante*, 376 (*t*).

Costs.

Costs.] As to costs in error generally, see the former di-

(*m*) See the reference to the forms in note (*d*), *ante*, 383.

(*n*) See *ante*, 374.

(*o*) See the form of the petition, Chit. Forms, 132; and order, Ib.

(*p*) Ord D. P., 22nd Dec. 1703.

(*q*) Ord. D. P., 19th April, 1698.

(*r*) See Ord. D. P., 2nd March, 1727.

(*s*) *Thornby* v. *Fleetwood*, 1 Str. 381.

(*t*) See *Vicars* v. *Haydon*, Cowp. 843: and *ante*, 377. And see a form of the entry of the proceedings in the House of Lords, and of the affirmance there, Chit. Forms, 133, 134, &c.

vision of this subject, namely, error from the Court of Queen's Bench to the Exchequer Chamber, *ante*, 379. In the House of Lords, they give sometimes very large and sometimes very small costs in their discretion, according to the nature of the case, and the reasonableness or unreasonableness of litigating the judgment of the court below (*u*). And if the House of Lords do not award costs, the court in which the original judgment was, can in no case supply the defect by awarding them (*x*).

Taxation of.

For regulating the taxation of costs on appeals and writs of error in the House of Lords, it is ordered, that "in all cases in which that House shall make any order for payment of costs, by any party or parties, in any appeal or writ of error, without specifying the amount, the clerk of the parliaments or clerk assistant shall, upon the application of either party, proceed for the taxation of such costs, in such manner as is directed by an act passed in the seventh and eighth years of the reign of his late Majesty King George the Fourth, intituled 'An Act to establish a taxation of costs on private bills in the House of Lords,' (7 & 8 *G*. 4, *c*. 64, *s*. 1, 2), and shall give a certificate thereof, expressing the amount of such costs: And it is further ordered, that the same fees shall be demanded from and paid by the party applying for such taxation, for or in respect thereof, as are now or shall be fixed by any resolution of that House concerning fees, made or passed in pursuance of the said act and in relation thereto: And the said clerk of the parliaments, or clerk assistant, may, if he think fit, either add or deduct the whole or a part of such fees, at the foot of his certificate; and the amount in money certified by him, after such addition or deduction, if any, shall be the sum to be demanded and paid under or by virtue of such order as aforesaid, for payment of costs" (*y*).

Execution.

Execution.] The execution should be issued out of the court below, (*ante*, 380), and may be by *fi. fa.*, *ca. sa.*, or *elegit* (*z*).

Restitution, &c.

Restitution, &c.] As to restitution, and *scire facias quare restitutionem non*, see *ante*, 380.

4. *Writ of Error from Inferior Courts to the Court of Queen's Bench.*

In what Cases it Lies.

As to the cases in which a writ of error lies from inferior courts to the Court of Queen's Bench, see *ante*, 351.

The Writ.

The Writ.] The writ is directed to the judges of the inferior court (except that in a county palatine it is directed to the Chancellor (*a*)) in which the judgment was given, and is made returnable on the first or last general return of the term, wheresoever &c. (*b*).

(*u*) *Bodily* v. *Bellamy*, 2 Burr. 1097.

(*x*) *Beadle* v. *Thompson*, 2 M. & Sel. 249: see *Frith* v. *Leroux*, 2 T. R. 58.

(*y*) Ordo Dom. Proc. 3 April, 1835: 9 Leg. Obs. 470.

(*z*) See the form of a *fieri facias* after affirmance, Chit. Forms, 141, 116; of a *capias ad satisfaciendum*, after affirmance, Id. 118; and of *fi. fa.* or *ca. sa.* after reversal, Id. 122.

(*a*) See as to the form, Chit. Forms, 136.

(*b*) See a form, Chit. Forms, 136.

How Sued out, &c.

How sued out, &c.] *Make out a præcipe for the writ* (c). *Take it to the cursitor, as directed ante*, 357, *and he will make out the writ; pay him* 1*l.* 10*s.* 6*d., and if sealed at a private seal*, 8*s.* 6*d. more.* And one of the masters of the court below will allow it. *Serve the copy of the note of allowance, as directed ante*, 357.

Bail.

Bail.] The statutes 3 *J.* 1, *c.* 8; 13 *C.* 2, *st.* 2, *c.* 2; 16 *C.* 2, *c.* 8; and 6 *G.* 4, *c.* 96, relating to this subject, mentioned *ante*, 362, 363, relate only to the courts of record at Westminster, and in the counties palatine. But by 19 *G.* 3, *c.* 70, *s.* 5 (*d*), the like bail is required in all cases of writs of error brought to reverse judgments in inferior courts of record when the damages are under 10*l.* (since extended to 20*l.* by 7 & 8 *G.* 4, *c.* 71, *s.* 6); and the bail are liable absolutely, if the judgment below be affirmed, or the writ of error *nonprossed.*

The bail is put in and justified, as in ordinary cases, according to the usage and practice of the inferior court.

Certifying the Record, &c.

Certifying the Record, &c.] Upon the return of the writ of error, or upon bail being put in and perfected, the defendant in error should serve the plaintiff with a rule out of the inferior court, to transcribe; and the plaintiff should thereupon bespeak the transcript of the proper officer below, and, when complete, take it to one of the masters of the Queen's Bench. The return is usually signed by the judge of the inferior court. The transcript must be delivered to one of the masters before the second seal, otherwise the defendant in error may obtain a certificate from that officer, that the writ of error is not returned, nor the transcript brought in; and, upon producing such certificate to the cursitor, he will make out for him a writ *de executione judicii*, directed to the judges of the court below, commanding them to proceed on the judgment, notwithstanding the writ of error (*e*).

Record supposed to be removed.

Although the record in this case is supposed to be removed, and formerly, perhaps, was so actually (*f*), yet it is now usual for inferior courts to send only the transcript of the record, and not the record itself (*g*). Execution, however, is always sued out in the Queen's Bench, even where the writ of error is *nonprossed* (*h*). The court cannot recognise the document returned as a *transcript*, but must consider it as the record, and cannot amend it (*i*); though perhaps by *mandamus* they may compel the inferior court to certify the record properly. Where, on a writ of error to the King's Bench from the Common Pleas, before the 11 *G.* 4 & 1 *W.* 4, *c.* 70, the clerk of the errors in the latter court omitted a special memorandum in making out the transcript, and, after errors assigned for want of such memorandum, amended the transcript by inserting it, the Court of King's Bench refused to order the transcript to be restored to the state in which it was when the plaintiff assigned his errors (*k*).

(*c*) See the form, Chit. Forms, 136.

(*d*) *Ante*, 362.

(*e*) *Anon.*, 3 Salk. 146; 2 Sellon, 388.

(*f*) See 50 Ass. 9: Ro. Abr. 753: 1 Bulst. 181.

(*g*) 2 Saund. 101 m.

(*h*) See *Copperthwaite* v. *Owen*, 3 T. R. 657.

(*i*) See *Salter* v. *Slade*, 1 A. & E. 608: *France* v. *Parry*, Id. 615.

(*k*) *Randole* v. *Bailey*, 1 M. & Sel. 232.

Assignment of Errors.

Assignment of Errors.] After the record is certified, the plaintiff in error should immediately assign his errors. Formerly, if he did not, the defendant might compel him by a *scire facias quare executionem non* (*l*), which might have been sued out immediately after the transcript was brought in, although that happened to be previous to the expiration of the rule to transcribe (*m*). Or it might have been sued out immediately after the expiration of the rule to transcribe, although the transcript were not then actually brought in (*n*). But now, by *R. H.*, 4 *W.* 4, *r.* 11, *ante*, 369, this writ of *scire facias quare executionem non* is abolished, and plaintiff must assign errors in eight days after the writ of error, with the transcript annexed, has been delivered to the master, and in failure to assign errors, the defendant in error, his executors or administrators, shall be at liberty to sign judgment of *nonpros* (*o*). As to assigning errors, &c., between the 10th of August and 24th of October, see *ante*, 370, 372; also as to obtaining further time to assign errors, see *ante*, 370.

Engross the assignment of errors on plain paper; get it signed by counsel (*p*); *and deliver it to the defendant's attorney* (*q*).

Alleging Diminution.

The plaintiff in error is not allowed to allege diminution (*r*), unless in error upon a judgment in the county palatine of Lancaster (*s*). In error from the latter court the plaintiff may, where the action has been by original writ, assign the want of that writ (*t*). If the want of an original writ be assigned, (which, however, since the 2 *W.* 4, *c.* 39, can no longer be the case in *personal* actions in the superior courts), the plaintiff must sue out a *certiorari*.

See *ante*, 370, 371, &c., for other matters relating to the assignment of errors.

Plea, &c.

Plea, &c.] Formerly, in this writ of error, in order to oblige the defendant to join in error, or plead, &c., the plaintiff must have sued out a *scire facias ad audiendum errores*, and have the defendant thereupon summoned, &c. (*u*). But now, by general rule of all the courts, *R. H.*, 4 *W.* 4, *r.* 13, "no *scire facias ad audiendum errores* shall be necessary, (*unless in case of a change of parties*), but the plaintiff in error may demand a *joinder in error*, or plea to the assignment of errors; and the defendant in error, his executors or administrators, shall be bound, *within twenty days after such demand*, to deliver a joinder or plea, or to demur; otherwise the judgment shall be reversed. Provided that if in any case the time allowed, as hereinbefore mentioned, for getting the transcript prepared and examined, for assigning errors, or for delivering a joinder in error, or plea, or demurrer, shall not have expired before the 10th day of August in any year, the party entitled to such time shall have the like time for the same purpose, after the

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(*l*) *Lynch* v. *Coot*, 3 Salk. 144; Carth. 40, 41.

(*m*) *Sambridge* v. *Housley*, 2 T. R. 17: see Lutw. 354: F. N. B. 20 (G).

(*n*) *Branscombe* v. *Hughes*, 15 East, 646.

(*o*) As to the manner of signing the judgment, see *post*, Vol. II. Book IV. Part I. Ch. 18; and see form of entry, Chit. Forms, 137.

(*p*) See *ante*, 374.

(*q*) See the form, Chit. Forms, 138.

(*r*) 1 Sid. 40, 147, 364: 1 Salk. 266.

(*s*) 1 Sid. 147, 364: 2 Bac. Abr., Error, (E): see 1 Leon. 189, 302; Yelv. 158; 1 Ro. Rep. 338; 1 Salk. 269.

(*t*) As to the forms, see Chit. Forms, 138.

(*u*) F. N. B. 20: 2 Bac. Abr., Error, (F).

24th day of October, without reckoning any of the days before the 10th of August. Provided also, that in all cases such time may be extended by a judge's order."

Scire Facias ad audiendum Errores.

It will be observed that the writ of *scire facias ad audiendum errores* is still requisite in the case of a *change of parties*, in order to compel the opposite party to join in error, or plead, &c.(*x*). If the party do not appear and plead to the assignment of errors, then, upon producing the record of the *scire facias ad audiendum errores* with the return, and an entry of the defendant's default, the court, upon motion, will reverse the judgment (*y*).

Plea or Joinder.

The plea or joinder in error is made out on plain paper, and, if special, signed by counsel(*z*), *and delivered to the plaintiff's attorney*(*a*).

Entry of the Proceedings upon Record.

Entry of the Proceedings upon Record.] After issue is joined, the plaintiff in error (or, in default of his doing so, the defendant) must enter the proceedings upon a new roll intitled of the term the transcript is brought in, (or, it seems, of the term in which issue is joined, and which may save a *post terminum* roll), thus: "*A syet of* —— *term, in the first year of the reign of Queen Victoria. Witness, Thomas Lord Denman.*" Then enter the writ of error, and the return; the proceedings in the inferior court, to the end of the final judgment; then the assignment of errors, joinder, &c.; and lastly, a *curia advisari vult* (*b*).

Take the roll to one of the masters, and he will enter the pleadings; pay for the entry.

Argument.

Argument.] *As to the mode of proceeding to the argument of the writ of error*, see *ante*, 374.

When the cause is called on, the counsel for the plaintiff is heard first; then the counsel for the defendant; and, lastly, the plaintiff's counsel in reply. The court will hear but one counsel on each side. If the case be not argued, counsel will move for judgment of affirmance or reversal. If the court be equally divided, no judgment can be given; unless the parties consent that it shall be affirmed, &c., in order that they may have the case determined upon a writ of error to the House of Lords(*c*).

Judgment.

Judgment.] *Draw up your rule for judgment with one of the masters; enter the judgment on the roll: take the rule and roll to him, and he will mark the latter, and tax the costs*(*d*).

Interest.

If the former judgment be affirmed, the court will order the master to compute interest upon it, by way of damages, and add it to the costs, in the same manner as the Court of Exchequer Chamber did before 3 & 4 *W.* 4, *c.* 42(*e*).

(*x*) As to such writ, see *Davenant* v. *Raftor*, 2 L. Raym. 1047; F. N. B. 20(G); 1 Sid. 173.

(*y*) See *Walmsley* v. *Roson*, 2 Str. 1210: *Thatcher* v. *Stephenson*, Id. 144.

(*z*) See *ante*, 372, 374.

(*a*) See form of joinder, Chit. Forms, 139.

(*b*) See as to the form, Chit. Forms, 140. It may be questionable whether this entry is requisite, since the rule of H. T., 4 W. 4, r. 15, *ante*, 205.

(*c*) *Thornby* v. *Fleetwood*, 1 Str. 379, 381.

(*d*) See the forms, Chit. Forms, 139.

(*e*) *Zinck* v. *Langton*, Doug. 752: and see *ante*, 534: and *Entwistle* v. *Shepherd*, 2 T. R. 78: and see, as to costs, *ante*, 379: and further, as to the judgment, *ante*, 376, 377.

Execution, &c.

Execution, &c.] As to execution and restitution, see, generally, *ante*, 380, 381 (*f*). These writs are sued out of the Court of Queen's Bench, notwithstanding the original record remains in the court below (*g*).

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5. *Writ of Error to the House of Lords, after Judgment of Inferior Court affirmed or reversed in Queen's Bench.*

The practice in this case is the same as mentioned *ante*, 381 *to* 385; and the forms the same, *mutatis mutandis*, as those there referred to.

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6. *Writ of Error* coram Nobis *or* Vobis.

1. *Proceedings to the Assignment of Errors*, 389.
2. *Proceedings from the Assignment of Errors to Execution, where the Errors are Matter of Law*, 390.
3. *Proceedings from the Assignment of Errors to Execution, where the Errors are Matter of Fact*, 392.

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1. *Proceedings to the Assignment of Errors.*

In what Cases it Lies.

As to the cases in which a writ of error *coram nobis* lies in the Court of Queen's Bench or Common Pleas, see *ante*, 350.

The Writ.

The Writ.] The writ of error *coram nobis* is directed "to our justices assigned to hold pleas in our court before us" (*h*), or *coram vobis*, is directed to the Chief Justice of the Court of Common Pleas, and is not in either case made returnable, because it is merely in the nature of a commission to the court to examine the record and rectify the error (*i*). If it be brought upon a former writ being quashed or having abated, it must recite the former writ, and correctly, otherwise it may be quashed (*k*).

How sued out, &c.

How sued out, &c.] *Make out a præcipe for the writ* (*l*). *Take it to the cursitor, as directed* ante, 357, *and he will issue the writ. Take it then to one of the masters of the court, and he will allow it, in open court. Draw up the rule of allowance with him* (*m*), *and serve a copy of it upon the opposite attorney* (*n*). If the errors are matters of law, let the note of allowance state some particular ground of error, as directed *ante*, 357. The new rules of *H. T.*, 2 *W.* 4, *r.* 83, and *H. T.*, 4 *W.* 4, *r.* 9, do not apply to errors in *fact:* a writ of error *coram nobis* or *vobis* is therefore a *supersedeas* from the time of notice that it is sued out, and not from the time of allowance only (*o*). If the error to be assigned be an error in fact, there must be an affidavit thereof, otherwise the writ of error will not be allowed (*p*). As, for instance, if infancy be intended to be assigned as error, a copy

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(*f*) See the form of a *fi. fa.* after affirmance or *nonpros* in error, Chit. Forms, 116, 122; of *ca. sa.*, Id. 118, 122.

(*g*) *Vicars* v. *Haydon*, Cowp. 841: and see *Copperthwaite* v. *Owen*, 3 T. R. 657.

(*h*) 2 Saund. 101 g: Lil. Ent. 220, 231, 232.

(*i*) See the form of the writ, Chit. Forms, 142.

(*k*) *Walker* v. *Stokoe*, 1 L. Raym. 115; Carth. 369, *S. C.*

(*l*) See the form, Chit. Forms, 142.

(*m*) See the form, Chit. Forms, 143.

(*n*) *Ante*, 357.

(*o*) *Levy* v. *Price*, 2 M. & W. 533.

(*p*) *Birch* v. *Triste*, 8 East, 415.

of the register of the baptism from the register-book, and an affidavit that it is a true copy, and also stating the age of the infant, must be laid before the cursitor, before he will make out the writ. So, if coverture is to be assigned for error, a similar affidavit of the coverture must be made (*q*). If brought by an infant, a guardian or *prochein ami* must be appointed to prosecute the writ of error, as in ordinary cases.

Bail.

Bail.] A writ of error *coram nobis* is of itself, in some cases, a *supersedeas*, in some not; for it is not within the statutes requiring bail in error (*r*). When it is brought after the abatement of a former writ, it seems that if the former writ abated by the act of God, or by act of law, the second writ is a *supersedeas;* but otherwise, if it abated by the act or default of the party (*s*). Where it is brought after a former writ quashed for insufficiency, it is no *supersedeas* (*t*). Where error in fact is intended to be assigned, the writ of error is or is not a *supersedeas*, according to circumstances; and, therefore, in such a case execution cannot be sued out after the allowance of the writ of error, without the leave of the court (*u*). In any of the above cases, where the writ of error operated as a *supersedeas*, no bail of course is required; but the plaintiff may at once proceed to assign errors, immediately after the writ of error is allowed. But when the writ of error does not of itself operate as a *supersedeas*, the court, upon motion, will grant a rule, that, upon the plaintiff in error putting in and perfecting bail in error within four days next ensuing, all proceedings on the original judgment shall be stayed until the writ of error shall be determined. This forms a part of the rule of allowance. The 6 *G.* 4, *c.* 96, *s.* 1, (*ante*, 363), is not applicable to writs of error *coram nobis* or *vobis* for errors in fact (*x*).

Where the writ of error is brought to reverse an outlawry, the rule of allowance always specifies whether the party shall put in bail, and within what time.

The bail is put in and justified as directed *ante*, 365 *to* 367 (*y*).

2. *Proceedings from the Assignment of Errors to Execution, where the Errors are matter of Law, as to reverse an outlawry for insufficiency of the* exigi facias, *&c.*

Assignment of Errors.

Assignment of Errors.] By *R. H.*, 4 *W.* 4, *r.* 11, "Within twenty days after the allowance of the writ of error *coram nobis* or *coram vobis*, the plaintiff in error shall assign errors; and, in failure to assign errors, the defendant in error, his executors or administrators, shall be entitled to sign judgment of *nonpros*" (*z*). By this rule, the *rule* to assign errors is rendered unnecessary. As to assigning errors between the 10th

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(*q*) Imp. B. R. 861: see *Ribout* v. *Wheeler*, Say. 166. See the form of the affidavit, Chit. Forms, 143.

(*r*) 1 Lil. Pr. Reg. 710: *Levy* v. *Price*, 2 M. & W. 533.

(*s*) *Ante*, 355, 362.

(*t*) *Walker* v. *Stokoe*, 1 L. Raym. 151; Carth. 368, *S. C.*: see *Cooper* v. *Ginger*, 1 Str. 607; 2 L. Raym. 1403, *S. C.*

(*u*) *Birch* v. *Triste*, 8 East, 412; Say. 166: *Levy* v. *Price*, 2 M. & W. 533.

(*x*) *Levy* v. *Price*, 2 M. & W. 533.

(*y*) See as to the forms, Chit. Forms, 144.

(*z*) See as to the mode of signing such judgment, *post*, Vol. II. Book IV. Part I. Ch. 18. See form of judgment, Chit. Forms, 145.

August and 24th October, and obtaining time to assign errors, see *ante*, 368.

The assignment of errors must be engrossed on plain paper, and signed by counsel(*a*). *Deliver it to the defendant's attorney*(*b*). See further as to the assignment, *ante*, 369, 370.

The *certiorari*, when necessary, is tested in the name of the Chief Justice of the Queen's Bench, and returnable *immediate. Get it signed by one of the masters and sealed; then leave it with the officer or other person to whom it is directed, and get it returned when a* certiorari *is necessary.* If the defendant wish to expedite the cause, *he should get a rule from one of the masters to return the* certiorari; *enter it with him, and serve a copy on the plaintiff's attorney.* This is a four-day rule; and if, upon its expiration, the *certiorari* be not returned, the defendant may enter a *non misit breve* on record, plead *in nullo est erratum*, and proceed to affirm the judgment(*c*).

Plea, &c.

Plea, &c.] As soon as errors are signed, and the *certiorari* (when necessary) returned, the defendant must plead to the assignment. This he generally does voluntarily; but, if he neglect to do so, you may compel him by a rule obtained for that purpose from one of the masters and entered with him, a copy of which must be served on the defendant's attorney. This is a four-day rule; and, if the defendant do not join in error before it expires, the court, upon motion, will reverse the judgment(*d*).

The plea, replication, &c., is engrossed on plain paper, and, if special, signed by counsel (*e*), *and delivered to the opposite attorney* (*f*).

Entry of the Proceedings on Record.

Entry of the Proceedings on Record.] When issue is joined, the proceedings must be entered on record. If it be a writ of error on a judgment in the Queen's Bench or Common Pleas, the proceedings must be entered on the judgment roll(*g*); if on the judgment of another court, after a former writ of error abated, &c., then it must be entered on the same roll with such former writ of error, otherwise the whole will be discontinued(*h*).

Argument.

Argument.] As to this, proceed as directed *ante*, 374.

Judgment, &c.

Judgment, &c.] *Draw up the rule for judgment with one of the masters*(*i*). *Then enter the judgment on the roll*(*i*); *take the rule and roll to him, and he will mark the latter and tax costs.* As to interest on the judgment, see *ante*, 378; and as to costs, see *ante*, 379; and further as to the judgment, see *ante*, 376, 377. *Docket and carry in the roll. See ante*, 377, 388).

As to execution and restitution, see *ante*, 380, 381. These

(*a*) See *ante*, 370.

(*b*) See as to the form, Chit. Forms, 146; and see generally upon this subject, *ante*, 369, 370.

(*c*) See *Smith* v. *Stoneard*, 2 L. Raym. 1156; 1 Salk. 267, *S. C.*; Comyns, 115; and *ante*, 372.

(*d*) See *Walmsley* v. *Roser*, 2 Str. 1210: *Thatcher* v. *Stephenson*, 1 Id. 144.

(*e*) See *ante*, 372, 374.

(*f*) See as to the form of the joinder, Chit. Forms, 145; and see *ante*, 374.

(*g*) 2 Saund. 101 t.

(*h*) *Walker* v. *Stokoe*, 1 L. Raym. 151; Carth. 369, *S. C.*; Cro. El. 281; and see Id. 155. See the rule of H. T., 4 W. 4, r. 15, *ante*, 205, but which does not, it seems, interfere with this practice. See the form of the entry, Chit. Forms, 145.

(*i*) See the forms, Chit. Forms, 146.

writs, of course, issue out of the court in which the error is brought.

3. *Proceedings from the Assignment of Errors to Execution, where the Errors are Matter of Fact.*

Assignment of Errors.

Assignment of Errors.] The plaintiff may assign for error any matter of fact, which, if it appeared upon the record, would have proved it to be erroneous: thus, that a sole *defendant* or one of several *defendants*, under age, appeared by attorney (*k*), except in ejectment (*l*). Or that a plaintiff (*m*), or defendant (*n*), or one of several defendants (*o*), was a *feme covert* at the time of the commencement of the action (*p*); or that the plaintiff or defendant died before verdict or interlocutory judgment (*q*); but assigning for error the death of plaintiff in ejectment would be a contempt (*r*). It must be observed, that the plaintiff cannot assign more than one error in fact, although of errors in law he may assign as many as he pleases (*s*); nor can he assign error in fact and error in law together, for they are distinct things, and require different trials (*t*).

The assignment concludes with a verification (*u*), and prayer that the former judgment may be revoked, annulled, and altogether held for nothing, and that the plaintiff may be restored to all things which he has lost by occasion of the said judgment (*x*). Where the death of the plaintiff in the original suit, before verdict or interlocutory judgment, is assigned for error, there is also added to the assignment a prayer for a *scire facias ad audiendum errores* against his executor or administrator (*y*).

When to be Assigned.

The errors must be assigned within twenty days after the allowance of the writ of error, *coram nobis* or *vobis*, and if the plaintiff fail to assign errors within the limited time, the defendant in error, his executors or administrators, may sign judgment of *nonpros* (*z*). If the period does not expire before the 10th of August, a like time is allowed after the 24th of October, without reckoning the days before the 10th of August, and the period prescribed for the assignment of errors may be extended on application by the plaintiff to a judge (*a*).

How Delivered, &c.

The assignment must, if special, be signed by counsel, ante,

(*k*) *Anon.*, Style, 406; Danvers' Abr. 2 Vol. Error, 12, pl. 13: and see 21 J. 1, c. 13, s. 2: *Castledine* v. *Mundy*, 4 B. & Ad. 90: *Bevan* v. *Cheshire*, 4 Dowl. 70: but see *Bird* v. *Pegg*, 5 B. & Ald. 418. If an infant assigns by attorney for error, that he has improperly appeared in the action by attorney, instead of guardian, it is not a mere irregularity, but a ground of error; still the court will on application set the assignment aside, and allow the plaintiff in error to assign by guardian. (*Beven* v. *Cheshire*, 3 Dowl. 70).

(*l*) *Goodright* v. *Wright*, 1 Str. 33: see the form of the assignment, Tidd's Forms, 525, s. 30.

(*m*) Ro. Abr. 761.

(*n*) Id. 748, 759: Style, 254, 280: 2 Ro. Rep. 53.

(*o*) Ro. Abr. 747.

(*p*) See the form of such assignment, Chit. Forms, 146.

(*q*) 2 Saund. 101, k. See the form of such an assignment, 10 Went. 4.

(*r*) *Moore* v. *Goodright*, 2 Str. 899: see further as to the assignment of errors, *ante*, 369, 370.

(*s*) F. N. B. 45 E.: *ante*, 370.

(*t*) Ro. Abr. 716: *Holdy* v. *Hodges*, 1 Sid. 147; 1 Leon. 105: *Burdett* v. *Wheatly*, 2 L. Raym. 883: *Jeffrey* v. *Wood*, 1 Str. 439: 2 Saund. 101 q: *ante*, 370.

(*u*) *Sheepshanks* v. *Lucas*, 1 Burr. 412; Carth. 367; 2 Bac. Abr., Error, (K. 2): *Castledine* v. *Mundy*, 4 B. & Ad. 95.

(*x*) See the form, Chit. Forms, 146.

(*y*) See *Edmonds* v. *Probert*, Carth. 339: *Dove* v. *Darkin*, T. Raym. 59; 1 Sid. 93, *S. C.*

(*z*) R. H., 4 W. 4, r. 11.

(*a*) R. H., 4 W. 4, r. 13.

370; *engross it on plain paper, and deliver it to the defendant's attorney* (*b*).

Plea, &c.

Plea, &c.] The defendant may come in voluntarily, and plead to the assignment; or the plaintiff may compel him to plead, by a rule to be obtained from one of the masters for that purpose, which must be entered with the master, and a copy served on the defendant's attorney. This is a four-day rule; and if the defendant do not plead before the expiration of that time from the service, the court upon motion will reverse the judgment (*c*).

Rule to Plead.

Form of Plea.

The defendant may either plead specially, confessing and avoiding the fact assigned, and concluding with a verification; or may plead generally, denying the fact assigned, and concluding to the country; or he may plead *in nullo est erratum*, which confesses the fact assigned, but denies that it is error; or he may demur (*d*).

If the error be well assigned, and the defendant wish to put in issue the truth of the fact, he should deny it by his plea, and so join issue upon it; but he must not in such a case plead *in nullo est erratum*, for by doing so he would acknowledge the fact assigned to be true (*e*). But if the defendant would acknowledge the fact, but deny it to be error, he should plead *in nullo est erratum* (*f*). So, if an error be assigned which is not assignable (*g*), or be ill-assigned (*h*), the defendant may plead *in nullo est erratum*, without danger of confessing the fact assigned; for the common joinder in such a case is deemed a demurrer, and the issue thereupon will afterwards be tried as in other cases of demurrer (*i*). But if the plaintiff assign error in fact and error in law, (which we have seen *ante*, 370, 374, would be bad), the defendant should demur specially to the assignment for the duplicity; for if, instead of doing so, he plead *in nullo est erratum*, it will be an acknowledgment of the error in fact, and the court must thereupon reverse the judgment (*k*).

Plea, &c.

The plea, replication, &c., (if special), or demurrer must be signed by counsel (*l*), *engrossed on plain paper, and delivered to the attorney of the opposite party.*

Issue, &c.

As soon as issue is joined, either attorney may make up the issue upon plain paper, as in ordinary cases, and deliver it to the other. The issue contains, first, a copy of the judgment roll, (which should previously have been carried in); then, an entry of the allowance of the writ of error, the plea, replication, &c.; and, lastly, the award of the *venire* if it be an issue of fact (*m*).

Entry of the Proceedings upon Record.

Entry of the Proceedings upon Record.] The proceedings are entered of record on the same roll as the original judgment,

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(*b*) See Chit. Forms, 146.

(*c*) See *Walmsley* v. *Roson*, 2 Str. 1210: *Thatcher* v. *Stephenson*, 1 Str. 144: *ante*, 549.

(*d*) See *ante*, 372, 373.

(*e*) Ro. Abr. 768; Bro. Error, 93: *Sheepshanks* v. *Lucas*, 1 Burr. 410; 1 Sid. 93: *Dove* v. *Darkin*, T. Raym. 59: *Okeover* v. *Overbury*, Id. 231: *Grell* v. *Richards*, 1 Lev. 294: *ante*, 372.

(*f*) Ro. Abr. 763.

(*g*) Cro. Car. 52: Yelv. 58: T. Raym. 231: 1 Vent. 252: 1 Lev. 76.

(*h*) Cro. Jac. 29, 521: *Okeover* v. *Overbury*, T. Raym. 231; Cro Car. 421; Ro. Abr. 758: *Evans* v. *Roberts*, 3 Salk. 147.

(*i*) See 2 Bac. Abr., Error, (G), (K).

(*k*) Carth. 338, 339: 2 Bac. Abr., Error, (K), 2: *Evans* v. *Roberts*, 3 Salk. 147. See the form of a demurrer, 10 Went. 5.

(*l*) See *ante*, 374.

(*m*) See Chit. Forms, 147.

beginning by an entry of the allowance of the writ of error, and the writ, &c., as in the issue (*n*). This is done for you by one of the masters, or his clerk. It is questionable, however, whether it is now necessary.

Record of Nisi Prius.

Record of Nisi Prius.] The record of *Nisi Prius* must next be made up, sealed, and passed; which may be done either by the plaintiff or defendant. This record is nearly in the usual form; but beginning with an entry of the writ of error, assignment, &c., to the award of the *venire*, inclusive, as in the issue; and, lastly, the *jurata*, as *ante*, 246, 247 (*n*).

Trial, &c.

Trial, &c.] After having the record sealed and passed, and notice of trial given, as in ordinary cases, *set down the cause for trial with the clerk at the chief justice's chambers.* The trial, &c., is the same in every respect as other trials at *Nisi Prius*.

After verdict, the party succeeding must move to put the cause in the paper for argument (*o*); and afterwards, upon producing the *postea*, the court will give judgment of affirmance for the defendant, or that "the judgment aforesaid be recalled," if for the plaintiff (*p*), according to the finding (*q*).

Get the postea and judgment entered on the roll by one of the masters, or his clerk, and sue out execution.

(*n*) See as to the form, Chit. Forms.

(*o*) See 1 Str. 127.

(*p*) Ro. Abr. 80, 5, pl. 9.

(*q*) 2 Sellon, 422.

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1. *Execution generally.*

From what Court to be sued out.

From what Court to be sued out.] Writs of execution are *judicial* writs, issuing out of the court where the record or other proceeding is, upon which they are grounded(*r*); and therefore, when the record, or transcript of the proceedings, is removed into any of her majesty's courts of record at Westminster, from a county palatine, or from an inferior court, by *certiorari*, under the statute 19 *G.* 3, *c.* 70, *s.* 4, or 33 *G.* 3, *c.* 68, *s.* 1(*s*); or from an inferior court, under 1 *&* 2 *V. c.* 110, *s.* 21, the execution is issued out of the superior court. And by the 4 *&* 5 *W.* 4, *c.* 62, *s.* 31, execution may be sued out of the superior courts at Westminster on judgments of the Common Pleas at Lancaster: and there is a similar enactment in the 6 *&* 7 *W.* 4, *c.* 106, *s.* 11, for the improving the administration of justice in the Stannaries in Cornwall. See further as to execution on removal from inferior courts, *post*, *Vol. II. Book IV. Part I. Ch.* 4, *p.* 950. As to execution after error brought, see *ante*, 380, 385, 389. As to execution on rules of court, *Vol. II.* 1196.

By what Attorney to be sued out.

By what Attorney to be sued out.] As the action is completed by judgment, execution may be sued out by an attorney different from the one employed to conduct the action, without an order to change(*t*).

When to be sued out.

When to be sued out.] We have seen, *ante*, 334, that, as soon as the final judgment is actually signed by the master, but not before, the party in whose favour it is given may immediately sue out execution, and this before the judgment is entered on the roll, or docketted(*u*).

Within a Year and Day.

A writ of execution may be sued out at any time within a year and a day after the judgment is signed(*x*), in cases where a *scire facias* is not required, or where execution is not stayed by writ of error, injunction(*y*), agreement, or the like(*z*). And according to a recent decision in the Court of Exchequer (*a*), if a writ of execution is actually sued out within the year, it may be executed at any time after its date and before the return-day, even after the expiration of the year; and if returnable immediately after execution, it will remain in force until executed, (without being returned and filed within the year); and if it be not executed so as to give the party the full benefit of his judgment, other writs of execution may be sued out after the year, upon returning and filing the first writ(*b*). And it is not necessary, in such a case, that these writs should be of the same species; for a *ca. sa.*, for instance, may issue after the year, upon a *fi. fa.* regularly sued out, and returned and filed(*c*).

After a Year and Day.

After a year and a day from the time at which judgment is signed, a *sci. fa.* becomes necessary, before execution can be issued, unless where execution has been issued within the year, as just mentioned; or, unless where exe-

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(*r*) 2 Wms. Saund. 5th ed. 27, 38, (2), and see Tidd. Prac. 9th ed. 400, 401, 994, 5.

(*s*) Tidd. Prac. 9th ed. 401, 995.

(*t*) *Topping* v. *Johnson*, 2 B. & P. 257.

(*u*) *Bragner* v. *Langmead*, 7 T. R. 21, n.: and see *Stampe* v. *Kinsey*, 2 Show. 494.

(*x*) Stat. Westm. 2, (13 Ed. 1), c. 45: *Simpson* v. *Gray*, Barnes, 197: *Winter* v. *Lightbound*, 1 Str. 301.

(*y*) It seems, however, that though execution be issued, notwithstanding the injunction, the court out of which it is issued will not interfere to set it aside. (*Forman* v. *Jayes*, 5 B. & Ad. 835).

(*z*) As to the cases where a judgment must be revived by *scire facias*, before execution can be sued out upon it, see Vol. II. Book III. Part I. Ch. 3.

(*a*) *Simpson* v. *Heath*, 7 Dowl. 832: see the cases in *Blayer* v. *Baldwin*, 2 Wils. 82, Barnes, 215; 2 Saund. 88, n.: *Anon.*, M. T. 1831, MSS., reported in the Leg. Obs. of that period.

(*b*) Until the return of the writ, the court is not in possession of the cause, so as to award an *alias*, *per Holt*, C. J., in *Attwood* v. *Burr*, 7 Mod. 3, cited in *Harris* v. *Woolford*, 6 T. R. 618.

(*c*) Co. Lit. 290. b.: *Aires* v. *Hardress*, 1 Str. 100.

cution has been stayed, by error, injunction, *cesset executio*, &c.; and, in the last-mentioned cases, it becomes necessary, after a year and a day from the time at which execution could first have been sued out. See, as to this, *Vol. II. Book III. Part I. Chap.* 3.

After Death of Party within Year and Day.

Formerly, if a party died within the year and day after judgment obtained against him, a *fi. fa.* tested in term time after the judgment and before his death (*c*), might have been sued out against his goods in the hands of his executor or administrator (*d*); but this cannot perhaps be done now, (unless the judgment were signed in or before a term previous to the issuing of the *fi. fa.* (*e*), since, by rule of *H. T.*, 4 *W.* 4, *r.* 3, (*ante*, 336), the judgment must be entered of the day of the month when signed, and the doctrine of relation to the term is wholly done away with, and a writ of execution cannot bear teste before the judgment (*f*). Formerly, even if he died before judgment, but after the day *in banc*, judgment might have been signed as of the term in which he died; or, if he died in vacation, then of the preceding term; and a *fi. fa.* tested the first day of such term might have been sued out, and executed upon his goods in the hands of his executor or administrator (*g*): but now, since the above rule of *R. H.*, 4 *W.* 4, *r.* 3, this course certainly cannot be adopted (*h*). As to *executing* a writ after the death of a party, when it has been sued out in his lifetime, see *post*, 408.

After Certificate for immediate Execution.

The judge who tried the cause may, as we have seen, *ante*, 332, in case of a nonsuit, or verdict, *certify* on the back of the record, (at any time before the end of the sittings or assizes), that, in his opinion, execution ought to issue *forthwith*, or on such a day as he shall certify, and subject or not to any qualification or condition, and for a part or the whole of the sum found for the plaintiff; in which cases costs may be taxed, and judgment signed, and execution issued forthwith, or afterwards on any day in vacation or term (*i*).

After Writ of Trial or Inquiry.

By 3 & 4 *W.* 4, *c.* 42, *s.* 18 (*j*), at the return of any *writ of inquiry* under 8 & 9 *W.* 3, *c.* 11, executed before the *sheriff* according to the former act, and also at the return of any writ for the *trial of an issue before the sheriff* (*k*), costs may be taxed, judgment signed, and execution issued *forthwith*, unless the sheriff, deputy, or judge before whom the trial may be had, certify under his hand, upon such writ, that judgment

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(*c*) *Heapy* v. *Parris*, 6 T. R. 368: *Waghorn* v. *Langmead*, 1 B. & P. 571: see *Watson* v. *Mascall*, 4 M. & Scott, 461; 2 Dowl. 811, *S. C.*: *infra*, n. (*h*).

(*d*) *Odes* v. *Woodward*, 2 L. Raym. 849.

(*e*) See *Brocher* v. *Pond*, 2 Dowl. 472: *Watson* v. *Mascall*, 2 Dowl. 810.

(*f*) *Peacock* v. *Day*, 3 Dowl. 291.

(*g*) *Bragner* v. *Langmead*, 7 T. R. 20: see *Copley* v. *Day*, 4 Taunt. 782: *Bates* v. *Lockwood*, 1 T. R. 637; recognised in *Calvert* v. *Tomlin*, 5 Bing. 1; 2 Moo. & P. 1, *S. C.*

(*h*) Where the plaintiff obtained a verdict at the spring assizes, the defendant died on the 18th April, costs were taxed on the 21st, final judgment signed on the 22nd, and a *fi. fa.* issued on the same day, tested on the first day of the term; the court refused to set aside the *fi. fa.* for irregularity, which on the face of it appeared regular, and it was considered that the objection should have been to the judgment. (*Watson* v. *Mascall*, 4 M. & Scott, 461; 2 Dowl. 810, *S. C.*) The rule of H. T., 4 W. 4, r. 3, enables the court or a judge to order the judgment to be entered *nunc pro tunc*, but they will not make such an order unless the delay of signing judgment has arisen from the act of the court, and not even then perhaps to affect third parties.

(*i*) 1 W. 4, c. 7, s. 2, *ante*, 331: and see form of a *fi. fa.*, Chit. Forms, 448; and of a *ca. sa.*, 190.

(*j*) See *post*, Vol. II. Book II. Part IV. Ch. 4, sect. 1.

(*k*) See *ante*, 333.

ought not to be signed until the defendant shall have had an opportunity of applying to the court or a judge for a new inquiry or trial, or a judge shall order that judgment or execution shall be stayed till a day to be named in such order.

In other *writs of inquiry*, also, at the expiration of four days from the return of the writ, final judgment may be signed, and execution issued, unless the sheriff or other officer before whom the writ of inquiry may be executed, shall certify on such writ that judgment ought not to be signed until the defendant shall have had an opportunity to apply to the court to set aside the execution of such writ, or a judge shall order the judgment to be stayed until a day named in such order (*l*).

In Ejectment.

In *ejectment*, by the 11 *G.* 4 *&* 1 *W.* 4, *c.* 70, *s.* 38, the judge may allow execution to be issued *immediately* after a verdict for plaintiff, or after a nonsuit for not confessing lease, entry, and *ouster* (*m*).

After Interpleader.

The 1 *&* 2 *W.* 4, *c.* 58, *s.* 7, (relating to the relief of sheriffs or other persons against *adverse claims*, where they have no interest therein), provides, that, if the *costs* directed to be paid under a rule or decision made under that act and entered of record, be not paid in fifteen days after notice of the taxation and amount thereof given to the party ordered to pay them, execution may issue for them, with the other costs of the writ of execution, &c. (*n*).

Leave of Court, when necessary.

Sometimes leave of the court or a judge is requisite previously to issuing execution. Thus, in actions upon policies of insurance, where several defendants enter into the common consolidation rule, the plaintiff, upon obtaining a verdict and judgment, cannot sue out execution against those who entered into the rule, without first obtaining leave of the court for that purpose (*o*). Such leave, it seems, is also necessary before execution is sued out after the allowance of a writ of error *coram nobis* or *vobis* (*p*). But it is not necessary before suing out execution on a judgment entered up on an award made after a verdict for a certain sum, subject to such award (*q*).

Staying Execution where Amount Tendered, &c.

Where Indictment for Perjury.

Where, in actions upon a promissory note against the drawer and indorser, the principal in one, and the costs in both actions, were tendered to the plaintiff after judgment, the court, upon application ruled that no execution should be sued out (*r*). They have refused to stay execution against a defendant until after the trial of an indictment against the plaintiff's witnesses for perjury (*s*).

Agreement not to sue out Injunction, &c.

Execution cannot be sued out if the party has agreed not to issue it, or where he is restrained by injunction (*t*), or if a writ of error be depending (*u*). A writ of error, in general, operates as a *supersedeas* of execution from the time of its

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(*l*) 1 W. 4, c. 7, s. 1, and R. H., 2 W. 4, r. 67, *ante*, 330, 331.

(*m*) See *post*, Vol. II. Book III. Ch. 1.

(*n*) See *post*, Vol. II. Book IV. Part. I. Ch. 11.

(*o*) Tidd, 9th ed. 996.

(*p*) *Ribout* v. *Wheeler*, Say. 166: *Rafeal* v. *Verelst*, 2 W. Bl. 1067: *Hayes* v. *Thornton*, Barnes, 201: *ante*, 390.

(*q*) *Lee* v. *Lingard*, 1 East, 401: *Higginon* v. *Nesbitt*, 1 B. & P. 97; Id. 480.

(*r*) *Windham* v. *Wither*, 1 Str. 515.

(*s*) *Warwick* v. *Bruce*, 4 M. & Sel. 140; see also Lofft, 436: *R.* v. *Tremaine*, 5 B. & Cres. 761; 8 D. & R. 590, *S. C.*: and further, *post*, Vol. II. Book IV. Part I. Ch. 10.

(*t*) *Winter* v. *Lightbound*, 1 Str. 301; 2 Burr. 600, *S. C.*

(*u*) See *Veal* v. *Warner*, 1 Mod. 20: *Winter* v. *Lightbound*, 1 Str. 301: *Francis* v. *Nash*, C. T., Hard. 53.

allowance, provided substantial bail be put in and perfected in due time (x).

What Writs: Succession of, &c.

What Writs, Succession of, &c.] The party for whom the judgment was given may have a writ of *fieri facias*, or *elegit*, or *levari facias*, or *capias ad satisfaciendum*, at his option; or he may have them all in succession, until his judgment is satisfied; or, after suing out one, he may abandon it before it is executed, and sue out another; or he may even have several writs running at the same time, either of the same species (y), or of a different species, such as a *fi. fa.* and *ca. sa.*, or the like (z). In a case where the plaintiff obtained judgment against two defendants, and sued out two several writs of *testatum fieri facias* at the same time into different counties, and the sheriff under each of them took possession of the goods of one of the defendants; it appearing that the plaintiff's object was merely to obtain payment of his debt, and that he was willing to allow the defendants the full benefit of all monies levied under the writ in one county, before he would call on the sheriff to return the writ issued into the other; the Court of Exchequer refused to put the plaintiff to his election, which of the writs he would proceed under, and also refused to set aside the other for irregularity (a).

New Writ where first proves ineffectual.

If part only of the amount is levied on a *fieri facias*, or if part be levied on the goods under an *elegit*, and *nihil* be returned as to the lands, a new writ of execution may be issued for the remainder. But if any part, however trifling, has been levied, the plaintiff cannot sue out any other writ of execution until *after the return* of the first writ (b); and this though the sheriff may have withdrawn the execution (c). And where a defendant was taken under a *ca. sa.* before the return of a *fi. fa.*, under which the plaintiff had seized, though the whole amount of the levy was swallowed up by the landlord's claim for rent, except 17*s.* 6*d.*, which went towards the expenses of the execution, the court discharged the defendant out of custody (d). Where, however, the sheriff seized goods under a *fi. fa.*, but the *whole* of them were then already seized under a distress for rent (e), or were already *in custodiâ legis*, and assigned under a bill of sale (f), and he afterwards withdrew the execution, it was considered a *ca. sa.* might be issued and executed before the return of the *fi. fa.* And though part of the amount of the judgment be levied under a *fi. fa.*, the plaintiff may bring an *action* for the residue before the return of such *fi. fa.*, and arrest the defendant thereon as in other cases in an action on a judgment, and as to which see *post*,

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(x) See *ante*, 357, &c.

(y) Tidd. 9th ed. 995.

(z) *Primrose* v. *Gibson*, 2 D. & R. 193: see *Miller* v. *Parnell*, 6 Taunt. 370; 2 Marsh. 78, *S. C.*: *Smith* v. *Johnson*, 4 Dowl. 208: *Dunn* v. *Harding*, 2 Dowl. 803: *Dicas* v. *Warne*, 2 Dowl. 762.

(a) *Cooper* v. *Rowe*, Tidd, 9th ed. 995: *Edmond, Assignee of the Sheriff of Surrey*, v. *Ross*, 9 Price, 5; 1 Ken. 120.

(b) *Coppendale* v. *Debonaire*, Barnes, 213: *Wilson* v. *Kingston*, 2 Chit. Rep. 203: *Foster* v. *Jackson*, Hob. 58: *Lawes* v. *Codrington*, 1 Dowl. 30.

(c) *Miller* v. *Parnell*, 2 Marsh. 78; 6 Taunt. 370, *S. C.*

(d) *Hodgkinson* v. *Whalley*, 2 C. & J. 86: 1 Dowl. 298, *S. C.* Where a part of a debt has been levied, and the defendant is detained on a *habeas corpus ad satisfaciendum* for the residue, it is not necessary to refer on the latter writ to the amount of the levy. (*Green* v. *Foster*, 2 Dowl. 191).

(e) See *Edmond, Assignee of the Sheriff of Surrey*, v. *Ross*, 9 Price, 512.

(f) *Dicas* v. *Warne*, 10 Bing. 341; 2 Dowl. 762; 3 M. & Scott, 814, *S. C.*

Book I. Part II. Chap. 1, *s.* 2 (*g*). If the party be taken under a *ca. sa.*, no other writ can be executed against him or his effects, unless he die in execution, or escape, or be rescued (*post*, 454). And so, if lands be extended on an *elegit*, and delivered to the plaintiff, a *fi. fa.* or *ca. sa.* cannot afterwards be executed against him (*h*). These points, however, will be found more fully noticed hereafter when treating of the particular writs themselves. If judgment be obtained against a defendant in custody on *mesne process*, and he has not been charged in execution, the plaintiff may have execution against his goods without first discharging him; though, indeed, he must be always ready to give such discharge when required (*i*).

Form of Execution, &c.
For Plaintiff.

Form of Execution, for what Amount, against whom, &c.] In *assumpsit*, covenant, case, trespass, and *replevin*, the writ of execution for the *plaintiff* is for damages and costs. In debt, the writ is for the debt, damages, and costs. In *detinue*, the execution for plaintiff is for the goods or their value, with damages and costs.

For Defendant.

For the *defendant*, in all cases excepting *replevin*, the execution is for the costs only; and in *replevin*, on a judgment at common law, it is also for a return of the goods; or on a judgment upon stat. 17 *C.* 2, *c.* 7, for the arrears of rent and costs. See further, as to *replevin*, *Vol. II. Book III. Part I. Ch.* 2.

Must pursue the Judgment.

Care must be taken that the writ of execution strictly pursue the judgment, and be warranted by it; otherwise it will be void.

In the Amount.

1. It must pursue the judgment in the amount.—Thus, if the judgment be for 88*l.* damages and costs, and the writ of execution state it to be for 100*l.*, it will be bad (*k*). But although the execution should be sued out for the whole amount, yet it should be indorsed only for the sum actually due (*l*). Thus, in debt on bond for performance of covenants, &c. where breaches are suggested, &c. under the stat. 8 & 9 *W.* 3, *c.* 11, *s.* 8 (*m*), although the writ of execution must be for the entire penalty, damages, and costs, yet it should be indorsed to levy only the damages assessed upon the breaches, the costs found by the jury, the costs of increase, and the costs of the execution; but if the damages assessed and charges of execution exceed the penalty of the bond, the execution can be only for the amount of the penalty, and the costs of increase (*n*). The writ in this case must be entered on the roll (*o*). So, in debt on bond conditioned to pay a sum in gross, although execution must be sued out for the entire penalty, in order to make it conformable with the judgment, yet it should be indorsed to levy only the principal, interest, nominal damages, and costs; and if it be executed for more, or if the defendant be charged in execution for more, it may be reduced, upon application to court, or to a judge at chambers (*p*); and where judgment was entered up for the penalty of a bond given to secure an

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(*g*) *Green* v. *Elgie*, 1 Dowl. 344; 3 B. & Ad. 437, *S. C.*

(*h*) *Crawley* v. *Lidgeat*, Cro. Jac. 338; *Beacon* v. *Peck*, 1 Str. 226: *Lancaster* v. *Fielder*, 2 L. Raym. 1451.

(*i*) *Jones* v. *Tye*, 1 Dowl. 181.

(*k*) *Arnell* v. *Weatherby*, 1 C., M. & R. 831; 3 Dowl. 464, *S. C.*

(*l*) See *Williams* v. *Waring*, 4 Dowl. 200; 2 C., M. & R. 354: *per cur.*, *Plevin* v. *Henshall*, 2 Dowl. 743.

(*m*) *Post*, Vol. II. Book II. Part IV. Ch. 4, Sect. 3.

(*n*) 1 Saund. 58 b.

(*o*) See form of entry, Chit. Forms.

(*p*) See *Amery* v. *Smalridge*, 2 W. Bl. 760: *M'Cormack* v. *Melton*, 1 A. & E. 331; 3 Nev. & M. 881.

annuity, and the defendant was taken in execution thereon, when the warrant of attorney, under which such judgment was entered up, only authorized the taking out execution for the arrears, and the defendant evidently had suffered by the excess, the court set aside the execution *in toto*, and not merely discharged the defendant *pro tanto* (*q*). In the case of several actions brought against different parties, for the same debt, as on a bail-bond, or bill of exchange, &c., each party is liable to pay the whole debt until it be paid, but he is liable to the costs of the action against himself only; and the levy must be made accordingly. So, where the plaintiff issued execution against a surety, including costs in an action against the principal which the defendant had expressly promised to pay, the court reduced the execution, and *Bayley*, B., said, "That is a collateral agreement on which you must sue. You cannot issue execution in this action for costs incurred against another defendant" (*r*).

As to the Parties.

2. It must pursue the judgment as to the parties.—Thus, upon a judgment against two, you cannot sue out a separate *capias* against one (*s*); nor a *capias* against one, and an *elegit* against another (*t*). So, where a married woman is sued as sole, and obtains a verdict on the plea of coverture, the *husband*, being no party to the record, cannot have execution in his name, or in their joint names, without a *sci. fa.* (*u*). But where an action was brought against five defendants, and there was a verdict against four, and judgment by default against the fifth, and error was brought in the name of the fifth only, the court, upon motion, gave leave to take out execution against the other four (*x*). Or, if a *scire facias* be sued out to revive a judgment against two, and one be returned summoned, and make default, and the other be returned *nihil*, the plaintiff may have execution against him who made default for the whole; or, if it were returned that one of them was dead, the plaintiff might have execution for the whole against the other (*y*). So, where there are several plaintiffs or defendants, and one of them dies, execution may be sued out by or against the survivors, upon suggesting the death upon the roll (*z*). But if in such case the plaintiff wishes to have execution against the *lands* of the deceased defendant, he must make his heir and terretenants parties to the record by *sci. fa.* (as to which see *post*, 444, and *Vol. II. title* "Scire facias").

In Actions against a Company, &c., in the Name of an Officer.

An exception to the general rule also exists in cases where an action is brought by or against a body of persons, in the name of an individual, by permission of an act of parliament. In such cases, execution cannot be issued against the individual, though he be the party on the record, unless expressly made liable by the act, but only against the persons or property pointed out by the act. Therefore, where under an act of parliament, a director of the West Cork Mining Company was sued, and judgment recovered in an action for, work and

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(*q*) *Tilby* v. *Best*, 16 East, 163: *M'Cormack* v. *Melton*, 1 A. & E. 331: see further, *post*, 417.

(*r*) *Evans* v. *Pugh*, 2 Dowl. 360.

(*s*) 15 H. 7: Ro. Abr. 888: *Clarke* v. *Clement*, 6 T. R. 525.

(*t*) Ro. Abr. 888: and see *Blumfield* v. *Rosewith*, Cro. El. 573, 574: 5 Co. 86, 87: 2 Bac. Abr., Execution, (G).

(*u*) *Wortley* v. *Rayner*, 2 Doug. 237.

(*x*) *Mason* v. *Simmonds*, Barnes, 202.

(*y*) 1 E. 3, 13: 1 Ro. Abr. 890.

(*z*) *Withers* v. *Harris*, 2 L. Raym. 808: and see *Pennoyer* v. *Brace*, 1 Salk. 319: *Howard* v. *Pitt*, 1 Show. 404: and *post*, Vol. II. Book IV. Part I. Ch. 32.

labour done for the company, the court held, that they had no power to order execution to issue against him, as the statute did not make him personally liable (*a*). So, in an action against the clerk to trustees of a turnpike road, under a statute which permits the trustees to be sued in the name of their clerk, execution cannot in general issue against the clerk personally (*b*).

The remedy in such cases, where there is no person or property expressly made liable by the act, is by *mandamus* or bill in equity (*c*).

Entering Suggestion before Execution against person not a Party to Record.

It should be here observed, that wherever, by the provisions of an act of parliament, a person not a party to the record is to be affected by a judgment, the proper course is to enter a suggestion on the roll, so that the party to be affected may demur, if the plaintiff do not set forth facts to bring the case within the act, or that he may traverse those facts if untrue. Therefore, where an act of parliament enacted that the St. Patrick's Assurance Company might be sued in the name of their secretary, and that execution upon any judgment obtained in such action might be issued against any member of the company, it was held, that a party who had obtained judgment against the secretary could not issue execution against a member, without having previously, by leave of the court, suggested on the record facts to shew that the party against whom he so issued execution, was liable as a member of the company (*d*).

Execution must pursue the Judgment in the Subject-matter.

3. It must pursue the judgment in the subject-matter.—A special execution is not warranted by a general judgment; therefore, a general judgment against an insolvent debtor was held not to warrant a special execution against his future effects, and was deemed void (*e*).

After Sci. Fa.

If a *scire facias* be issued unnecessarily, the execution must still issue on it (*f*).

Amendment of.

The court, in these cases, unless the rights of third parties would be affected by the amendment, will allow the writ to be amended, so as to make it conformable with the judgment, and this although after execution executed and returned (*g*), or after a motion to set aside the writ (*h*). It may be proper here to observe, that a variance between the sheriff's warrant and the writ lodged in his office, is immaterial as against the sheriff (*i*).

New Forms of Writs under 1 & 2 V. c. 110, s. 20.

New Forms of Writs under 1 & 2 *V. c.* 110, *s.* 20.] The 20th section of the act 1 & 2 *V. c.* 110, enacts, "that such new or altered writs shall be sued out of the courts of law, equity, and bankruptcy as may by such courts respectively be deemed necessary or expedient for giving effect to the provisions hereinbefore contained, and in such forms as the judges of such courts respectively shall from time to time think fit to

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(*a*) *Harrison* v. *Timmins*, 4 M. & W. 510; 7 Dowl. 28 *S. C.*

(*b*) *Wormwell* v. *Hailstone*, 6 Bing. 668; 4 Moo. & P. 512, *S. C.*

(*c*) *Per Tindal*, C. J., *Wormwell* v. *Hailstone*, *ubi supra*: *R.* v. *St. Katharine's Dock Co.*, 4 B. & Ad. 360.

(*d*) *Bartlett* v. *Pentland*, 1 B. & Ad. 704: *Barton* v. *Hunter*, 1 Hudson & Brooke, Rep. K.B., (Ireland), 569.

(*e*) *Buxton* v. *Mardin*, 1 T. R. 82.

(*f*) *Davis* v. *Norton*, 1 Bing. 133.

(*g*) *Thorpe* v. *Hook*, 1 Dowl. 501: *Shaw* v. *Maxwell*, 6 T. R. 450: see *Phillips* v. *Tanner*, 6 Bing. 237; 3 Moo. & P. 562, *S. C.*: *Inman* v. *Huish*, 2 New Rep. 133: *Hunt* v. *Pasman*, 4 M. & Sel. 329: *Johnson* v. *Dobell*, 1 Moo. & P. 28: Vol. II. Book IV. Part I. Chap. 28.

(*h*) *Arnell* v. *Weatherby*, 1 C., M. & R. 831; 3 Dowl. 464, *S. C.*

(*i*) *Rose* v. *Tomblinson*, 3 Dowl. 49.

order; and the execution of such writs shall be enforced in such and the same manner as the execution of writs of execution is now enforced, or as near thereto as the circumstances of the cases will admit; and that any existing writ, the form of which shall be in any manner altered in pursuance of this act, shall nevertheless be of the same force and virtue as if no alteration had been made therein, except so far as the effect thereof may be varied by this act."

In Hilary vacation, 1839, the judges of the common law courts, in pursuance of this section, published several forms of writs of *elegit* and *fieri facias*. These will be found in Chit. Forms. The following general rule is prefixed to the forms: *viz.*—

Writs not to be invalidated by Variance in Matter of Form.

"It is ordered, That the following forms of writs framed by the judges pursuant to the statute 1 & 2 *V. c.* 110, *s.* 20, be used from and after the first day of March next, with such alterations as the nature of the action, the description of the court in which the action is depending, the character of the parties, or the circumstances of the case may render necessary; but that any variance, not being in matter of substance, shall not affect the validity of the writs sued out."

These writs are, of course, to be directed, tested, and made returnable like the former writs of execution; as to which, see the following sections:—

Direction of the Writ.

Direction of the Writ.] The *fieri facias* or *ca. sa.* should regularly in the first instance issue and be *directed* to the sheriff of the county in which the *venue* in the action was laid; (or, if the sheriff be a party, it must be directed to the coroners of the county; or, if they be interested, then to *elisors* (*l*); in which case a suggestion of the reason for directing the writ to the coroners, &c., must be entered on the roll when it is made up, but need not be inserted in the writ (*l*)); and after the first writ has been returned, a *testatum* writ may then be sued out, directed to the sheriff of another county (*m*). But an *elegit*, *levari facias*, or extent, may, it seems, be directed to the sheriff of a different county, in the first instance; and, according to the *dictum* of *Parke*, J., in a recent case, a *fi. fa.* might be so (*n*). As to amendment when a *testatum* is sued out without a *fi. fa.* or *ca. sa.* to warrant it, &c., see *Vol. II. Book IV. Part I. Ch.* 28. Upon judgment in the courts at Westminster, execution may issue into the county palatine of Lancaster (*o*); and it is the daily practice (*p*). So, upon judgments given in the Common Pleas of Lancaster any court of record at Westminster may issue execution into other counties in England upon the certificate of the prothonotary of the county palatine court of the amount of the judgment, if the party remove himself or his goods out of the jurisdiction of that court, (4 & 5 *W.* 4, *c.* 62, *s.* 31), and there is a similar clause, the 6 & 7 *W.* 4, *c.* 106, *s.* 11, for the improvement of the administration of justice in the Stannaries of Cornwall (*q*). If the *venue* in the action was in the county palatine of Lan-

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(*l*) *Bastard* v. *Trutch*, 5 N. & M. 109.

(*m*) *Vide post*, 419.

(*n*) *Farncombe* v. *Kent*, 2 Dowl. 465: see Dyer, 162 b.

(*o*) *Anon.*, 1 Lev. 256: *Draper* v. *Blaney*, Id. 291: T. Raym. 206: 2 Saund. 193: and see 11 G. 4 & 1 W. 4, c. 70.

(*p*) 2 Saund. 194 n.

(*q*) 33 G. 3, c. 68, s. 1: 11 G. 4 & 1 W. 4, c. 70.

caster or in a cinque port town, the writ should be directed as mentioned *post, Book I. Part II. Ch.* 1, *s.* 6.

Teste of the Writ.
At what Time.

Teste of the Writ.] As these are judicial writs, it was, before the 3 & 4 *W.* 4, *c.* 67, *s.* 2, requisite that they should in all cases (except when issued by virtue of the 1 *W.* 4, *c.* 7, *ante*, 289, 398, or the 1 & 2 *W.* 4, *c.* 58, *s.* 7, *ante*, 398, bear *teste* in *term* time (*r*); otherwise, (although it had been holden that the sheriff might justify under them (*r*)), they were so far void, that the sheriff was not liable for an escape; for instance, if an arrest had been made upon a *ca. sa.* tested out of term (*r*). But the writ might bear *teste* upon any day in the term of which judgment was signed, and even before the actual signing of the judgment (*s*); and in practice it was usual, when the writ was sued out in term, to *teste* it on the first day of the term; if sued out in vacation, to *teste* it on the last day of the preceding term; whether it was the term of which judgment was signed, or any subsequent term. It could not, however, in general, be tested of a term prior to that of which the judgment was signed (*t*). If the writ of execution is issued by virtue of the 1 *W.* 4, *c.* 7, *ante*, 289, (in cases where the judge has certified it might issue), then, by the 3rd section of that act, it ought to be tested on the day of issuing it: and it might be so tested when issued in pursuance of the 1 & 2 *W.* 4, c. 58. And now, by the 3 & 4 *W.* 4, *c.* 67, *s.* 2, "all writs of execution *may* be tested on the day on which the same are issued, and be made returnable immediately after the execution thereof" (*u*), and this whether in *term* or *vacation*. But notwithstanding this act the writ *may* be tested, as heretofore (*x*). It must not be tested of a day or term before the time of signing judgment (*y*).

In whose Name.

The writ should in general be tested in the name of the chief justice or chief baron of the court out of which it issues. Where a *ca. sa.* issued in the course of a term in the name of a chief justice, who was dead at the time of issuing the writ, but alive on the first day of the term, the court refused to inquire into the exact day of issuing the writ, but considered it as regular, the *teste* on the face of it appearing regular (*z*). In the Common Pleas at *Lancaster* it is enacted by the statute 4 & 5 *W.* 4, *c.* 62, *s.* 33, that "all writs issued out of the said court shall be tested in the name of the chief justice of that court, or, in the case of a vacancy in such office, in the name of one of the other judges thereof; and that all writs of execution may, if the parties suing out the same shall see fit, be made returnable immediately after the execution thereof." The same in the Court of Pleas, Durham, by 2 *V.* *c.* 16, *ss.* 8, 30.

Amendment of.

A mistake in the *teste* may, in general, be amended if the rights of third parties be not affected thereby (*a*).

Return Day of the Writ.

Return Day of the Writ.] Before the 3 & 4 *W.* 4, *c.* 67,

(*r*) *Shirley* v. *Wright*, 2 Salk. 700; 2 L. Raym. 775, *S. C.*: 2 Bac. Abr., Execution, (C), 1.

(*s*) Comyn, 117.

(*t*) See *Gawler* v. *Jolly*, 1 H. Bl. 74.

(*u*) There is a similar enactment in the act for improving the administration of justice in the Common Pleas of Lancaster, 4 & 5 W. 4, c. 62, s. 33.

(*x*) *Brocher* v. *Pond*, 2 Dowl. 472.

(*y*) *Peacock* v. *Day*, 3 Dowl. 291.

(*z*) *Sutton* v. *Lord Cardross*, 1 Dowl. 511: and see *Watson* v. *Maskell*, 4 M. & Scott, 461: 2 Dowl. 810, S. C.

(*a*) *Campbell* v. *Cumming*, 2 Burr. 1188: *Engleheart* v. *Dunbar*, 1 Dowl. 202: *ante*, 402: *post*, Vol. II. Book IV. Part I. Ch. 28.

Return Day of the Court.

s. 2, writs of execution must have been made *returnable* on a day certain in *term;* otherwise the court would have quashed them (*b*), or, in the case of *ca. sa.*, discharged the defendant (*c*), although they would, in general, allow a defect in this respect to be amended unless the rights of third parties would be affected thereby (*d*). Now, however, by that act, "all writs of execution *may* (*e*) be tested on the day on which the same are issued, and be made *returnable immediately after the execution thereof*." The act is applicable to executions issued on judgments obtained both before and since it passed (*f*). It should seem that you might in the writ of execution adopt the words of the act, by making the writ returnable either "immediately after the execution thereof," or upon any particular day, whether in term or vacation; though the latter, as to making it so returnable in vacation, may be doubtful. In the case of a *ca. sa.* sued out for the purpose of fixing bail, the writ should be returnable as heretofore in term time, the above act applying, it seems, only to cases where the writ is intended to be *executed* (*g*).

At common law, in actions by original, it was necessary that there should be fifteen days between the *teste* and return of all writs of execution; but this was rendered unnecessary in the writs of *fieri facias* and *ca. sa.* by stat. 13 *C.* 2, *s.* 2, *c.* 2, *s.* 6; unless the *ca. sa.* were sued out for the purpose of fixing the bail, or proceeding to outlawry. Since the 2 *W.* 4, *c.* 39, it should seem that there is no occasion in any case except in proceeding to an outlawry, that there should be fifteen days between the teste and return of any writ of execution. It was not, nor is it now, necessary in any case that a writ of execution should be made returnable in the term next after that in which it was tested; if a term intervene, it is not material (*h*); and upon this principle, perhaps, a writ of execution made returnable immediately after the execution thereof, may be deemed in force until returned or executed; at least for a year and a day; but this is open to discussion, and has not been decided. As to when and how the writ is returned, see 410.

Amendment of Writ.

Amendment of Writ.] A writ of execution may in most cases be amended for any formal error therein, unless the rights of third persons would be affected thereby. (*See ante*, 402; *post, Vol. II. Book IV. Part I. Ch.* 28).

From what Time it binds Defendant's Property.

From what Time it binds Defendant's Property.] The judgment, and not the writ of execution, binds the *lands* of the party (*i*), but as to his *goods and chattels*, they were *bound* by the writ of execution, at common law, from the time of its *teste*. By stat. 29 *C.* 2, *c.* 3, *s.* 16, however, "no writ of *fieri facias* or other writ of execution shall bind the property of the goods of the party against whom such writ of execution is

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(*b*) *Furtado* v. *Miller*, Barnes, 213: *Adams* v. *S..arry*, 1 Wils. 155.

(*c*) *Walker* v. *Haryes*, Barnes, 413.

(*d*) *Campbell* v. *Cumming*, 2 Burr. 1188: *Thorpe* v. *Hook*, 1 Dowl. 501: *ante*, 402, n. (*g*): *post*, Vol. II. Book IV. Part I. Ch. 28.

(*e*) See *Brocher* v. *Pond*, 2 Dowl. 472: *ante*, 404.

(*f*) *R.* v. *Shff. of Surrey*, 3 Dowl. 82.

(*g*) So decided by *Bayley*, B., and *Parke*, B., at chambers: and see Tidd, New Pract. 568, 569: *Kemp* v. *Hyslop*, 4 Dowl. 687; 1 M. & W. 58; 1 T. & G. 77; 1 Gale, 438, *S. C.*

(*h*) *Shirley* v. *Wright*, 2 Salk. 700; 2 L. Raym. 775, *S. C.*

(*i*) As to lands, see *post*, title "Elegit."

sued forth, but from the time that such writ shall be *delivered to the sheriff, under-sheriff, or coroners, to be executed;* and for the better manifestation of the said time, the sheriff, under-sheriff, and coroners, their deputies and agents, shall, upon the receipt of any such writ, (without fee for doing the same), indorse upon the back thereof the day of the month or year whereon he or they received the same." It would seem that a delivery of the writ to the deputy-sheriff in London is the same thing as a delivery to the sheriff himself; and that, consequently, the property is bound from the time of such delivery (*j*). This statute, however, was intended only to protect *purchasers* from any injury which might arise to them from the relation which writs of execution had to their *teste* at common law; and therefore, as far as relates to the party himself, and to all others but purchasers for a valuable consideration, writs of execution still bind the party's goods from the time of their *teste* (*k*). Also, the meaning of the words "that the goods shall be bound by the delivery of the writ to the sheriff" is, that after the writ is so delivered, if the defendant make an assignment of the goods for a valuable consideration, unless in market overt (*l*), the sheriff may take them in execution (*m*). The *binding*, both in the case of the Crown and of a common person, relates only to the debtor himself and his acts, so as to vacate any intermediate assignment made by him otherwise than in market overt (*n*). But the property in the goods is not *altered* by the writ until execution and sale by the sheriff (*o*); and if the defendant become bankrupt after the delivery of the writ to the sheriff, but before a levy is made under it, the writ is superseded (*p*). If, however, he takes the benefit of the Insolvent Act after the delivery to the sheriff, the law seems to be different (*q*). The law admits of the inquiry into the fraction of a day, whether the writ of execution was delivered to the sheriff or not before the completion of the conveyance or purchase; and where A., expecting an execution, executed a deed, assigning all his property to trustees for the benefit of all his creditors, after paying expenses, with a power to the trustees to retain the money to pay the costs of an action which had been brought by J. S. against A.: this deed was executed at nine A. M., on the 25th of February; a writ of *fi. fa.* was delivered to the sheriff's officer on the 24th, and by him delivered to the under-sheriff at ten A. M. on the 25th: it was held, that the deed was good, notwithstanding the proviso to retain, and that the goods could not be taken under the *fi. fa.* (*r*).

Priority of Writs.

Priority of Writs.] If two writs of execution against the same person are delivered to the sheriff, he must execute that

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(*j*) See *Williams* v. *Waring*, 4 Dowl. 200; 2 C., M. & R. 354, *S. C.*

(*k*) 1 Saund. 219 f: *Anon.*, 2 Vent. 218: *Horton* v. *Ruesby*, Comb. 33: *Houghton* v. *Rugby*, 2 Show. 485; Skin. 257, *S. C.*

(*l*) See 2 Eq. Ca. Abr. 381.

(*m*) *Per* Lord *Hardwicke* in *Louthal* v. *Tomkins*, B. N. P. 91: and see R. v. *Wells*, 16 East, 278. Lord *Ellenborough*, C. J., in *Payne* v. *Drewe*, 4 East, 523, stated the rule to be thus: "The goods are bound by the delivery of the writ to the sheriff as against the party himself, and all claims by assignment from, or representation through or under him."

(*n*) *Per Patteson*, J.: *Giles* v. *Grover*, 1 Clarke & F. 74.

(*o*) *Lucas* v. *Nockells*, 10 Bing. 182: *Samuel* v. *Duke*, 6 Dowl. 536: *Payne* v. *Drew*, 4 East, 523; 1 Smith, 170, *S. C.*: but see *per Littledale*, J., in *Giles* v. *Grover*, 1 Clarke & F. 177.

(*p*) See *post*, 432.

(*q*) See *post*, 435.

(*r*) *Bowen* v. *Bramidge*, 6 C. & P. 140.

first which was first delivered to him, even where both were delivered upon the same day (*s*), unless the first writ, or the possession held under it, were fraudulent, in which case the second should have priority (*t*). But if, contrary to his duty, he execute the second writ first, the execution and sale will be valid, and bind the sheriff; and the party who sued out the first must have recourse to his action against the sheriff, if he be thereby damnified (*u*). Where the sheriff, however, merely seizes under the second execution, and then (before any sale is actually made of the defendant's goods) seizes under the first, the first writ shall have priority, the property in the goods not being divested out of defendant until the sale (*v*). Also, where a writ of execution was delivered to the sheriff at the suit of A., and which was not executed before it was returnable, and A. therefore sued out an *alias*, but, before it could be delivered to the sheriff, an execution against the same party at the suit of B. was left at the sheriff's office; the court held that B.'s writ was entitled to priority (*x*). But the goods are bound by the second writ, from the date of the delivery of it to the sheriff, subject of course to the first execution (*y*). And, therefore, where two writs were at different times delivered to the sheriff against the same defendant, and he seized and sold under the first writ, and, upon the first writ of execution being afterwards set aside by rule of court, he paid the money over to the defendant, as he was ordered by the rule; he was holden to be liable to the plaintiff in the second action, to the extent of the money levied by him in the first (*z*): he should have aplied to the court, who would have allowed him to pay the money in satisfaction of the second writ of execution, instead of obliging him to pay it over to the defendant. In an action for a false return of *nulla bona* to a *fi. fa.*, if the plaintiff prove the debtor to be possessed of certain goods, it is no defence for the sheriff to shew a prior execution to an amount of greater value, if to that execution the sheriff also returns *nulla bona;* nor, if the sheriff has the proceeds of the goods in his hands, can he defend himself on the ground that the *fi. fa.*, on the return of which the action is brought, was delivered at the sheriff's office at a quarter past six o'clock on the day on which it was returnable, it being made returnable on a particular day (*a*).

When, where, and how Executed.

When, where, and how executed.] It is the duty of the sheriff to set about executing the writ within a reasonable time after he receives it for execution, and if he omit doing so, and any damage arise to the party from his negligence, an action

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(*s*) *Hutchinson* v. *Johnson*, 1 T. R. 729: and see *Sawle* v. *Paynter*, 1 D. & R. 307; 6 C. & P. 142.

(*t*) *Bradley* v. *Wyndham*, 1 Wils. 4: *Lovick* v. *Crowder*, 8 B. & C. 132; 2 M. & R. 84, *S. C.: Pringle* v. *Isaac*, 11 Price, 445: *Kempland* v. *M'Cauley*, Peake, 66: *Warmoll* v. *Young*, 5 B. & C. 660; 8 D. & R. 442, *S. C.:* see *Payne* v. *Drew*, 4 East, 523: and *post*, 432, as to what is a fraudulent execution; and as to the remedy, *post*, 418.

(*u*) *Smalcomb* v. *Buckingham*, Carth. 419: *Payne* v. *Drew*, 4 East, 523; 1 Salk. 310: *Rybot* v. *Peckham*, 1 T. R. 731 n: 2 Bac. Abr., Execution, (D).

(*v*) *Hutchinson* v. *Johnson*, 1 T. R. 729: *Jones* v. *Atherton*, 7 Taunt. 56; 2 Marsh. 375, *S. C.*

(*x*) MS., M. 1815.

(*y*) *Jones* v. *Atherton*, 7 Taunt. 56; 2 Marsh. 375, *S. C.:* and see *Cleghorn* v. *Desanges*, 3 Moore, 83; Gow, 66, *S. C.*

(*z*) *Saunders* v. *Bridges*, 3 B. & Ald. 95.

(*a*) *Towne* v. *Crowder*, 2 C. & P. 355.

on the case may be supported against him (*b*); and upon this principle it has been held, that the sheriff is bound to sell the goods taken under a *fi. fa.* within a reasonable time, and before the issuing or return of a *venditioni exponas* (*c*).

When executed.

The writ may be executed at any time before it is returnable; and even at any time on the day on which it is returnable, if made returnable on any particular day (*d*); although it was formerly holden that it must have been done before the rising of the court on the return day, and not afterwards (*e*). It may be executed either by day or night (*f*), and on any day except Sunday. If a bailiff execute a writ before it comes to the sheriff's hands, or before the warrant is made on it, the bailiff is a trespasser (*g*).

The same sheriff who begins the execution must end it, although he go out of office before the sale, &c. (*h*).

In Case of Death after Issuing of Writ.

If the defendant die after execution is sued out, the writ may, it seems, notwithstanding, be executed on the goods in the hands of the executor, &c. (*i*). So, if the plaintiff die after execution sued out, the writ may, notwithstanding, be executed, and his executor, &c., shall have the money (*k*); or, if there be no executor, and administration be not as yet granted, the money shall be brought into court, and there deposited until some person appear to claim it as representative of the deceased (*l*).

Where Executed.

The observations made *post*, *Book I. Part II. Ch.* 1, *s.* 6, as to *where* a writ of *capias* may be executed, will here apply. The authority of the sheriff or officer to whom the writ is directed is confined to the county or place whereof he is sheriff or officer; and if he execute a writ out of it he is a trespasser. The 2 *W.* 4, *c.* 39, *s.* 20, reciting that "there are in divers parts of England certain districts and places, parcel of some one county, but wholly situate within and surrounded by some other county, which is productive of inconvenience and delay in the service and execution of the process of the said courts; for remedy thereof," enacts, "that every such district and place shall and may for the purpose of the service, and execution of every writ and process, whether mesne or judicial, issued out of either of the said courts, be deemed and taken to be part as well of the county wherein such district or place is so situate as aforesaid, as of the county whereof the same is parcel; and every such writ and process may be directed accordingly, and executed in either of such counties."

Entering open House.

The sheriff may enter the house of the defendant when the outer door is open, to seize the person or goods of the defendant; and this, though neither he nor his goods be therein, if

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(*b*) See *Brown* v. *Jarvis*, 5 Dowl. 281.

(*c*) *Jacobs* v. *Humphrey*, 2 C. & M. 13: *Biles* v. *Wingfield*, 2 N. & M. 831: *Aireton* v. *Davis*, 9 Bing. 740; 3 M. & Scott, 138, *S. C.*: *Doker* v. *Hasler*, 2 Bing. 479; 10 Moore, 210, *S. C.*

(*d*) *Maud* v. *Barnard*, 2 Burr. 812: *Towne* v. *Crowder*, 2 C. & P. 355.

(*e*) 2 Saund. 101 i: and see *Dyke* v. *Blackstone*, 2 L. Raym. 1449.

(*f*) 2 Ord. 436.

(*g*) *Greene* v. *Jones*, 1 Saund. 299, n. 5: *post*, Book I. Part II. Chap. 1, Sect. 7: *Astley* v. *Goodjer*, 2 Dowl. 619: *Hall* v. *Roche*, 8 T. 188.

(*h*) *Clerk* v. *Withers*, 1 Salk. 323.

(*i*) 3 Wils. 399; Comb. 33: *Wither* v. *Harris*, 2 L. Raym. 808; 12 Mod. 130, 241. As to how far execution can be sued out after the death of the party, see *ante*, 397.

(*k*) *Cleve* v. *Vere*, Cro. Car. 459: *Harrison* v. *Bowden*, 1 Sid. 29: *Clerk* v. *Withers*, 2 L. Raym. 1073; 1 Salk. 322; 6 Mod. 290, *S. C.*

(*l*) *Clerk* v. *Withers*, 2 L. Raym. 1073; Noy, 73: 2 Bac. Abr., Execution, (L): and see *Dunsford* v *Gouldsmith*, 8 Moore, 145: *Fothergill* v. *Walton*, 4 Bing. 711; 1 Moo. & P. 743, *S. C.*

there is reasonable ground for suspecting that he or they are there (*m*). And the sheriff may enter the house of a third person to execute a *ca. sa.* or *fi. fa.*, if the defendant or his goods be actually therein (*m*), otherwise not (*o*). On a *fi. fa.* against the goods of an intestate in the hands of the administratrix and her husband, the sheriff may enter the house of the husband to search for the goods of the intestate, though none be found therein (*n*). The sheriff must not remain on the premises longer than is reasonably necessary for the removal of the defendant or his goods, unless with the license of the defendant or the possessor of the premises, otherwise he would be a trespasser (*p*).

Breaking open Door, &c.

The sheriff cannot break open any outer door (*q*) of the party's dwelling-house, in order to execute a writ of execution (*r*); unless in the case of a writ of seisin, or *habere facias possessionem*, in which case he may break open the door, if he be denied entrance by the tenant (*s*). But, having got entrance at the outer door, he may in all cases break open an inner door, cupboards, trunks, &c., if necessary (*t*); and if there were other means of entry, whereby less violence may be used than breaking open the door, the same should be adopted; and if any person be present who can open the door, it should not be broken open without a previous demand and refusal of admission. It seems, also, that goods may be taken through the window of a house, if open (*u*). There is another exception, also, to the above rule, namely, that when the execution is at the suit of the queen (*x*), (even in the case of a *capias utlagatum* (*y*),) the sheriff may break open the outer door of the defendant's dwelling-house, having first signified the cause of his coming, and desired admission (*z*). The rule also extends only to the party's dwelling-house; therefore, the sheriff may, if necessary, break open the outer door of a barn or out-house, not connected or within the same curtilage with the dwelling-house, without a previous demand and refusal of admission (*a*). Also, after such demand and refusal, the sheriff may break open the outer door of a dwelling house belonging to a third person, if the defendant has, upon a pursuit, taken refuge there, or his goods be brought there to prevent the execution (*b*). Or, if the defendant, after being *arrested* on a *capias*, escape into either his own or another's dwelling-house, the officer will be justified in breaking the outer door to re-take him (*c*). Also, if, after a peaceable entrance at the outer door of the party's dwelling-house, the sheriff or his officer be locked in, he may justify breaking open the outer door in order to get out; and the court will probably grant an attachment against the defendant (*d*). So, if the officer gets in

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(*m*) *Semayne's case*, 5 Co. Rep. 92.

(*n*) *Johnson* v. *Legh*, 1 Marsh. 565; Com. Dig., Execution, (C), 5.

(*o*) *Cooke* v. *Birt*, 5 Taunt. 765; 1 Marsh. 333, *S. C.*

(*p*) *Post*, 422.

(*q*) He cannot even break open a latch, *semb.* Dalt. 350, H. (*Buckingham* v. *Francis*, 11 Moore, 40).

(*r*) 5 Co. 91: *Semayne* v. *Gresham*, Moore, 668; Yelv. 28; Cro. El. 908, *S. C.*; 2 Bac. Abr., Execution, (N).

(*s*) *Semayne's case*, 5 Co. 91.

(*t*) *R.* v. *Bird*, 2 Show. 87: *Lee* v. *Gansel*, Cowp. 1: *Hutchinson* v. *Birch*, 4 Taunt. 619.

(*u*) 1 Roll. Abr. 671, pl. 7.

(*x*) 5 Co. 91 b.

(*y*) *R.* v. *Bird*, 2 Show. 87.

(*z*) 5 Co. 91: *Sir Thomas Kemp and Windsor's case*, 4 Leon. 41: *Semayne* v. *Gresham*, Cro. El. 909, 714.

(*a*) *Penton* v. *Browne*, 1 Sid. 181, 186.

(*b*) *Semayne's case*, 5 Co. 93 a: *Penton* v. *Browne*, 1 Sid. 186.

(*c*) Lofft, 390.

(*d*) *White* v. *Wiltshire*, Palm. 52; Cro. Jac. 555; 2 Ro. Rep. 132, *S. C.*

through another door, and seizes under a *fi. fa.*, and is unable to carry away the goods without himself opening the outer door, neither the defendant nor any one on his behalf being present whom the officer could ask to open the door, he is justified in breaking the outer door and lock in order to carry away the goods (*e*). If the sheriff break open an outer door, when he is not justified in doing so, this does not vitiate the execution, but merely renders the sheriff liable to an action of trespass (*f*). The court, or a judge, however, will in general discharge the party out of custody when arrested, or restore the goods, when taken by such means.

Entering Palaces, Courts, Tower, &c.

The sheriff cannot enter any of the royal palaces for the purpose of executing a writ of execution against the person or goods of any person residing in them (*g*); nor can he do so in the courts of justice, whilst the justices are sitting; nor in the Tower (*h*).

The manner in which the several writs of execution must be executed will be mentioned hereafter, while treating of each particular writ.

Shewing Warrant.

In executing a writ, a sworn and known officer, be he sheriff, under-sheriff, bailiff, or serjeant, need not shew his warrant or writ, although demanded; but a special bailiff must shew his warrant, if the party demands it, otherwise the latter need not obey it (*i*). And the known officer, upon the execution of the writ, ought to declare the contents of his warrant, as to whose suit he executes it, out of what court, and when returnable: to the end that the defendant may pay the money (*k*).

Interpleader.

Interpleader in Case of Adverse Claims.] See this noticed *post, Vol. II. Book IV. Part I. Ch.* 11.

When and how Returned and Effect of Return, &c.

When and how Returned, and Effect of Return, &c.] It is not usual to return writs of execution which are executed, although the sheriff in strictness is bound to do so (*l*). The *elegit*, however, is an exception to this; for if lands be extended on it, it is absolutely essential that the *elegit* and inquisition should be returned, otherwise the tenant by the *elegit* will have no title (*m*). Also, where the execution is against the defendant's goods, it may be advisable to rule the sheriff to return the writ, in order to prevent improper conduct in the officer (*n*).

Rule to Return.

The sheriff may be ruled to return the writ either by the plaintiff or the defendant (*o*). The sheriff may be so ruled or ordered by the defendant under a *fi. fa.*, though the defendant has paid the money without a sale (*p*). Formerly, the rule could be given in term only, and if it expired in vacation, the sheriff in the Queen's Bench had until and all the first day

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(*e*) *Pugh* v. *Griffiths*, 3 Nev. & P. 187.

(*f*) 5 Co. 93 a: but see 2 Bac. Abr., Execution, (N).

(*g*) *Winter* v. *Miles*, 10 East, 578.

(*h*) *Batson* v. *M'Lean*, 2 Chit. Rep. 51: *Bell* v. *Jacobs*, 1 Moo. & P. 309.

(*i*) *Mackally's case*, 9 Rep. 69: Bac. Abr., Shff. (N): *sed vide Hall* v. *Roche*, 8 T. R. 188; where Lord *Kenyon* expressed a strong opinion that the warrant ought to be produced, at least, where demanded.

(*k*) *Mackally's case*, 9 Rep, 61: *Countess Rutland's case*, 6 Rep. 54 a.

(*l*) See 5 Co. 90: 4 Co. 67: *Cheasley* v. *Barnes*, 10 East, 73: *Rowland* v. *Veale*, Cowp. 18.

(*m*) 5 Co. 90 a: 4 Co. 74: 2 Inst. 396: Bac. Abr., Execution: Com. Dig., Execution: *Carraway* v. *Harrington*, Cro. Jac. 569: *Palmer* v. *Humphrey*, Cro. El. 584. The defendant may compel the plaintiff to enter on the roll the *elegit* and sheriff's return. (*Casseldine* v. *Murray*, 6 L. O. 28).

(*n*) See *Edmunds* v. *Watson*, 7 Taunt. 5.

(*o*) *France* v. *Clarkson*, 2 Dowl. 533. See form of rule, Chit. Forms, 168.

(*p*) *Edmunds* v. *Watson*, 2 Marsh. 333; 7 Taunt. 5, *S. C.*

of the next term to return the writ (q). But now, by 2 *W.* 4, *c.* 39, *s.* 15, "it shall be lawful, in term time, for the court out of which any writ issued by authority of this act, or any writ of *capias ad satisfaciendum*, *fieri facias*, [*venditioni exponas* (r),] or *elegit*, shall have issued, to make rules, and also for any judge of either of the said courts in vacation to make orders, for the return of any such writ; and every such order shall be of the same force and effect as a rule of court made for the like purpose; provided always, that no attachment shall issue for disobedience thereof, until the same shall have been made a rule of court." And by *R. M.*, 3 *W.* 4, *r.* 13, "in case a judge shall have made an order in *vacation*, for the return of any writ issued by authority of the said act, or any writ of *capias ad satisfaciendum*, *fieri facias*, [*venditioni exponas* (r),] or *elegit*, on any day in the *vacation*, and such order shall have been duly served, but obedience shall not have been paid thereto, and the same shall have been made a rule of court in the term then next following, it shall not be necessary to serve such rule of court, or to make any fresh demand of performance thereon, but an attachment shall issue forthwith for disobedience of such order, whether the thing required by such order shall or shall not have been done in the meantime." And by *R. H.*, 2 *W.* 4, *r.* 11, "when the rule to return the writ expires in vacation, the sheriff shall file the writ at the expiration of the rule, or as soon after as the office shall be open (s); also, by *R. H.*, 2 *W.* 4, *r.* 12, "the officer with whom it is filed shall indorse the day and hour when it was filed."

Rule to return Writ after Sheriff out of Office.

Though the sheriff go out of office, he may be still ruled or ordered to return the writ. He is not, however, liable to be called upon to return it, unless required so to do within six months after the expiration of his office (t), that is, six lunar months; and the day upon which the sheriff quits his office is reckoned inclusive (x). Also, he must be ruled or ordered to return the writ within that time, otherwise he is not bound to do so; although requested before (y). Perhaps, under very special circumstances, he might be ordered to return the writ, though long after the expiration of the six months of his going out of office (z). By the 3 & 4 *W.* 4, *c.* 99, *s.* 7, we have seen, *ante*, 14, that the old sheriff must deliver over to the new one all unexecuted writs, and that the new sheriff shall be chargeable with the execution thereof; and if he omit to do so, he will subject himself to an action at the suit of the party injured thereby (a).

Where Sheriff cannot be

Where there has been a compromise between the parties, the

(q) *R.* v. *Shff. of Berks*, 5 East, 386; 1 Smith, 427, *S. C.* In the C. P. and Exch., the sheriff must have filed his return in vacation, and could not have waited till the ensuing term. (*R.* v. *Shff. of Middlesex*, 5 Taunt. 647; 1 Marsh. 270, *S. C.*: *Smith* v. *Blyth*, 9 Price, 255).

(r) *Hughes* v. *Rees*, 4 M. & W. 468; 7 Dowl. 56, *S. C.* The *venditioni exponas* being a branch of the *fi. fa.*, is included, though not expressly mentioned.

(s) Formerly there was an extra charge in Q. B. for opening the treasury in vacation in order to file the writ, and the sheriff had to pay it; (see *R.* v. *Shff. of Surrey*, 3 Dowl. 82); but that charge is abolished by R. T., 7 W. 4, Q. B., which orders, that sheriffs may file their returns to writs in vacation, and searches may be made in vacation for writs and returns filed without payment of the extra fee of 5*s.* 10*d.*, hitherto charged.

(t) 20 G. 2, c. 37, s. 2.

(x) *R.* v. *Adderley*, Doug. 463; 2 Saund. 47 m.

(y) *R.* v. *Jones*, 2 T. R. 1; see *Yaroth* v. *Hopkins*, 3 Dowl. 711.

(z) *Wilton* v. *Chambers*, 3 Dowl. 333; 1 H. & W. 116, *S. C.*

(a) See *Yaroth* v. *Hopkins*, 3 Dowl. 711.

Ruled to Return.

sheriff cannot be ruled or ordered to return the writ (*b*), nor can he be so where the plaintiff has appointed a special bailiff (*c*), nor where there is any collusion between the sheriff's officer and the plaintiff, or his attorney (*d*); nor to return a *ca. sa.* where the defendant has become bankrupt (*e*) or insolvent (*f*), and the plaintiff consents to become his assignee. And he will be ordered to make a specific return of the goods sold and their proceeds, applied for on the ground that the goods had been wasted by the officer (*g*).

Setting Aside Rule, &c.

If improperly ruled to return the writ, it seems the sheriff's course is to move to set the rule aside (*h*); if improperly ordered by a judge to do so, his course will be to get the order rescinded.

Proceedings on Rule.

The mode of obtaining the rule or order to compel the return, the form and service of it, the time for returning the writ after it, and when the sheriff will be in contempt for not obeying it, and the mode and time of obtaining an attachment, will be found noticed post, Book I. Part II. Ch. 1, *sect.* 9, *the practice in this respect on mesne process being for the most part the same as on final process.*

Return of Testatum Writ.

Where a *ca. sa.* or *fi. fa.* is sued out merely to warrant a *testatum* writ, the attorney may make the return (*i*), although in practice it is usual to take it to the sheriff's office for that purpose.

Return in case of Bailiff of Liberty.

The different returns will be noticed while treating of each particular writ, see *post*, 435, 446, 453. If the bailiff of a liberty have the execution and return of the writ, the sheriff may return, that he commanded the bailiff to execute the writ; and if the bailiff has not made a return, the sheriff should return that fact accordingly: or if he have made a return, the sheriff should return it (*k*). If the bailiff sends an insufficient return, the sheriff should return that the bailiff has made no return (*l*). If the sheriff return, that he commanded the bailiff, &c., when the sheriff himself might have entered the liberty, the return is void (*m*). Where both the sheriff and the high-bailiff had obtained time to return a writ of *ca. sa.*, and the sheriff afterwards in due time returned *cepi corpus*, it was held, that as the plaintiff had got all which he had a right to require, the high-bailiff could not be compelled to return the mandate (*n*).

Rescue, a Bad Return.

The sheriff cannot return a rescue to a writ of execution, as he may do to a writ of mesne process, for he must, by stat. *Westminster* 2nd, raise the *posse comitatus* (*o*).

(*b*) *Alchin* v. *Wells*, 5 T. R. 470: *Hodges* v. *Jordan*, 5 Dowl. 6.

(*c*) *Pallister* v. *Pallister*, 1 Chit. Rep. 614, n: *Porter* v. *Viner*, Id. 613. Where a plaintiff appoints his own bailiff to execute a writ, the sheriff is relieved from all responsibility until the party is arrested and delivered into the actual custody of the sheriff. (*Ford* v. *Leeke*, 1 Nev. & P. 737). Whether what is said, or written, or done, amounts to an appointment of a special bailiff, is a question of fact rather than of law. (*Ford* v. *Leeke*, *Balson* v. *Meggatt*, *ubi supra*, Atkinson on Sheriffs, 46). The mere expression of a wish by the attorney. that a particular officer may be employed to execute the writ does not constitute the latter the plaintiff's agent. (*Porter* v. *Viner*, 1 Chit. Rep. 613: *Balson* v. *Meggatt*, 4 Dowl. 557). As to what amounts to such an appointment, see Id.: *Corbett* v. *Brown*, 6 Dowl. 794: *Balson* v. *Meggatt*, 4 Dowl. 557.

(*d*) *Ruston* v. *Hatfield*, 3 B. & Ald. 204; 1 Chit. Rep. 613, *S. C.*

(*e*) *Per Tindal*, C. J., 8 Bing. 20.

(*f*) *Hepworth* v. *Sanderson*, 8 Bing. 19.

(*g*) *Willett* v. *Sparrow*, 6 Taunt. 576.

(*h*) *De Moranda* v. *Dunkin*, 4 T. R. 119; *Hamilton* v. *Dalziel*, 2 Bl. Rep. 952.

(*i*) *Palmer* v. *Price*, 2 Salk. 590: *Farncombe* v. *Kent*, 2 Dowl. 464.

(*k*) See form, Chit. Forms, 172.

(*l*) Roll. Abr., Return, (M), 2, 3: Watson on Sheriff, 76: *post*, 413.

(*m*) Fitz. Retorn. 53.

(*n*) *Jackson* v. *Taylor*, 5 Dowl. 140.

(*o*) *May* v. *Probie*, Cro. Jac. 419: *R.* v. *Baldwin*, Barnes, 430: *Slie* v. *Finch*, 2 Roll. Rep. 57: Wats. Shff. 74.

Return, how made, and Form of.

The return is made on the back of the writ itself, but, if the return be long, a schedule is usually annexed, and referred to in the indorsement on the writ (*p*). The writ and return are filed with one of the masters before or on the day on which the rule or order to return the writ expires. By rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 12, in order to make sheriffs punctual in their return of writs, it is ordered, that "the officer with whom it is filed shall indorse the day and hour when it was filed." The return must be certain (*q*), and must answer the whole writ (*r*); where a *venditioni exponas* to sell goods levied as to part of the debt, and a *fieri facias* as to the residue, were included in the same writ, and the sheriff made a return to the *venditioni exponas*, without making any return as to the *fi. fa.*, it was held bad (*s*). The return must answer the whole writ up to the period when the return is made (*t*). The return must not falsify the writ on the record (*u*), or be contrary to a former return of the sheriff or of his predecessor (*x*). The sheriff ought to put his christian and surname to the return (*y*); but the omission would not render the return bad, though the sheriff might be amerced (*z*). And when there are two sheriffs, both ought to put their names, or the return would be no return at all (*a*). Where a new sheriff makes a return to a writ which has been executed by a predecessor, (but which is not usual), he should return, that his predecessor delivered it to him, with the latter's return thereon (*b*).

Insufficient Return.

If the return be insufficient, it is as no return, and the court will quash it, and grant an attachment against the sheriff who returns it (*c*). But they will in general allow the return to be amended, and set aside the attachment on the sheriff's paying the costs (*d*).

Amendment of Return.

Any defect in the formal part of the return will be cured by the words, "in manner and form as I am within-commanded" (*e*). The return may also be in general amended (*f*); and this, although after execution executed; and, in some cases, although the application for the amendment be not made by the sheriff himself (*g*). Where a levy was made under a *fi. fa.*, and the plaintiff's attornies, who had subsequently become the defendant's attornies unfairly, induced the sheriff to make a false return to the *fi. fa.*, which shewed a larger sum to have been received by the sheriff than was the fact, the court ordered the return to be amended according to the truth (*h*). Where the sheriff, under a *fi. fa.* and a writ of extent, seized not only the

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(*p*) See form, Chit. Forms, 172, 183.

(*q*) Bro. Return de Briefe, pl. 8: Roll. Abr., Return, (L): Wats. Shff. 69.

(*r*) Roll. Abr., Return, (M), 2: Wats. Shff. 69.

(*s*) *R.* v. *Shff. of Middlesex*, 1 Marsh. 344.

(*t*) See *Palmer* v. *Potter*, Cro. Eliz. 512: *Perkins* v. *Meacher*, 1 Dowl. 21: *Cavenagh* v. *Collett*, 4 B. & Ald. 279: *Baker* v. *Davenport*, 8 D. & R. 606.

(*u*) Com. Dig., Retorn, (E), 4: *Moor* v. *Watts*, 2 Salk. 581: 1 L. Raym. 613, *S. C.*

(*x*) Roll. Ab., Return, (E), (F): Vin. Abr., Retorn, (E), (T).

(*y*) *Dive* v. *Manningham*, Plowd. 63: Fitz., Retorn, 8.

(*z*) *Dalton* v. *Thorpe*, Cro. El. 767: *sed quære*: see Watson, Shff. 69.

(*a*) *Lamb* v. *Wiseman*, Hob. 70; 11 Rep. 4.

(*b*) *R.* v. *Shff. of Middlesex*, 4 East, 604.

(*c*) Roll. Abr., Return, (M) 1, 2: Wats. Shff. 76. As to what affidavit is necessary, see *Wilton* v. *Chambers*, 5 N. & M. 431.

(*d*) *R.* v. *Shff. of Kent*, 2 M. & W. 316; 5 Dowl. 451, *S. C.* A return that the defendant is "not *to be* found," &c., is bad. (Id.)

(*e*) Fitz., Retorn, 44: Wats. Shff. 68.

(*f*) 8 Hen. 6, c. 12, s. 6: *Thorpe* v. *Hook*, 1 Dowl. 494: see *R.* v. *Shff. of Monmouth*, 1 Marsh. 344; and the cases in Watson, Shff. 71.

(*g*) *Thorpe* v. *Hook*, 1 Dowl. 494.

(*h*) *Green* v. *Glasbrooke*, 2 Bing. N. C. 143; 2 Scott, 261.

defendant's goods, but also goods belonging to a stranger which were on the premises, and the sheriff returned to both writs that he had seized goods to the amount, but that they remained in his hands for want of buyers; the sheriff being obliged afterwards, by order of the Court of Exchequer, to levy the amount of the extent upon the defendant's goods, and not upon the goods of the stranger, and having no longer goods of the defendant to satisfy the *fi. fa.*, he applied to this court for leave to amend his return to the latter writ: the court, however, refused to allow the amendment, saying, that as he had seized sufficient property of the defendant under this writ, he must be accountable to the plaintiff for it; had he, as soon as he received the order of the Court of Exchequer, stated the facts of the case to that court, they would have relieved him from his embarrassment (*i*).

Return, how far conclusive.

The return is conclusive between the same parties in the same action, but not against other parties, or in another action (*k*). Even in another action, however, the return is *primâ facie* evidence of the facts stated in it (*l*). If the return be false, the party who is injured by it may maintain an action against the sheriff (*m*): the court will not, in general, on motion, try the truth of it on affidavits, but will leave the party to his action against the sheriff (*n*). The sheriff is generally concluded by his return; and the bailiff of a liberty is, it seems, concluded by it, although false, and his remedy over is against the sheriff (*o*). But the sheriff's officer is not, for the purposes of his own justification, so concluded (*p*). Where the sheriff levied and sold goods of a defendant under a *fi. fa.*, and *after notice* that the defendant had petitioned the Insolvent Court, returned *fieri feci*, he was held bound by that return, and that he must pay over the money to the plaintiff, although the defendant was afterwards discharged under the Insolvent Act (*q*). But where the sheriff returned to a *fi. fa.*, that he had levied, it was held in an action against him for not paying over the money, that, notwithstanding his return, he might be admitted to prove that the defendant became bankrupt before the judgment, and that the plaintiff knew his insolvency before action brought (*r*).

Sheriff's Poundage and Expenses of Execution.

Sheriff's Poundage and Expenses of Execution.] At common law the sheriff was bound to execute all the king's writs, without any fee or reward; and he cannot now claim any such fee or reward, unless it be provided for by statute (*s*).

Upon Fi. Fa.

Upon executing a *fieri facias*, the sheriff is by statute 29 *Eliz.* c. 4, entitled to 12*d.* for every 20*s.*, if the sum levied does not exceed 100*l.*, and 6*d.* for every 20*s.* over and above that

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(*i*) MS., E. 1817: see *Saunders* v. *Bridges*, 3 B. & Ald. 95: but see *Tomlinson* v. *Thynn*, 4 Moore, 505; 2 B. & B. 77, *S. C.*

(*k*) Dalton, 189: Roll. Abr., Return, (O): *Gibson* v. *Brooke*, Cro. El. 859: *Morrison* v. *Bowne*, Sir W. Jones, 418: see *Leonard* v. *Simpson*, 2 Bing. N. C. 176; 2 Scott, 335.

(*l*) *Gifford* v. *Woodgate*, 11 East, 297.

(*m*) Dalton, 190: Vin. Abr., Return, (O), 47.

(*n*) *Goubot* v. *De Crouy*, 2 Dowl. 86: see *Barber* v. *Mitchell*, 2 Dowl. 574.

(*o*) *Shaw* v. *Simpson*, 1 L. Raym. 184.

(*p*) *Parker* v. *Mosse*, Cro. Eliz. 181.

(*q*) *Field* v. *Smith*, 2 M. & W. 388; 5 Dowl. 735, *S. C.*

(*r*) *Brydges* v. *Walford*, 6 M. & Sel. 42. In this case there was no laches on the part of the sheriff, as there was in *Field* v. *Smyth*, *supra*. (See *Clutterbuck* v. *Jones*, 15 East, 78).

(*s*) See 2 Inst. 210: *Graham* v. *Grill*, 2 M. & Sel. 294; Wats, Shff. 76, as to poundage on extents, &c.; and Chit. jun. Prerog. Crown, 322.

Poundage.

sum; if he exacts more, he is by that act liable to a penalty of 40*l*., one moiety to the Queen, and the other to the informer, and also to an action by the party grieved for treble damages (*t*). By the recent stat. 7 *W.* 4 & 1 *V. c.* 55, *s.* 2, *ante*, 17, the amount of the sheriff's fees in the execution of civil processes is regulated by what is allowed by the masters, under the sanction of the judges (*u*) and by sect. 3, the remedy for extortion is by summary application to one of the superior courts (*x*). But the statute, though it enumerates and repeals other statutes, does not mention the stat. of *Elizabeth*, or the stat. 3 *G.* 1, *c.* 15, or 43 *G.* 3, *c.* 4; and consequently the statutes of 29 *Eliz. c.* 4, 3 *G.* 1, *c.* 15, and 43 *G.* 3, *c.* 46, *s.* 5, are still in force. And accordingly it has been held that the sheriff is still entitled to his poundage under the act 29 *El. c.* 4, as well as to his fees under the above act (*y*). The sheriff is entitled to the poundage allowed him by the stat. of *Eliz.* after seizure of the goods, although the parties enter into a compromise before he sells them (*z*), or although the judgment and execution are afterwards set aside for irregularity (*a*). He is not entitled to poundage if the money is paid to him without any levy (*b*); nor where money is paid into court by the sheriff, under the 43 *G.* 3, *c.* 46, *s.* 2, or 7 & 8 *G.* 4, *c.* 71 (*c*).

Expenses.

The sheriff could not before the act 7 *W.* 4 & 1 *V.* charge the expenses of selling the goods by auction, because he is bound to sell the goods himself: yet, if the auction were at the request of the plaintiff or defendant, the party so requesting it must pay the expenses of it (*d*). As to the fees now allowed in pursuance of that act, see Appendix.

Also before the above act of 7 *W.* 4 & 1 *V. c.* 55, it was held that the sheriff was not entitled to the expense incurred in taking and keeping possession of goods under a *fi. fa.* at the request of the party suing out the writ, although they were not sold, on account of his refusing to give an indemnity against the claims of third persons (*e*); also that he was not entitled to retain anything beyond the regular poundage, for expenses incurred by keeping possession of the goods, in consequence of an injunction (*f*). But the judges of the Common Pleas seem to have been of opinion, that, where the sheriff did anything beyond his official duty, in allowing time for dividing the property seized into lots, for the benefit of selling them to more advantage, *at the instance of the defendant*, the officer was entitled to some remuneration beyond poundage (*g*). And perhaps, since the above act of 7 *W.* 4 & 1 *V. c.* 55, a more liberal allowance may be made to the sheriff in similar cases (*h*).

Who to pay.

There was some doubt, formerly, who should pay the expenses of the execution of a *fi. fa.*; but now, by 43 *G.* 3, *c.* 46,

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(*t*) See *Anon.*, 1 Salk. 331: *Woodgate* v. *Knatchbull*, 2 T. R. 158: *R.* v. *Marsack*, 6 Id. 771: *Savage* v. *Smith*, 2 W. Bl. 1101: *Tyte* v. *Glode*, 7 T. R. 267: *Deacon* v. *Morris*, 2 B. & Ald. 393.

(*u*) See Appendix at the end of the Work for a table of these fees.

(*x*) See *ante*, 17.

(*y*) *Davies* v. *Griffiths*, 4 M. & W. 377; 7 Dowl. 204, *S. C.*

(*z*) *Alchin* v. *Wells*, 5 T. R. 470.

(*a*) *Rawstorne* v. *Wilkinson*, 4 M. & Sel. 256.

(*b*) *Graham* v. *Grill*, 2 M. & Sel. 296.

(*c*) *Stewart* v. *Bracebridge*, 2 B. & Ald. 770; 1 Chit Rep. 529, *S. C.*: *Haines* v. *Nairne*, 2 Dowl. 43: *Hunn* v. *Brine*, 6 Moore, 124: *post*, "Bail."

(*d*) *Woodgate* v. *Knatchbull*, 2 T. R. 157.

(*e*) *Bilke* v. *Havelock*, 3 Camp. 374.

(*f*) *Buckle* v. *Bewes*, 3 B. & C. 688; 5 D. & R. 595, *S. C.*

(*g*) *Stevens* v. *Rothwell*, 6 Moore, 338; 3 B. & B. 143, *S. C.*

(*h*) See the table of fees now allowed in the Appendix at end of 2nd volume.

s. 5, "in every case of execution against the *goods* of a *defendant*, the plaintiff may also levy the poundage, fees and expenses of the execution, over and above the sum recovered by the judgment (*i*). And under the term "expenses of the execution," used in the act, is included the expense of *levying*. The plaintiff, in levying for these expenses, must always take care to levy only such a reasonable sum as would be afterwards allowed upon taxation, otherwise the court, upon application, will order the excess to be restored, with costs (*j*). The statute of 43 *Geo.* 3, only extends to an execution at the suit of the plaintiff; and where it issues at the suit of the defendant, the expenses of it must, it seems, be borne by him (*k*). It seems that it does not extend to executions at the suit of the crown (*l*).

Upon a Ca. Sa.

Upon executing a *ca. sa.* the sheriff is by stat. 29 *Eliz. c.* 4, entitled to 12*d.* in every 20*s.* if the sum does not exceed 100*l.*; and 6*d.* for every 20*s.* over and above that sum, in the same manner as upon the *fi. fa.;* which, by the 3 *G.* 1, *c.* 15, *s.* 17, is to be calculated upon the amount of the debt really due, and marked on the back of the writ. The sheriff's right to poundage under this act is not affected by the act 7 *W.* 4 & 1 *V. c.* 55 (*m*). It has been decided that the sheriff is entitled to this poundage, although the defendant goes to prison without paying the debt (*n*); or, although the defendant was already in custody of the sheriff when the *ca. sa.* was delivered to him (*o*). But it has been considered that the plaintiff could not levy under a *ca. sa.* the poundage, officers' fees, or other expenses of the execution, above the sum recovered by the judgment, unless the judgment was for a penalty, or there be an express authority for such levy by the defendant's agreement.

Upon an Elegit or habere facias.

Upon executing an *elegit* or *habere facias possessionem*, the sheriff is, by the 3 *G.* 1, *c.* 15, *s.* 16, entitled to 12*d.* in every 20*s.* of the yearly value of the lands, &c., whereof possession or *seisin* shall be given, if such yearly value exceed not the sum of 100*l.*; and 6*d.* in every 20*s.* of the yearly value above that sum (*p*). But where the goods are taken under an *elegit*, the sheriff is entitled *pro tanto* to poundage, as he would under a *fi. fa.*

Upon a Levari Facias.

Upon executing a writ of *levari facias* for a crown debt, the sheriff was not entitled, before the 7 *W.* 4 & 1 *V. c.* 55, to poundage (*q*); and perhaps that is the case still.

How recovered.

The sheriff may maintain an action for his poundage, &c. (*r*); or he may retain it out of the money levied under the execution. But he cannot refuse to execute a writ until his fees are paid (*s*). Nor is he justified in taking goods to secure his poundage, after he has consented to their being delivered to a third person under a claim of property. (*t*)

Remedy for Extortion.

Besides the remedy given by the above stat. of 29 *Eliz.*, the party upon whom the extortion is committed may maintain

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(*i*) See *Rumsey* v. *Tuffnell*, 9 Moore, 425; 2 Bing 255, *S. C.*

(*j*) *Benwell* v. *Oakley*, 2 Taunt. 174.

(*k*) *Baker* v. *Sydee*, 7 Taunt 179: see *Woodgate* v. *Knatchbull*, 2 T. R. 158.

(*l*) See *Rex* v. *Miles*, 7 T. R. 367: West, 238.

(*m*) *Davies* v. *Griffiths*, 4 M. & W. 277; 7 Dowl. 204, *S. C.*; 2 Jurist, 1045.

(*n*) *Lake* v. *Turner*, 4 Burr. 1981.

(*o*) *Taylor* v. *Ward*, Tidd, 9th ed. 1040.

(*p*) See *Price* v. *Hollis*, 1 M & Sel. 105.

(*q*) *Stevens* v. *Rothwell*, 6 Moore, 338; 3 B & B. 143, *S. C*

(*r*) *Tyson* v. *Paske*, 2 L. Raym. 1212; 1 Salk. 333, *S. C.*: see *Rawstorne* v. *Wilkinson*, 4 M. & Sel 256: *Foster* v. *Blakelock*, 5 B. & C. 328; 1 R. & M, C. N. P. 314.

(*s*) *Hescott's case*, 1 Salk. 330; Noy, 75.

(*t*) *Goode* v. *Langley*, 7 B. & C. 26.

an action for money had and received against the sheriff. The party guilty of the extortion may also be indicted at common law (*u*). But the sheriff, though he may be sued, cannot be indicted for the extortion of his officer (*x*). The treble damages mentioned in the statute of *Eliz.* are calculated at three times the amount of the damages found by the jury (*y*); the damages themselves being, in general, the sum overcharged (*z*). By the 7 *W.* 4 & 1 *V. c.* 55, *s.* 3, 4, *ante*, 17, there is a remedy for extortion by summary application to the court against the offender; how far this enactment affects the other remedies above pointed out remains to be decided.

How far a Discharge of Judgment, and Remedy for Amount levied.

How far a Discharge of Judgment, and Remedy for Amount levied.] This will be found while treating of the particular writs of execution (*post*, 439, 454). As to the entry of satisfaction on the roll, see *post*, *Ch.* 4, *Sect.* 5, *p.* 456.

Contribution.

Contribution.] If execution be sued out against two or more persons, and the whole amount be levied upon one, in actions *ex contractu*, (unless upon a contract made with the defendants as partners in trade (*a*),) the party upon whom the whole is levied may maintain an action against the others, and oblige them to contribute their respective shares; but in most cases in actions *ex delicto* he cannot thus compel a contribution, and he is, in general, altogether without remedy (*b*).

Irregular Execution.

Irregular Execution.] If there be any irregularity in the execution of the writ, the same may be set aside, and in general with costs: and if goods or money have been levied under it, the court or a judge will order them to be restored; or, if the party be in custody under it, they will order him to be discharged. But in the case of an execution levied either on the person or goods, for a greater sum than ought to have been, in such a case, in general, the court or a judge will not do more than reduce the amount of the levy, unless indeed the defendant has suffered by the excess of the execution (*c*). It may be here observed, that an action will lie for issuing and executing a writ of execution for too much (*d*).

Motion to Set Aside.

The application to set aside the execution should be made as early as possible, and, generally speaking, at all events before the end of the term in which the writ is returnable, if made so returnable (*e*). In moving to set aside a *ca. sa.*, on the ground of a misnomer, the affidavit should be intitled in the right name (*f*). In setting aside the execution, the court will, in general, restrain the defendant from bringing any action, unless a strong case of damage be shown (*g*), or the judgment and execution were against good faith (*h*).

(*u*) *Smith* v. *Mall*, 2 Roll. Rep. 263; Palm. 318, *S. C.*

(*x*) *Woodgate* v. *Knatchbull*, 2 T. R. 148, *per Gould*, J.: *Sanderson* v. *Baker*, 3 Wils. 316.

(*y*) *Woodgate* v. *Knatchbull*, 2 T. R. 159: *Buckle* v. *Bewes*, 6 D. & R. 1; 4 B. & C. 154, *S. C.*

(*z*) *Woodgate* v. *Knatchbull*, 2 T. R. 158: and see *Buckle* v. *Bewes*, 3 B. & C. 688; 5 D. & R. 495, *S. C.*

(*a*) *Sadler* v. *Hickson*, 3 N. & M. 258. The remedy is then in equity.

(*b*) *Ante*, 323.

(*c*) *Larouche* v. *Wasbrough*, 2 T. R. 737: *M'Cormack* v. *Melton*, 1 A. & E. 331: *Monys* v. *Leake*, 8. T. R. 416, n.

(*d*) See *Wentworth* v. *Bullen*, 9 B. & C. 840.

(*e*) See *post*, Book IV. Part I. Ch. 17.

(*f*) *Thorpe* v. *Hook*, 1 Dowl. 494: *post*, Vol. II. Book IV. Part I. Ch. 35.

(*g*) *Lorimer* v. *Lule*, 1 Chit. Rep. 134: 238; *Wentworth* v. *Bullen*, 9 B. & C. 840.

(*h*) *Cash* v. *Wells*, 1 B. & Ad. 375.

Irregular Execution, how far operative.

Although the judgment and writ be irregular, yet, unless set aside, the party may justify under it (*i*); and, whether set aside or not, the sheriff or his officer is in general protected by them, however irregular (*k*), provided it be not *void*, and provided he do not join in the same plea with the party (*l*). A *bonâ fide* purchaser also will gain a title under the sheriff, unless the writ were *void*, (as issuing from a court not having jurisdiction), or, unless the goods were the goods of a stranger, and not of the party against whom the execution was issued (*m*); in which latter case the owner may recover even against a *bonâ fide* purchaser for value (*n*). If the judgment or execution has been set aside for irregularity, the party who issued it, and his attorney, cannot justify under it (*o*).

If the writ be set aside, the plaintiff may issue and execute another writ, as if no previous one had been issued (*p*).

Fraudulent Execution.

Fraudulent Execution.] Although there is strong reason to believe that a *fi. fa.* has been issued in order to defraud a *bonâ fide* creditor, and that the sheriff is a party to the fraud, the court will not interfere summarily to compel the sheriff to pay over the proceeds of the levy to the *bonâ fide* creditor, but the question of fraud must be left to a jury (*q*). Perhaps, however, in a clear case the court might interfere summarily (*r*). See *post*, *Vol. II. Book II. Ch.* 2, as to a fraudulent warrant of attorney.

Restitution.

Restitution.] If, after money is levied under a writ of execution, the judgment be reversed or set aside, the party against whom the execution was sued out shall have restitution. If a term or goods be sold under a *fi. fa.*, it is only the money for which they were sold, and not the term or goods themselves, which shall be restored (*s*); but, if the judgment be reversed before the term or goods are sold, the term or goods, of course, must be delivered back to the party (*t*). So, if lands be extended, or chattels delivered to the party *per rationabile pretium et extentum*, under an *elegit*, and the judgment be afterwards reversed, the lands or chattels shall be restored, and not merely the extended value (*u*). As to the mode of restitution, where the judgment has been reversed for error, see *ante*, 380. But where the judgment is set aside for irregularity, &c., restitution (when necessary) forms part of the rule; and if the goods or money be not restored, the court will, of course, grant an attachment (*v*). Where restitution of the sums paid by defendant is awarded, the plaintiff is bound only to repay defendant what has been properly paid by him (*x*).

(*i*) *Philips* v. *Biron*, 1 Str. 509.

(*k*) *R.* v. *Shff. of Middlesex*, 5 B. & Ald. 746: *Ives* v. *Lucas*, 1 C. & P. 7.

(*l*) *Philips* v. *Biron*, 1 Str. 509: *R.* v. *Harrison*, 15 East, 615: *Bates* v. *Pilling*, 6 B. & C. 38; 9 D. & R. 44, *S. C.*

(*m*) 1 Ves. 195: *Doe* v. *Murless*, 6 M. & Sel. 110: *Doe* v. *Thorne*, 1 Id. 425; *Anon.*, Dyer, 363, pl. 24; 5 Rep. 90: *post*, 423.

(*n*) *Farrant* v. *Thompson*, 2 D. & R. 1.

(*o*) *Philips* v. *Biron*, 1 Str. 509.

(*p*) Com. Dig., Execution, (H): *Fish's case*, Godb. 372; Latch. 193; Gilb. Execution, 54: *M'Cormack* v. *Melton*, 1 C., M. & R. 525; 3 Dowl. 215, *S. C.*: *Mackie* v. *Warren*, 3 Moo. & P. 279; 5 Bing. 176, *S.C.*

(*q*) *Barber* v. *Mitchell*, 2 Dowl. 574.

(*r*) *Per Patteson*, J., Ibid.

(*s*) Ro. Abr. 778; 8 Co. 19, 143: *Eyre* v. *Woodfine*, Cro. El. 278; 2 Bac. Abr., Execution, (Q): *Doe* v. *Thorne*, 1 M & Sel. 425.

(*t*) See 2 Ro. Abr. 491.

(*u*) Ro. Abr. 778: *Goodyere* v. *Ince*, Cro. Jac. 246; Yelv. 179, *S. C.*: 2 Bac. Abr., Execution, (Q).

(*v*) *Anon*, 2 Salk. 588. And see a form of a notice to the sheriff to retain the money levied, Chit. Forms, Book IV. Part I. Chap. 17.

(*x*) *Whalley* v. *Barnett*, 2 Dowl. 33.

2. *Fieri Facias.*

What, and Form of.

What, and Form of.] The writ of *fieri facias* is a judicial writ that lieth for him which hath recovered any debt or damages in the Queen's courts. In substance, it is a command to the person to whom it is directed, that, of the goods and chattels of the party, he cause to be made the sum recovered by the judgment, (specifying it according to the form of the action), together with interest upon such sum, at the rate of £4 per cent. from the time of entering up the judgment, or from (the time at which 1 *&* 2 *V. c.* 110 came into effect) 1st October, 1838, according as the judgment was entered up after or before that day, and that he have the money and interest and the writ itself before the queen (or before her justices if in C. P., or her barons if in the Exchequer) at Westminster, immediately after the execution of the writ(*y*), to be rendered to the party who sued it out, and further to do all that he is authorized and required to do by 1 *&* 2 *V. c.* 119(*z*). It does not contain a *non omittas* clause, except in the Exchequer of Pleas.

The writ of *fieri facias*, and the writ of *levari facias*, were the only writs of execution at common law; excepting in actions of trespass, in which the *capias ad satisfaciendum* was allowed.

Direction, Teste, and Return of.

As to the direction, *teste*, and return of the writ, see *ante*, 403, 404, 405. As to the new forms published by the judges pursuant to 1 *&* 2 *V. c.* 110, *s.* 20, see *ante*, 402. This writ, like other writs of execution, must strictly pursue the judgment, and be warranted by it, or it will be void; see *ante*, 400, 401, 402, and the instances there.

Alias and Pluries fi. fa.

If the sheriff return *nulla bona*, the party may sue out an *alias fi. fa.*, and upon the return of that, a *pluries* writ into the same county; or, he may have a *testatum fi. fa.* into another county; and each of these writs may contain a clause of *non omittas* when necessary; and as to when such clause is necessary, see *post, Book I. Part II. Ch.* 1, *sect.* 6.

Testatum fi. fa.

If it be required to have execution of the defendant's goods in a different county from that in which the *venue* of the action was laid, the writ must, it seems, be a *testatum* writ, and you must first sue out a *fi. fa.* directed to the sheriff of the county where the *venue* was laid in order to warrant it(*a*). Regularly, the *testatum* should be *tested* on the return day of the previous writ(*b*); and the same in the case of *alias* and *pluries* writs. But the court are so far from being strict in this respect, that they will never inquire when the previous writ was tested or sealed; nor will they in general set aside an execution under a *testatum* writ, for any defect in this respect(*c*). Therefore, in practice, it is usual to sue out the *fi. fa.* and *testatum* at the same time; and leave the one to be

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(*y*) It would seem that the writ *may* still be made returnable on a day certain; (*Brocher* v. *Pond*, 2 Dowl. 472); but in the forms prepared by the judges in pursuance of 1 & 2 V. c. 110, s. 20, it is made returnable immediately, and this is the usual practice.

(*z*) See the forms of a *fi. fa.*, Chit. Forms, 148, &c.

(*a*) *Brand* v. *Mears*, 3 T. R. 388. From the dictum of *Parke*, J., in the case of *Farncombe* v. *Kent*, 2 Dowl. 465, it seems that there is no absolute occasion for this testatum: and see Dyer, 162 b.

(*b*) In actions by original it was tested on the *quarto die post.*

(*c*) *Boulsworth* v. *Pilkington*, T. Jon. 200.

returned *nulla bona*, and the other to be executed; and, indeed, a *fi. fa.* returnable before judgment affirmed was held good in favour of execution to warrant a *testatum* (*d*). If, however, you sue out the *testatum* only, and the other party seek to set aside the execution on that account, you may remedy the defect by suing out a *fi. fa.* to warrant the *testatum*, and getting it returned, and by entering the writ, return, and award of *testatum* on the roll, and producing it in court when you shew cause (*e*). Or even where a *fi. fa.* is directed to the sheriff of another county, instead of a *testatum*, the plaintiff, upon suing out such a *fi. fa.* as would warrant the former one if it had been a *testatum*, and making the entry on the roll, as above mentioned, may, according to some decisions, have leave to amend the former *fi. fa.* even after error brought (*f*).

You may issue out several writs of execution at the same time (*g*). As to how far you must wait till the return-day, if the writ be in part executed, see *ante*, 399.

When to be Sued out.

When to be Sued out.] As to this, see *ante*, 396.

How Sued out and Indorsed.

How Sued out and Indorsed.] *Engross your writ upon a plain piece of parchment, and get it sealed by the sealer of the writs.* It need not be signed (*h*). *At the time you get the writ sealed, you must produce to the sealer of the writs the* postea, *judgment paper, or inquisition* (*i*); *and, if any, the judge's certificate, for immediate execution. Indorse it thus:* "*Levy the whole,* (or £—, or whatever sum you are entitled to levy for), *with interest, besides sheriff's poundage, officer's fees, and other incidental expenses* (*k*). *P. A., James Street, plaintiff's attor-*

(*d*) *Austin* v. *Crisby*, 7 Mod. 139: and see *Farncombe* v. *Kent*, 2 Dowl. 464.

(*e*) *Brand* v. *Mears*, 3 T. R. 388: *Farncombe* v. *Kent*, 2 Dowl. 464: and see *Milstead* v. *Coppard*, 5 T. R. 272: *Shaw* v. *Maxwell*, 6 T. R. 450. The court will look at the record only, and will take it for granted that the roll is true, and cannot allow it to be contradicted. And see, as to this, *Dickenson* v. *Teague*, 1 C., M. & R. 243. The attorney may return the writ, at least if the sheriff refuses to make the return.

(*f*) *Copperthwaite* v. *Owen*, 3 T. R. 657: *Mayer* v. *Ring*, 1 H. Bl. 541: *Allen* v. *Allen*, 2 W. Bl. 694: *Farncombe* v. *Kent*, 2 Dowl. 464: but see *Hunt* v. *Pasman*, 4 M. & Sel. 329: *Phillips* v. *Tanner*, 3 Moo. & P. 562; 6 Bing. 237, *S. C.*

(*g*) *Ante*, 399.

(*h*) R. H., 2 W. 4, r. 75. By that rule "it shall not be necessary that any writ of execution should be signed; but no such writ shall be sealed till the judgment paper, *postea*, or inquisition, has been seen by the proper officer."

(*i*) R. H., 2 W. 4, r. 75; *supra*, n. (*h*): R. H., 2 & 3 G. 4, Q. B. The words of this latter rule are, "The sealer of the writs of this court shall not seal any writ of *fieri facias* or *capias ad satisfaciendum* without having the judgment paper, *postea*, or inquisition produced to him. And it is further ordered, that the attorney concerned for the plaintiff in the cause, or his agent, shall upon all *bailable mesne process*, and every *writ of attachment*, and *fieri facias*, and *capias ad satisfaciendum*, indorse the place of abode and addition of the party against whom the writ is issued (or such other description of him as such attorney or agent may be able to give). And it is also ordered, that no judgment be signed upon any *cognovit*, without such *cognovit* being first produced to the clerk of the dockets, and, after taxation of the costs, filed with him." And by R. E., 2 W. 4, C. P., "after the *posteas* and inquisitions have been left with the clerk of the judgments, conformably with the rule of the court made in Trinity term, 13 G. 2, it shall be lawful for the clerk of the judgments to permit the same to be taken out of the office for the purpose of being produced to the sealer of the writs, in order to obtain a writ of execution. And that the attorney or agent, who procures such *posteas* or inquisitions from the office of the clerk of the judgments, shall cause the same to be returned again to the same office during the office hours of that day." (See *ante*, 329).

(*k*) It is conceived that as the writ directs the sheriff to levy for the whole sum, and the indorsement is merely restrictive, the sheriff is bound to levy the full amount indorsed, provided it do not exceed the sum mentioned in the writ, and that he may justify under it, though in fact there be not so much due to the plaintiff at the time. In other words, an excessive indorsement (so long as it is within the amount of the judgment and execution) is the subject of an action against the plaintiff, but not against the sheriff. See for what amount the plaintiff should indorse, *ante*, 400.

ney"(*l*). *Also, if the writ be sued out of the Queen's Bench, indorse on it the place of abode and addition of the party against whom it is issued, or such other description of him as you may be able to give.* This is required by *R. H.*, 2 & 3 *G.* 4, *ante*, 420, *note* (*m*). It has been determined on this rule, before the Uniformity of Process Act, (2 *W.* 4, *c.* 39), that a sheriff was not bound to execute bailable process, on which the place of abode and addition of the defendant were not indorsed, although at the time of receiving the *capias* he made no objection to the want of such indorsement (*m*). And the court set aside a *capias ad satisfaciendum*, on the ground that the rule had not been complied with; and that if the writ were suffered to remain in force, and the sheriff compelled to make a return, he might be subjected to the peril of an action for an escape (*n*). But the court would not discharge a defendant out of custody on a *testatum capias ad satisfaciendum*, on the ground of the want of an indorsement on the *capias ad satisfaciendum*, pursuant to the above rule (*o*). There is no such rule in the Exchequer. But there is a rule in that court of *M. T.*, 1 *W.* 4, *reg.* 2., *s.* 1, "that henceforth the name and address of the attorney issuing any writ shall be indorsed or written thereon; and also, that the day, month, and year, in which the same shall be issued, shall be indorsed or written on all writs to be issued in the office of pleas of this court." The latter part of this rule, which requires the day, month, and year to be indorsed, has been held to be merely directory, and the court refused to set aside process because there was no such indorsement upon it (*p*). The former part of the rule is in compliance with the statute 2 *G.* 2, *c.* 22, *s.* 22, which requires the name of the attorney to be written on the writ, and where the name of the London agent only, and not the name of the attorney immediately employed, was indorsed on the copy of serviceable process, the court set aside the service for irregularity (*q*).

In Exchequer.

Either leave the writ at the sheriff's office, with directions to give the warrant to the officer you intend should execute it; or give it, in the first instance, to the officer, who will procure the warrant upon it (*r*). The officer will thereupon execute the writ.

When, where, and how Executed.

When, where, and how Executed.] As to when and where writs of execution may in general be executed, see *ante*, 408, 409. As to how far doors may be broken open, see *ante*, 409, 410. As to the necessity for shewing the warrant, &c., see *ante*, 410.

Seizure of the Goods.

The officer, in execution of this writ, enters upon the premises in which the defendant's goods are, and leaves one of his assistants in possession of them (*s*). Seizing part of the goods in the name of the whole is a good seizure of the whole (*t*).

(*l*) See 2 G. 2, c. 23, s. 22, which requires the name of the attorney to be written on every writ. As to whether the sheriff is justified in levying to the amount of the indorsement, though there be not so much due, see 420 n. (*k*).

(*m*) *Kenrick* v. *Nanney*, 1 Dowl. 58.

(*n*) *Clarke* v. *Palmer*, 9 B. & C. 153; 4 Man. & R. 141, *S. C.*

(*o*) *Davidson* v. *Dunne*, 4 Dowl. 119. and see *Parker* v. *French*, 5 N. & M. 651.

(*p*) *Miller* v. *Bowden*, 1 C. & J. 563.

(*q*) *Anon.*, T. T. 1832: Jervis's Rules, 5: see *Constable* v. *Johnson*, 1 C. & M. 88.

(*r*) See form of warrant, Chit. Forms, 168.

(*s*) See *Blades* v. *Arundale*, 1 M. & Sel. 711: *Ackland* v. *Paynton*, 8 Price, 95: *Doker* v. *Hasler*, 2 Bing. 479.

(*t*) See *Cole* v. *Davies*, 1 L. Raym. 724.

He then gets an auctioneer to make an inventory of them, or of so much of them as he thinks sufficient to satisfy the execution, and to remove and sell them, or to sell them on the premises, if the defendant, or the person on whose premises the goods are, consent to it (*u*). He is allowed to remain on the premises a reasonable time to remove the goods. It is the sheriff's duty to remove the goods to a place of safe custody until they can be sold; for, if they be rescued, the sheriff is liable to the plaintiff for their value (*v*). And it is said, if the sheriff take cattle, and returns that he has taken cattle to the value of 100*l*., and afterwards the cattle die for want of meat, he is answerable for the value returned (*x*).

The Sale of the Goods.

The sheriff cannot keep the goods himself, and pay the plaintiff his debt (*y*), nor deliver them to the plaintiff in satisfaction of his debt, as may be done on an *elegit* (*z*); but they must be sold, if the defendant do not immediately satisfy the plaintiff for the debt, costs, and expenses. There is no objection, however, to *selling* them to the plaintiff, or to any person in trust for him, at their real value (*a*). The sheriff may sell the goods after the return of the writ, even after he is out of office, without a writ of *venditioni exponas* (*b*). The sheriff is not obliged to sell the goods by public auction; indeed, if, before the 7 *W.* 4 & 1 *V.* *c.* 55, (the act for better regulating the fees payable to sheriffs on the execution of civil process), he sold them by auction, the expense attending it would have fallen on himself, unless the plaintiff or defendant expressly required the auction (*c*); but it will be seen, on referring to the table of fees sanctioned by the judges under that statute (*d*), that a per centage, graduated according to the amount of the sum levied, is now allowed for every sale by auction. It seems that, if a very inadequate price be offered for the goods, the sheriff should not sell them; but should return that they remain in his hands for want of buyers, and wait until he shall be served with a *venditioni exponas*, under which he will be obliged to sell them for whatever price may be offered (*e*). If the sheriff wilful delay to sell for an unreasonable time, and thereby injure the defendant, he would be liable to an action (*f*); and he would, it seems, be so liable to the plaintiff if he thereby injured him (*g*).

Levying Poundage and Expenses.

Besides the amount of the debt, the sheriff also levies his poundage and expenses, when allowable, as mentioned *ante*, 414.

Returning Surplus.

If any surplus remain, the sheriff is not bound to search for the defendant in order to pay it to him, but he may retain it in his hands until it be demanded (*h*).

(*u*) See *Aikenhead* v. *Blades*, 5 Taunt. 198.

(*v*) *Sly* v. *Finch*, Cro. Jac. 514.

(*x*) Id. 515: *Clerk* v. *Withers*, 2 L. Raym. 1075: 1 Salk. 322, *S. C.*: see stat. 5 & 6 W. 4, c. 59, ss. 4, 5, 6.

(*y*) Noy, 107.

(*z*) *Thompson* v. *Clerk*, Cro. El. 504: *Langdon* v. *Wallis*, 1 Lutw. 589: *Bealy* v. *Sampson*, 2 Vent. 95.

(*a*) *Petit* v. *Benson*, Comb. 452: *per cur.*, *Leader* v. *Danvers*, 1 B. & P. 360.

(*b*) *Doe* v. *Douston*, 1 B. & Ald. 230: *Ayre* v. *Aden*, Cro. Jac. 73; Yelv. 44; Wats Shff. 188: *sed vide Langdon* v. *Wallis*, 1 Lutw. 589; 2 Saund. 37 m.

(*c*) *Woodgate* v. *Knatchbull*, 2 T. R. 157: *ante*, 415.

(*d*) See the Appendix at the end of the second volume.

(*e*) *Keightley* v. *Birch*, 3 Camp. 521: but see *Barnard* v. *Lee*, 1 Stark. 43.

(*f*) *Carlile* v. *Parkins*, 3 Stark. 163.

(*g*) *Aireton* v. *Davis*, 9 Bing. 740; 3 M. & Scott, 138, *S. C.*: *Doker* v. *Hasler*, 2 Bing. 479; 10 Moore, 210, *S. C.*: *Jacobs* v. *Humfrey*, 2 C. & M. 413. It seems that the action might be brought before the sheriff makes his return or is ruled to make it, at least if the writ be made returnable immediately after the execution thereof.

(*h*) Noy, 69: *Jefferies* v. *Sheppard*, 3 B. & Ald. 696.

Effect of Sale by Sheriff.

The sale or assignment by the sheriff of the goods or chattels of the defendant taken on a *fi. fa.* conveys an indefeasible title to a *bonâ fide* vendee; so much so, that if the writ be afterwards vacated, the defendant shall not be restored to his goods (*i*). But, if the writ were *void*, (as issuing from a court not having jurisdiction), or if the goods were the goods of a stranger, and not of the defendant, the sale of the sheriff would convey no property (*k*); and the real owner may recover even against a *bonâ fide* purchaser for value (*l*).

Indemnity Bond.

A bond to the sheriff conditioned to pay the money into court at the return of the *fi. fa.* (*m*), or to indemnify the sheriff from any proceedings for his return to the writ, though a false return (*n*), or for any irregularity in executing it (*o*), is valid, notwithstanding statute 23 *H.* 6, *c.* 9, relative to bonds to sheriffs.

Payment of Debt and Costs to Officer, a Payment to Plaintiff.

The defendant, instead of allowing the writ to be executed on his goods, may pay the debt and costs, &c., to the officer; and this will be deemed a good payment to the plaintiff (*p*); and the sheriff's duty on a *fi. fa.* in this respect differs from his duty on a *ca. sa.* If the sheriff seize or sell the goods after a tender of the debt and costs, he would, it seems, be a trespasser (*q*).

As to payment of a year's rent and taxes, on seizure under *fi. fa.*, see next head (*infra*).

As to what sort of property may be taken under *fi. fa.*, and how disposed of, &c., see second next head (*post*, 425).

As to whose property may be taken, see third next head (*post*, 429).

Payment of Rent and Taxes on Seizure under.

Payment of Rent and Taxes on Seizure under.] By 8 *Anne*, *c.* 14, *s.* 1, "no goods or chattels whatsoever, lying or being in or upon any messuage, lands, or tenements, which are or shall be leased for life, or lives, term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out, shall, before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises, or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution; provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party, at whose suit such execution is sued out, paying the said landlord, or his bailiff, one year's rent, may proceed to execute his judgment, as he might have done before the making of this act; and the sheriff or other officer is hereby empowered and required to levy and pay to

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(*i*) *Doe* v. *Thorn*, 1 M. & Sel. 425: *Anon.*, Dyer, 363, pl. 24; 5 Rep. 90 b; 1 Ves. 195: *Doe* v. *Murless*, 6 M. & Sel. 110: *ante*, 418. See form of a bill of sale, Chit. Forms, 178.

(*k*) *Ante*, 418.

(*l*) *Farrant* v. *Thompson*, 2 D. & R. 1.

(*m*) *Bewfage's case*, 10 Co. 99 b.

(*n*) 1 Saund. 161 n.: but see *Wright* v. Lord *Verney*, 3 Doug. 240. See form of bond, Chit. Forms, 178, 179.

(*o*) *Rogers* v. *Reeves*, 1 T. R. 421.

(*p*) *Taylor* v. *Belkon*, 2 Lev. 203; T. Jon. 97, *S. C.*: *Swinsted* v. *Lydal*, 5 Mod. 296: Cro. El. 504.

(*q*) See *Lefaus* v. *Moregreen*, 1 Keb. 655.

the plaintiff as well the money so paid for rent, as the execution money."

Cases within 8 Anne, c. 14.

This statute contemplates a tenancy subsisting at the time of the execution; therefore, no claim can be made against the sheriff for rent which accrued after the day of the demise in an ejectment in which judgment has been obtained by the landlord against the tenant, for the same premises (*r*). It does not apply where the landlord is himself the execution creditor (*s*). The statute also must be understood as extending only to the immediate landlord; and therefore it has been holden that a ground landlord has no claim for his rent under an execution against the under-lessee (*t*). It extends, however, to the case of lessee and under-tenant (*u*). Also to that of the trustee of an outstanding satisfied term in trust for mortgagees, and to attend the inheritance (*x*). And an executor or administrator is entitled to the benefit of the statute, as to arrears due to the testator in his lifetime (*y*). Also, where on the sale of land it was agreed that the vendee should pay the vendor 100*l*. a year until the purchase was completed, it was held that the vendor was a landlord, and entitled to the benefit of the statute (*z*). Forehand rent due at the time of seizure is within the statute (*a*). It applies to executions issued by defendants for costs (*b*).

Effect of intervening Bankruptcy.

Where the sheriff has seized under a *fi. fa.*, and afterwards receives notice before sale of the landlord's claim for rent in arrear, and afterwards a fiat of bankruptcy, over-reaching the execution, issues, the assignees are entitled to the goods, unless the landlord has made a distress for rent (*c*).

What Amount the Landlord is entitled to.

The landlord cannot claim for more rent than was due at the time the goods were first taken possession of under the writ (*d*). The landlord is entitled to the full year's rent, though he has been used to remit a portion of it to the tenant (*e*). If two years' rent be due, and one year's rent be paid under one execution, the landlord cannot claim the second year's rent under a second execution in the sheriff's hands at the same time as the first execution (*f*). And where growing corn is taken in execution, and the landlord is paid a year's rent out of it, he cannot afterwards distrain the same corn for rent subsequently accruing due (*g*), unless it be left on the premises an unreasonable time after it is ripe. The landlord is not obliged to pay the sheriff poundage on the amount of the rent levied by him (*h*).

Duty and Liability of the Sheriff.

According to this statute the sheriff is not bound to take the goods in execution, unless the plaintiff in the action, before the removal of such goods, pays the landlord the rent due to the extent of one year's arrears at the time of the levy (*i*).

(*r*) *Hodgson* v. *Gascoigne*, 5 B. & A. 88.

(*s*) *Taylor* v. *Lanyon*, 6 Bing. 536.

(*t*) *Bennet's case*, 2 Str. 787.

(*u*) *Thurgood* v. *Richardson*, 7 Bing. 428.

(*x*) *Colyer* v. *Speer*, 4 Moore, 473; 2 B. & B. 67, *S. C.*

(*y*) *Palgrave* v. *Windham*, 1 Str. 212. But it seems that letters of administration have not relation for this purpose, (1 Str. 97).

(*z*) *Saunders* v. *Musgrave*, 6 B. & C. 524.

(*a*) *Harrison* v. *Barry*, 7 Price, 690.

(*b*) *Henchett* v. *Kimpson*, 2 Wils. 140.

(*c*) *Gethin* v. *Wilks*, 2 Dowl. 189.

(*d*) *Hoskins* v. *Knight*, 1 M. & Sel. 245: and see *Keightley* v. *Birch*, 3 Camp. 521.

(*e*) *Williams* v. *Lewsey*, 1 Moo. & Sc. 92; 8 Bing. 28, *S. C.*

(*f*) *Dod* v. *Saxby*, 2 Str. 1024.

(*g*) *Peacock* v. *Purvis*, 2 B. & B. 362; 5 Moore, 79, *S. C.*; *Wright* v. *Dewes*, 3 N. & M. 790; 1 A. & E. 641, *S. C.*

(*h*) *Gore* v. *Gofton*, 1 Str. 643.

(*i*) *Calvert* v. *Joliffe*, 2 B. & Ad. 418: and see *Wray* v. *Earl of Egremont*, 1 N. & M. 190; 4 B. & Ad. 122, *S. C.*

If, therefore, a sheriff, on executing a *fi. fa.*, receive notice of or know of a year's rent being due, in case the goods are not sufficient to satisfy (and the party suing out the execution does not choose to pay) the year's rent, the sheriff should withdraw without selling (*k*). If the sheriff remove any part of the goods without the rent due is thus paid, he will be liable to an action (*l*). A bill of sale by the sheriff is a removal of the goods within the meaning of the act (*m*); but unless there be such bill of sale or removal, as, if the defendant pay the debt before the goods are sold, or the like, the landlord has no claim upon the sheriff (*n*). So, if there be any irregularity in the execution of the writ, so as to render it void (*o*), or if the landlord consent to the removal, though such consent be founded on receiving an undertaking for the rent, which afterwards turns out to be void (*p*), the sheriff is not liable to the landlord.

Landlord's Remedy against the Sheriff.

The landlord's remedy against the sheriff, under this act, is either by special action on the case (*q*), or by motion to the court. An action for money had and received will not lie for the year's rent, even after sale (*r*). If the landlord moves, the court might stay the proceedings on the sheriff paying over the proceeds of the sale, which the court would not do if the landlord brought an action (*s*). Formerly it was holden, that, to entitle the landlord to either remedy, he must have made a demand, and given notice to the sheriff of the rent due before the goods were removed (*t*); but this has since been decided otherwise: and a notice to the sheriff even after the removal of the goods, provided it be before he has actually paid over the money, will be sufficient to ground a motion to the court (*u*); and, in the case of an action, it is not necessary to prove a formal notice; if it can be shewn, that the sheriff or his officer knew, previously to the removal of the goods, that there was rent due to the landlord, it will be sufficient (*x*).

Taxes.

The Queen's taxes due at the time of the seizure, to the extent of one year's arrears, must be paid by the sheriff to the collector (*y*).

What Sort of Property may be taken, and how disposed of.

What Sort of Property may be Taken, and how Disposed of.] The sheriff may seize and sell all the personal goods and chattels belonging to the defendant that he can find (*z*), and which can be sold (*a*), with the exception of wearing apparel actually in use (*b*).

1 & 2 V. c. 110, s. 12.

Also, by the 12th section of the act for abolishing arrest on *mesne* process, and extending the remedies of creditors, &c., (1 & 2 *V. c.* 110), it is enacted, "that by virtue of

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(*k*) *Foster* v. *Hilton*, 1 Dowl. 35; *Calvert* v. *Joliffe* 2 B. & Ad. 418: and see *Colyer* v. *Speer*, 4 Moore, 473; 2 B. & B. 67, *S. C.*

(*l*) *Colyer* v. *Speer*, 4 Moore, 473; 2 B. & B. 67, *S. C.*: *Calvert* v. *Joliffe*, 2 B. & Ad. 418.

(*m*) *West* v. *Hedges*, Barnes, 211: see *Smith* v. *Russell*, 3 Taunt. 400.

(*n*) 1 Sellon, 535.

(*o*) *Hann* v. *Capell*, Barnes, 199.

(*p*) *Rotherey* v. *Wood*, 3 Camp. 24.

(*q*) *Green* v. *Austin*, 3 Camp. 260: *Duck* v. *Braddyll*, M'Clel. 217; 13 Price, 455, *S. C.*: *Rotherey* v. *Wood*, 3 Camp. 24.

(*r*) *Green* v. *Austin*, 3 Camp. 260.

(*s*) *Foster* v. *Hilton*, 1 Dowl. 35: *Henchett* v. *Kimpson*, 2 Wils. 141.

(*t*) *Waring* v. *Dewbery*, 1 Str. 97.

(*u*) MS., H. 1820: *Arnitt* v. *Garnett*, 3 B. & Ald. 440.

(*x*) MS., T. 1820: *Clerk* v. *Dixson*, 3 B. & Ald. 645.

(*y*) 43 G. 3, c. 99, s. 37.

(*z*) 3 Co. 12.

(*a*) Com. Dig., Execution, (C), 4.

(*b*) *Hardistey* v. *Barney*, Comb. 356. In *Sunbolf* v. *Alford*, 3 M. & W. 254, *Parke*, B., said, "Wearing apparel on a man's person (even if it does not extend to goods in the possession of the person) cannot be taken under a *fieri facias*, or under an extent."

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1 & 2 V. c. 110, s. 12.

any writ of *fieri facias* to be sued out of any superior or inferior court, after the time appointed for the commencement of this act, (1st October, 1838), or any precept in pursuance thereof, the sheriff or other officer having the execution thereof may and shall seize and take any money or bank notes, (whether of the Governor and Company of the Bank of England, or of any other bank or bankers), and any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money, belonging to the person against whose effects such writ of *fieri facias* shall be sued out; and may and shall pay or deliver to the party suing out such execution any money or bank notes which shall be so seized, or a sufficient part thereof; and may and shall hold any such cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money as a security or securities for the amount of such writ of *fieri facias* directed to be levied, or so much thereof as shall not have been otherwise levied and raised; and may sue in the name of such sheriff or other officer for the recovery of the sum or sums secured thereby, if and when the time of payment thereof shall have arrived; and that the payment to such sheriff or other officer by the party liable on any such cheque, bill of exchange, promissory note, bond, specialty, or other security, with or without suit, or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment, or of such recovery and levy in execution, as the case may be, from his liability on any such cheque, bill of exchange, promissory note, bond, specialty, or other security; and such sheriff or other officer may and shall pay over to the party suing out such writ the money so to be recovered, or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied; and if, after satisfaction of the amount so to be levied, together with sheriff's poundage and expenses, any surplus shall remain in the hands of such sheriff or other officer, the same shall be paid to the party against whom such writ shall be so issued; provided that no such sheriff or other officer shall be bound to sue any party liable upon any such cheque, bill of exchange, promissory note, bond, specialty, or other security, unless the party suing out such execution shall enter into a bond, with two sufficient sureties, for indemnifying him from all costs and expenses to be incurred in the prosecution of such action, or to which he may become liable in consequence thereof, the expense of such bond to be deducted out of any money to be recovered in such action."

What Deeds, Writings, &c., may be taken.

Previously to this act nothing could have been taken in execution that could not be sold; therefore, deeds, writings, &c., could not have been taken in execution (*c*), nor can they even since that act, unless they be securities for money, within the 12th section. For instance, a title-deed, (even it would seem if pledged with the debtor), or a letter, or a guarantee for some collateral act, or any other deed, or writing, which could not form the foundation of an action by the debtor himself for a specific sum of money, cannot be taken; but it would seem that all instruments containing an unconditional covenant or agreement for payment of a specific sum of money to the

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(c) *Francis* v. *Nash*, Hardw. 53.

What Monies may be taken.

Money owing to Debtor.

Money in Debtor's Pockets, &c.

execution-debtor for his own benefit, (*ex. gr.* ordinary annuity deeds), are within the words "other securities for money," and may be taken. As to money, bank-notes, and other valuable things current as cash, they could not have been taken under a *fi. fa.* before the above act, even, perhaps, if in the defendant's own desk (*d*); and so strict was the law in this respect, that, where the sheriff had money of the defendant's in his hands, whether the produce of an execution at the suit of the defendant (*e*), or even the surplus of a former execution against him at the suit of the same plaintiff (*f*), the court would not stay such money in the sheriff's hands, to satisfy a present execution (*g*); and whether they would do so even since the act, seems doubtful, for *Parke*, B., has said (*h*) that the 12th section "only applies to money in the hands of the debtor, and not in the hands of a third party, as trustee for him." And whether money belonging to the defendant, in the hands of a third person, not a mere trustee, (*ex. gr.* a borrower), can be seized, or whether a person who simply owes money to the execution-debtor (without having given any security for it) can pay the debt to the sheriff, may well be doubted. A question may arise, whether money, &c., in the actual possession of the defendant, in his pockets, &c., can be taken? It would seem that it cannot, any more than wearing apparel on a man's person could be taken before the act (*i*).

Terms for Years, &c.

The sheriff, under a *fieri facias*, cannot sell an estate in fee or for life (*k*), unless, perhaps, an estate *pur autre vie* (*l*); but he may sell leases or terms for years belonging to the defendant, and execute an assignment of them, under his seal of office, to the purchasers (*m*); and the same of a term for years acquired by marriage, (the execution having the same effect as a disposal by the husband (*n*)), and the same of an annuity for years (*o*). Where an outgoing tenant had agreed to assign the residue of his term to the incoming tenant, it was held, that the sheriff, before any actual assignment made, might sell the residue under a *fi. fa.* against the tenant, and put upon it the value agreed to be given by the incoming tenant (*p*). And it seems that an outstanding term, vested in a trustee upon trust to attend the inheritance, may be seized in execution against the *cestui que trust*, the owner of the inheritance (*q*). The sheriff cannot, however, sell an equity of redemption, for the legal estate in such a case is in the mortgagee (*r*). When he sells a term for years, he cannot turn the tenant in possession out, in order to give possession to the purchaser (*s*),

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(*d*) See *Armistead* v. *Philpot*, 1 Doug. 231: Tidd, 9th ed. 1002: see the cases in the following note.

(*e*) *Knight* v. *Criddle*, 9 East, 48: *Padfield* v. *Brine*, 3 B. &. B. 294; 7 Moore, 127, *S. C.*: see *Armistead* v. *Philpot*, 1 Doug. 231, *contra*.

(*f*) *Fieldhouse* v. *Croft*, 4 East, 510: see *Staple* v. *Bird*, Barnes, 214.

(*g*) *Willows* v. *Ball*, 2 New Rep. 376.

(*h*) *Robinson* v. *Peace*, 7 Dowl. 94: *ante*, 344.

(*i*) See per *Parke*, B., *Sunbolf* v. *Alford*, 3 M. & W. 254: *ante*, 425, n. (*b*.)

(*k*) 3 Co. 13.

(*l*) *Johnson* v. *Streete*, Comb. 391.

(*m*) 3 Co. 13: 8 Id. 171: 4 Id. 74: *Taylor* v. *Cole*, 3 T. R. 294: and see 2 Saund. 68 c: *Doe* v. *Douston*, 1 B. & Ald. 230: and *Doe Westmoreland* v. *Smith*, 1 Man. & Ry. 137, where the term seized was a tenancy from year to year.

(*n*) Per *Buller*, J., *Farr* v. *Newman*, 4 T. R. 638.

(*o*) *York* v. *Twine*, Cro. Jac. 79: Com. Dig., Execution, (C), 4.

(*p*) *Sparrow* v. *Bristol*, 1 Marsh, 10.

(*q*) *Doe Phillips* v. *Evans*, 1 C. & M. 450: but see the cases in the next note.

(*r*) See 3 Atk. 739: and see *Scott* v. *Scholey*, 8 East, 467: *Metcalfe* v. *Scholey*, 2 New Rep. 461: Tidd, 9th ed. 1003.

(*s*) *R.* v. *Deane*, 2 Show. 85. See Bac. Abr., Execution, (C), in which it is said that the purchaser, to obtain the actual possession, must bring ejectment.

unless, perhaps, where the defendant himself is in possession (*t*). If the tenant, however, will voluntarily relinquish possession, the sheriff, of course, may give possession to the purchaser (*u*). If the sheriff sell a term before the return of the writ, he may execute the assignment after the return (*x*). The assignment may be made by the under-sheriff in the name and under the seal of office of the sheriff (*y*).

Fixtures.

The sheriff, under the writ, cannot sell things fixed to the freehold, and which go to the heir and not to the executor (*z*), such as furnaces, ovens, doors, windows, &c. (*a*), hearths, chimney-pieces, &c. (*b*). Where a mill, with mill-machinery, was demised for a term, and the tenant, without leave, severed the machinery, it was held, that the property in the machinery reverted to the landlord, and that it could not be taken under a *fi. fa.* (*c*). And so it would be in every case where the tenant severs from the freehold fixtures which he cannot lawfully remove. But the sheriff may sell utensils fixed by the defendant for the purposes of his trade, such as coppers, vats, or the like (*b*). So he may sell fixtures which may be removed by the tenant (*d*). Where the sheriff takes a lease and fixtures in execution, he must sell the fixtures separately if he cannot find a purchaser for the whole (*e*).

Crops, &c.

Corn and other articles which are raised by the industry of man, are emblements which go the executor, and may be taken in execution; but things which give no annual profit, or which proceed without the labour of man, are not emblements—they go to the heir, and cannot be taken in execution (*f*). Where the tenant is a trespasser, crops cannot be seized under a *fi. fa.* against him (*g*). Clover, rye-grass, or artificial grass, growing under corn, cannot be seized under a *fi. fa.* (*h*). Where corn sold under a *fi. fa.* is not ripe, the vendee has a reasonable time, after it is ripe, to cut it and carry it away, and during that time it is not liable to a distress for rent (*i*).

In case of Husbandry Contracts, &c.

The seizure and sale of straw, chaff, turnips, manure, hay, grasses, roots, vegetables, &c., on lands let to farm, is regulated by 56 *G.* 3, *c.* 50, *s.* 1, which, after reciting that it is expedient that the execution of legal process should be so regulated as to be consistent with good husbandry, and the effect and intent of covenants and agreements entered into between the owners and occupiers of land let to farm, it is enacted, "that no sheriff or other officer in England or Wales shall, by virtue of any process of any court of law, carry off, or sell or dispose of for the purpose of being carried off, from any lands let to farm, any straw threshed or unthreshed, or any straw of crops growing, or any chaff, colder, or any

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(*t*) *Taylor* v. *Cole*, 3 T. R. 298.

(*u*) Id. 292.

(*x*) *Doe Stephens* v. *Douston*, 1 B. & Ald. 230.

(*y*) *Doe James* v. *Brown*, 5 B. & Ald. 243.

(*z*) *Winn* v. *Ingilby*, 5 B. & Ald. 625; 1 D. & R. 247, *S. C.*: and see *Steward* v. *Lombe*, 4 Moore, 281; 1 B. & B. 506, *S. C.*; *Scorall* v. *Borall*, 1 Y. & J. 398.

(*a*) Com. Dig., Execution.

(*b*) *Poole's case*, 1 Salk. 368: *Elwes* v. *Maw*, 3 East, 38.

(*c*) *Farrant* v. *Thompson*, 5 B. & Ald. 826: see *Steward* v. *Lombe*, *ubi supra*.

(*d*) Id.: 3 Atk. 13: and see *Duck* v. *Braddyl*, M'Clel. 217: *Storer v. Hunter*, 3 B. & C. 368; 5 D. & R. 240, *S. C.*: Per *Parke*, *B.*, *Minshull* v. *Lloyd*, 2 M. & W. 459.

(*e*) *Barnard* v. *Leigh*, 1 Stark. 43.

(*f*) Gilb. Execution, 19: *Poole's case*, 1 Salk. 368: *Scorall* v. *Borall*, 1 Y. & J. 398. As to what are emblements, see 1 Williams on Executors, 452: *Graves* v. *Weld*, 5 B. & Ad. 105; 2 Nev. & Man. 725.

(*g*) *Hodgson* v. *Gascoigne*, 5 B. & Ald. 88.

(*h*) 56 G. 3, c. 50, *s.* 7, *post*, 429.

(*i*) *Peacock* v. *Purvis*, 5 Moore, 79; 2 B. & B. 362, S. C.

turnips, or any manure, compost, ashes, or seaweed, in any case whatsoever; nor any hay, grass, or grasses (whether natural or artificial); nor any tares, or vetches, nor any roots or vegetables, being produce of such lands, in any case where, according to any covenant or written agreement entered into and made for the benefit of the owner or landlord of any farm, such hay, grass, or grasses, tares and vetches, roots or vegetables, ought not to be taken off or witholden from such lands, or which by the tenor or effect of such covenants or agreements ought to be used or expended thereon, and of which covenants or agreements such sheriff or other officer shall have received a written notice before he shall have proceeded to sale."—Sect. 2., in substance, enacts, that the tenant shall give notice to the sheriff of the existence of such covenants, and of the name and residence of the landlord; that the sheriff shall give notice to the landlord and his steward of the seizure, and in case of their absence or silence shall postpone the sale as long as he lawfully can. But by subsequent sections, the sheriff may sell such produce subject to an agreement to expend it on the land according to the custom of the country, where there is no express contract, and according to such contract where there is one, and the vendor is to have the use of all such necessary barns, &c., as the tenant would have been entitled to, and the sheriff shall assign for that purpose (*k*). And the corn or produce sold under the act, and all cattle, implements, &c., used for the purpose of consuming the produce on the land, &c., are exempt from distress (*l*). And the sheriff, on being indemnified, is to allow the landlord to bring actions in his name for breach of the agreement (*m*). And the sheriff, before sale of any crops or produce, shall by all ways and means make inquiry as to the name and residence of the landlord (*n*). Also, no clover, rye-grass, or artificial grass newly sown, and growing under any crop of standing corn, shall be sold under process (*o*). Provided that the act is not to extend to articles which the tenant might remove consistently with some contract in writing (*p*). The act also enacts, that the sheriff shall not be liable for any breach or omission of its provisions, unless wilful (*q*), and indemnifies all persons acting under it (*r*). And, lastly, that assignees of bankrupts, &c., shall not take produce, manure, &c., in any other way than the bankrupt, &c., would have been entitled to do (*s*).

General directions, as to how the property seized is to be disposed of, are given *ante*, *p*. 425.

Whose Property may be taken.

Inquest as to Property.

Whose Property may be taken.] In all cases, the sheriff must at his peril execute the writ only on the goods of the party therein mentioned; for, if he seize the goods of a stranger, he will be liable to an action (*t*). If the sheriff have any doubt upon the subject, he may impannel a jury to inquire in whom the property of the goods is vested (*u*); which will

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(*k*) 56 G. 3, c. 50, s. 3.

(*l*) Id. Section 6.

(*m*) Id. Section 4.

(*n*) Id. Section 5.

(*o*) Id. Section 7.

(*p*) Id. Section 8.

(*q*) Id. Section 9.

(*r*) Id. Section 10.

(*s*) Id. Section 11.

(*t*) Bro. Abr., Trespass, 99: *Anon.*, Keilw. 119: *Ackworth* v. *Kemp*, 1 Doug. 40: *Sanderson* v. *Baker*, 2 W. Bl. 832; 3 Wils. 309, S. C.: and see *Dawson* v. *Wood*, 3 Taunt. 256: *Smith* v. *Plomer*, 15 East, 607: *Ladbroke* v. *Crickett*, 2 T. R. 649: *Guthrie* v. *Wood*, 1 Stark. 367.

(*u*) Bro. Abr., Trespass, 99: *Anon.*, Keilw.

Interpleader.

have the effect of indemnifying the sheriff in making a return of *nulla bona* (*x*), or will mitigate the damages in an action of trespass, if he have seized and sold the goods (*y*). The court will not set aside such an inquisition (*z*). Or if after the sheriff has seized the goods a third person claim them, and the execution-creditor still insist on his right to have them sold, the sheriff may apply under the Interpleader Act, and so get rid of his responsibility. See fully as to this, *Vol. II., Book IV. Part I. Ch.* 2, and *Index*, title "Interpleader." The following are the cases in which questions as to the rights of third parties to the goods are most likely to arise:—

Goods of Husband or Wife.

The goods of a woman cohabiting with the defendant cannot be taken in execution, although she passes for his wife (*a*). It has been indeed questioned whether a woman, who has cohabited with a man for several years, and passed herself off as his wife, can recover in trespass for the taking in an execution against the man, her goods being in the house in which the cohabitation took place; but in such case it may be left to the jury to say whether they think, that, under the circumstances, the property was given up by the woman to the man, and if they do, they may find a verdict against her (*b*). The sheriff may sell a term vested in a husband in right of his wife, upon an execution against the husband (*c*), unless it have been vested in trustees for the benefit of the wife, before marriage. But goods vested in trustees before marriage, for the benefit of the wife, cannot be taken in execution for the husband's debt, although he take an equitable interest for life under the settlement, and be actually in possession of them at the time of the execution (*d*). The trustees, however, must have the legal interest; and the equitable doctrine in some cases, that the husband will be deemed the trustee for his wife, will not bind courts of law or legal rights; and in such cases the goods may be seized, though the wife may be entitled to the beneficial interest in them (*e*). On a *fi. fa.* against the wife, who marries pending the action, it is irregular to take the husband's goods (*f*).

Goods of Testator.

The goods of a testator or intestate cannot, in general, be taken in execution for the personal debt of the executor or administrator (*g*). Where, however, an executrix used the goods of her testator as her own, and afterwards married, and then treated them as her husband's, it was held that as they had

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119: *Farr* v. *Newman*, 4 T. R. 633, 641. As to the costs of the inquisition, see *Doe Holt* v. *Roe*, 4 Moo. & P. 177; 6 Bing. 447, *S. C.*; where a party gave a cognovit for 357*l.*, and a mortgage for payment of the sum due, and costs of the judgment and all other costs and charges attending the same, and an execution being issued, an inquisition became necessary in consequence of the debtor's denying certain goods to be his, which denial turned out to be false, the mortgagee having paid the sheriff the costs of the inquisition, was held entitled to claim them as against the debtor.

(*x*) *Roberts* v. *Thomas*, 6 T. R. 88: but see *Glossop* v. *Poole*, 3 M. & Sel. 175, *contra*: 1 Arch. Pl. & Ev. 372, 373.

(*y*) Dalt. 146: *Ackworth* v. *Kemp*, 1 Doug. 40.

(*z*) *Roberts* v. *Thomas*, 6 T. R. 88.

(*a*) *Edwards* v. *Bridges*, 2 Stark. Rep. 396: *Glasspoole* v. *Young*, 9 B. & C. 696; 4 Man. & R. 553.

(*b*) *Edwards* v. *Farebrother*, 3 C. & P. 524; 2 Moo. & P. 293, *S. C.*: and see *Langford* v. *Foot*, 2 M. & Scott, 349.

(*c*) *Farr* v. *Newman*, 4 T. R. 638.

(*d*) *Cadogan* v. *Kennett*, Cowp. 432: *Jarman* v. *Worlston*, 3 T. R. 618: and see 2 Vern. 239: *Darby* v. *Smith*, 8 T. R. 82: *Nunn* v. *Wilsmore*, Id. 521: *Dewey* v. *Bayntun*, 6 East. 257.

(*e*) *Izod* v. *Lamb*, 1 C. & J. 35.

(*f*) *Doe Taggart* v. *Butcher*, 3 M. & Sel. 557.

(*g*) *Farr* v. *Newman*, 4 T. R. 621: *Gaskell* v. *Marshall*, 2 M. & M. 132; 5 C. & P. 31, *S. C.*: *aliter*, if the executor has made the goods his own. (See *Quick* v. *Staines*, 1 B. & P. 293: see 1 Will. Ex. 438).

made their own of the goods, they could not object to their goods being taken in execution for the husband's debt (*h*).

Goods of Partners.

Under a *fi. fa.* against one of two partners, the sheriff may, it seems, seize the goods of both, and sell the defendant's undivided moiety in them; in which case, the vendee will, it is said, be tenant in common with the other partner (*i*); but from a recent case, there appears to be much doubt as to what interest in the partnership property can be sold by the sheriff (*k*).

Goods fraudulently assigned.

When the defendant has sold or assigned his goods and chattels before the writ is executed, in some cases the sheriff may seize and sell them notwithstanding such sale or assignment. If the defendant have sold them, even for a valuable consideration, after the delivery of the writ to the sheriff to be executed, the sale is void (*l*), unless it were in market *overt* (*m*). Or if the assignment, &c., were not for a valuable consideration (*n*), or if colourable merely, and to defraud the creditor, and not *bonâ fide*, it would be void, though made for a valuable consideration (*o*), at least if made after the time the writ bears *teste* (*p*). Continuance in possession of goods and chattels by a vendor after the execution of a bill of sale is a badge and evidence of fraud (*q*), but not conclusive; therefore if the possession be consistent with the deed (*r*), as if it be a mortgage, and, by its terms, the debtor is to remain in possession until default (*s*), or a marriage settlement under which the debtor takes an equitable interest for life (*t*), or if the sale be notorious, as if it be made publicly by a sheriff under an execution (*u*), or by public auction (*v*), or if it be made with the knowledge and assent of the person who seeks to impugn it (*x*), the assignment is in general valid, though the vendor or original owner remain for some time in possession (*y*).

Goods Let, Pawned, or Distrained.

The sheriff cannot sell absolutely goods which are pawned or gaged for a debt with the defendant, nor goods demised or let to him for years (*z*), or goods of his which are distrained (*a*). Though, indeed, goods pawned or leased may be sold, subject to the right of the pawnee or lessee, but not seized before the end of the term (*b*); and the sheriff is not, it seems, liable to any action for selling the entire property, unless he be informed of the defendant's having only a special property

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(*h*) *Quick* v. *Staines*, 1 B. & P. 293: see 1 Will. Ex. 438.

(*i*) *Eddie* v. *Davidson*, 2 Doug. 650: *Pope* v. *Hayman*, Comb. 217: *Heydon* v. *Heydon*, 1 Salk. 392: and see *Morley* v. *Strombom*, 3 B. & P. 254, 288: Tidd, 9th ed. 1807.

(*k*) See *Burton* v. *Green*, 3 C. & P. 306; and see the note there.

(*l*) See *ante*, 405, 406.

(*m*) 2 Eq Ca. Abr. 381: *Samuel* v. *Duke*, 6 Dowl. 536; 3 M. & W. 622, *S. C.*

(*n*) See *ante*, 405, 406.

(*o*) *Cadogan* v. *Kennett*, Cowp. 432, per *Lord Mansfield*.

(*p*) 3 H. 7, c. 4: 50 Ed. 3, c. 6: 3 R. 2, st. 2, c. 3: 13 El. c. 5. See in general as to what is evidence of a fraudulent assignment, Rosc. on Evid. 635: Tidd, 9th ed. 1004.

(*q*) *Twyne's case*, 3 Rep. 80: *Edwards* v. *Horben*, 2 T. R. 537: *Woodall* v. *Smith*, 1 Camp. 333: *Paget* v. *Perchard*, 1 Esp. 205.

(*r*) See *Reeves* v. *Capper*, 5 Bing. N. C. 136; 6 Scott, 877, per *Tindal, C. J.*

(*s*) *Martindale* v. *Booth*, 3 B. & Ad. 498: *Minshall* v. *Lloyd*, 2 M. & W. 450: *Reeves* v. *Capper*, 5 Bing. N. C. 136, per *Tindal*, C. J.: *Woodeman* v. *Baldock*, 8 Taunt. 676.

(*t*) *Cadogan* v. *Kennett*, Cowp. 432.

(*u*) *Latimer* v. *Batson*, 4 B. & C. 652; 7 D. & R. 106, *S. C.*: *Kidd* v. *Rawlinson*, 2 B. & P. 59.

(*v*) *Leonard* v. *Baker*, 1 M. & Sel. 251.

(*x*) *Steele* v. *Brown*, 1 Taunt. 381.

(*y*) See the cases above cited; and see the notes to *Twyne's case*, 3 Rep. 80: Smith's leading cases, 1: Rosc. 635.

(*z*) *Dean* v. *Whittaker*, 1 C. & P. 347: *Duffil* v. *Spottiswoode*, 3 Id. 435: *Izod* v. *Lamb*, 1 C. & J. 35.

(*a*) Bro. Abr., Pledges, 28: Dy. 67 b. in marg.: Com. Dig., Execution, (C), 3.

(*b*) *Scott* v. *Scholey*, 8 East, 476. See forms of returns, Chit. Forms, 172 to 175.

Lien lost by Seizure.

therein (*c*). If a party having a lien on goods cause them to be taken in execution at his own suit, he loses his lien thereby, although the goods are sold to him under the execution, and are never removed off his premises (*d*).

Goods seized under former Execution.

Goods in custody of the sheriff under a former execution cannot be seized (*e*), unless it were fraudulent (*f*), or unless he have returned *nulla bona* to the former writ (*g*). It has been held that, when the sheriff returns *nulla bona*, and there is a recovery against him for a false return, that vests no property of the goods in him or the plaintiff, but they remain in the defendant, and are liable to a subsequent execution for his debt (*h*); but, according to a more recent decision, this is incorrect (*i*).

Goods of Bankrupts.

Upon the same principle, the sheriff cannot seize the goods of a party who has previously become bankrupt; because the goods in that case belong, not to the bankrupt, but to his assignees (*k*); and if, in such case, the seizure of the goods under the writ and the act of bankruptcy happen on the same day, it is open to inquire at what time of the day they took place respectively; and if the goods were actually seized before the act of bankruptcy, the execution will be valid, and the goods may in general be sold at any time to satisfy the judgment (*l*). But, in general, if seized after the act of bankruptcy, although sold before the issuing of the commission (*m*); or if the execution be fraudulent or collusive, as for instance, if, upon a writ of execution sued out before an act of bankruptcy committed, a warrant be made out, directed to the defendant's own shopman, who takes possession and conducts the business as usual, (but without the interference of the defendant), and on the day after the defendant commits an act of bankruptcy (*n*); or if the warrant be made out to a sheriff's officer, and he be directed by the plaintiff not to sell, but merely to leave a man in possession, and the defendant be allowed to carry on his trade in the house as usual for some months, until he become bankrupt (*o*), or the like; in these cases the goods seized will pass to the assignees under the assignment, notwithstanding the execution (*p*).

Executions, however, levied *two calendar months previous to a commission of bankrupt being sued out*, were, by the 6 *G.* 4, *c.* 16, *s.* 81, declared valid, notwithstanding a prior act of bankruptcy, provided the parties at whose suit they are levied had no notice of the prior act of bankruptcy at the time of levying them (*q*). And this has, since 19th July, 1839,—by 2 & 3 *V. c.* 29,—been extended to executions *bonâ fide* executed before the date and issuing of the fiat,

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(*c*) *Dean* v. *Whittaker*, 1 C. & P. 347; *sed quære*; and see *Jenkins* v. *Cooke*, 1 A. & E. 372.

(*d*) *Jacobs* v. *Latour*, 5 Bing. 130; 2 Moo. & P. 201, *S. C.*

(*e*) *Letchmere* v. *Thorowgood*, 3 Mod. 236: *Blackhurst* v. *Clinkard*, 1 Show. 173.

(*f*) *Ante*, 406, 407: see *Barber* v. *Mitchell*, 2 Dowl. 577.

(*g*) *Towne* v. *Crowder*, 2 C. & P. 355; 2 Vern. 238.

(*h*) 2 Vern. 239.

(*i*) *Clegg* v. *Woollan*, MS., 1832.

(*k*) *Smallcombe* v. *Cross*, 1 L. Raym. 252: and see *Hindle* v. *Bell*, 4 Camp. 283.

(*l*) *Giles* v. *Grover*, 9 Bing. 128; 2 M. & Scott, 197, *S. C.*: *Godson* v. *Sanctuary*, 1 N. & M. 52; 4 B. & Ad. 255, *S. C.*: *Sadler* v. *Leigh*, 4 Camp. 197: *Thomas* v. *Desanges*, 2 B. & Ald. 586: *Head* v. *Gascoigne*, 8 Taunt. 527: see *Clutterbuck* v. *Jones*, 15 East, 78.

(*m*) *Lazarus* v. *Waithman*, 5 Moore, 313.

(*n*) *Jackson* v. *Irwin*, 2 Camp. 48.

(*o*) *Toussaint* v. *Hartop*, Holt, C. N. P. 385: and see *Dober* v. *Hasler*, 2 Bing. 479.

(*p*) Arch. B. L. 4th ed. 156.

(*q*) See Arch. B. L. by Flather, 171.

without notice of any prior act of bankruptcy. If the fiat be sued out sooner, the sheriff is liable in trover for executing the writ, even though at the time he executed it he had no notice of the act of bankruptcy (*r*). The above 81st section applies to all executions, and is not, it seems, affected by the 108th section, *infra* (*s*). Under a *fi. fa.* upon a judgment founded on a warrant of attorney, the sheriff seized at 11 o'clock on the 13th of August; a commission of bankrupt issued against the debtor at a later hour, on the 13th of October, in the same year; the sale took place subsequently to the issuing of the commission: it was held under 6 *G.* 4, *c.* 16, *s.* 81, first, that the seizure was a "levying" within the above 81st section; secondly, that more than two months had elapsed between the seizure and the issuing of the commission; and thirdly, that the execution was not within the 108th section, *infra* (*t*).

6 G. 4, c. 16, s. 108.

By the 108th section of the Bankrupt Act, (6 *G.* 4, *c.* 16), "no creditor having security for his debt, or having made any attachment in London, or any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied, by seizure upon, or any mortgage of, or lien upon, any part of the property of such bankrupt before the bankruptcy; provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with such creditors." This provision is materially altered by the more recent enactment of the 1 *W.* 4, *c.* 7, *s.* 7, whereby "no judgment signed or execution issued after the passing of this act, (11th of March, 1831), on a *cognovit actionem* signed after declaration filed or delivered, or judgment by default, confession, or *nil dicit*, according to the practice of the court in any action commenced *adversely*, and not by collusion, for the purpose of fraudulent preference, shall be deemed or taken to be within provision of the 6 *G.* 4, *c.* 16, *s.* 108." Judgments or executions on warrants of attorney are not within this enactment (*u*). Where the creditor entered up judgment under a warrant of attorney, issued a *fi. fa.*, and took from the sheriff before the bankruptcy a bill of sale of the goods seized, it was held, in an action of trover brought by the creditor against the assignees, that the seizure and sale being perfect and complete before the act of bankruptcy, the creditor was in fact paid, and therefore was not, at the time of the bankruptcy, a "creditor having security" within the meaning of the 108th section (*v*); and al-

1 W 4, c. 7, s. 7.

(*r*) *Garland* v. *Carlisle*, 2 C. & M. 31; 10 Bing. 452; 4 M. & Scott, 24, *S. C.*: and see *Groves* v. *Cowham*, 10 Bing. 5; 3 M. & Scott, 352, *S. C.*: *Smith* v. *Milles*, 1 T. R. 475: *Cooper* v. *Chitty*, 1 Bur. 20: *Lee* v. *Lopes*, 15 East, 230: *Balme* v. *Hutton*, 2 Tyr. 600; 1 C. & M. 262: 3 M. & Scott, 1; 2 C. & J. 19, *S. C.*: Tidd, New. Prac. 570.

(*s*) "The legislature evidently intended that the 81st section should apply to all executions," per *Parke*, J., *Godson* v. *Sanctuary*, 1 N. & M. 59.

(*t*) *Godson* v. *Sanctuary*, 1 N. & M. 52; 4 B. & Ad. 255, *S. C.*

(*u*) *Crosfield* v. *Stanley*, 4 B. & Ad. 87; 1 N. & M. 668, *S. C.*

(*v*) *Wymer* v. *Kemble*, 6 B. & C. 479; 9 Dowl. & Ry. 511: *Morland* v. *Pellatt*, 8 B. & C. 722; 2 Man. & Ry. 411.

though the act of bankruptcy is committed before the return of the writ (*x*). But if the act of bankruptcy is committed before the sale, it is the duty of the sheriff, having notice of the bankruptcy, to pay the amount to the assignees, and if afterwards paid over to the execution-creditor, the sheriff will be liable to an action by the assignees for money had and received (*y*). But the Court of Queen's Bench will not interfere in a summary way, by motion, to compel him to pay over the proceeds of the sale to the assignees (*z*). The 108th section applies only to such executions as are not within the protection of the 81st section (*a*), that is, such executions as have been levied less than two months before the issuing of the fiat (*b*).

After-acquired Goods of Bankrupt.

If the writ be executed upon the goods which the bankrupt has acquired since his bankruptcy, though upon a judgment in respect of a debt provable under the fiat, the execution will be valid if the bankrupt's certificate be not then signed and allowed (*c*). Yet if it be allowed at any time before the goods are sold, the court will order them to be restored upon motion (*d*). And where the after-acquired goods of a certificated bankrupt had been taken in execution for a debt which might have been proved under the commission, the Court of Queen's Bench, on motion, set aside the *fi. fa.*, and refused to put the bankrupt to an *auditâ querelâ*, though it was stated on behalf of the creditor, that the bankruptcy was collusive, and that, in an action by the assignees, a jury had found against the plaintiffs as to the fact of the trading (*e*). But in a prior case in the Common Pleas the court put the defendant to an *auditâ querelâ* (*f*). As to the execution against the future effects of a bankrupt who has twice become so, see *post, Vol. II. Book III. Part II. Ch.* 9.

Filing Warrant of Attorney, &c.

As to the necessity of filing warrants of attorney and cognovits, in order to prevent executions under them from being *void* as against assignees of bankrupts and insolvents, unless judgment be signed and execution issued within twenty-one days, see 3 *G.* 4, *c.* 39, *s.* 2; 1 & 2 *V. c.* 110, *s.* 60, *post; Vol. II. Book II. Part IV. Chap.* 1, 2.

Goods of Insolvents.
1 & 2 V. c. 110, s. 61.

By 1 & 2 *V. c.* 110, *s.* 61, it is enacted, "that in all cases where any prisoner whose estate shall have been vested in the said provisional assignee under this act shall have executed any warrant of attorney to confess judgment, or shall have given any *cognovit actionem*, or bill of sale, whether for a valuable consideration or otherwise, no person shall, after the commencement of the imprisonment of such prisoner, avail himself or herself of any execution issued or to be issued upon any judgment obtained or to be obtained upon such warrant of attorney or *cognovit actionem*, or of such bill of sale, either by seizure and sale of the property of such prisoner, or any part thereof, or by sale of such property theretofore seized, or

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(*x*) *Higgins* v. *M'Adam*, 3 Y. & J. 1.

(*y*) *Notley* v. *Buck*, 2 M & R. 68; 8 B. & C. 160, *S. C.*: see *Crosfield* v. *Stanley*, 4 B. & Ad. 87; 1 N. & M. 668, *S. C.*

(*z*) *In re Washburn*, 2 M. & R. 374; 8 B. & C. 444, *S. C.*

(*a*) *Ante*, 432, 433.

(*b*) *Godson* v. *Sanctuary*, 1 N. & M. 52; 4 B. & Ad. 255, *S. C.*

(*c*) *Callen* v. *Meyrick*, 1 T. R. 361.

(*d*) *Lister* v. *Mundell*, 1 B. & P. 427: *Davis* v. *Shapley*, 1 B. & Ad. 54.

(*e*) *Barrow* v. *Poile*, 1 B. & Ad. 629.

(*f*) *Hanson* v. *Blakey*, 1 Moo. & P. 261; 4 Bing. 493, *S. C.*

any part thereof, but that any person or persons to whom any sum or sums of money shall be due in respect of any such warrant of attorney or *cognovit actionem*, or of such bill of sale, shall and may be a creditor or creditors for the same under this act."

Under this enactment, which is nearly the same as 7 *G.* 4, *c.* 57, *s.* 34, the sale of the goods of an insolvent under a *fi. fa.* issued upon a judgment on a warrant of attorney given by the insolvent, is invalid, if it take place after the insolvent's imprisonment, notwithstanding the goods may have been seized under the writ before the imprisonment (*g*). And it has been held, under 7 *G.* 4, that the sheriff will be liable in trover for selling, after notice of assignment to the provisional assignee, the goods of an insolvent taken in execution under a judgment on *cognovit* after the commencement of the insolvent's imprisonment, but before the assignment (*h*). It is observable, that the enactment extends only to cognovits, warrants of attorney, and bills of sale, and that there is no provision in the Insolvent Act as to judgments by default, or on verdict, &c., analogous to the 108th section of the Bankrupt Act; it may be questioned, therefore, whether the property of an insolvent be not bound by execution on such judgments, as against his assignees, from the time of the delivery of the writ to the sheriff, if such delivery take place before the vesting order (*i*).

Goods of Surviving Defendants.

If there be two or more defendants, and one of them die after final judgment, and before execution executed, the writ should in form be against all, but it can be executed on the goods of the survivors only (*k*); or upon suggesting the death upon the roll, the writ may be against the survivors alone (*l*).

As to execution, after the death of a sole plaintiff or defendant, see *ante*, 408; *post*, *Vol. II. Book IV. Part I. Ch.* 32.

Goods of Ambassadors.

The goods or chattels of ambassadors and other public ministers of foreign princes or states at this court, and their domestics and domestic servants, are privileged from being taken in execution (*m*); and see fully *post*, 466.

Goods of Clergymen.

The goods ecclesiastical of clergymen cannot be seized by the sheriff (*n*).

From what time it binds, &c.

From what time it binds Defendant's Property, and Priority of Writs.] As to this, see *ante*, 405, 406.

When and how Returned.

When and how returned.] We have already noticed (*ante*, 405, *et seq.*) when and how the sheriff may be compelled to return the writ of execution in general, and how the return is to be made. The execution may be good, although the writ be not returned (*o*); and it is a sufficient justification to the sheriff in an action of trespass for taking the defendant's goods, to plead that he took them by virtue of the *fi. fa.*, without shewing it

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(*g*) *Kelcey* v. *Minter*, 1 Scott, 616; 1 Bing. N. C. 720; 1 Hodges, 177, *S. C.*

(*h* *Groves* v. *Cowham*, 10 Bing. 5; 3 M. & Scott, 352, *S. C.*: and see cases cited in note (*r*), *ante*, 433.

(*i*) See the observations of *Patteson*, J., 9 Bing. 140; *Alderson*, J., 9 Bing. 160; and *Tindal*, C. J., 9 Bing. 268; and *quære*, does not the law there laid down as to the effect of a *fi. fa.* from its *teste*, (before 29 C. 2, c. 3), as against the assignees of bankrupts, (before 21 J. 1, c. 29, s. 9), now apply to the effect of a *fi. fa.* from its *delivery*, (since 29 C. 2, c. 3), as against assignees of insolvents?

(*k*) 2 Saund. 50 a, 72 k, o.

(*l*) *Withers* v. *Harris*, 2 L. Raym. 808· *post*, Vol. II. Book IV. Part I. Ch. 32.

(*m*) 7 Ann. c. 12, s. 3.

(*n*) 2 Inst. 472: *Walwyn* v. *Awberry*, 2 Mod. 257, 46.

(*o*) 4 Co. 64: *ante*, 410.

returned (*p*); therefore, it is not usual for the sheriff to return writs of *fi. fa.*, unless ruled to do so (*q*). Where a *fi. fa.* is sued out merely to warrant a *testatum* writ, the attorney may return it (*r*); although in practice it is usual to take it to the sheriff's office for that purpose.

As to how the sheriff should act in the case of adverse claims, see *post, Vol. II. Book IV. Part I. Ch.* 11.

What Return Sheriff should make.

The sheriff should make a true return: if the return be untrue, the plaintiff may maintain an action against him for his false return (*s*). In such action the sheriff cannot go into circumstantial evidence to impeach the judgment on the ground of a collateral fraud (*t*). But if the judgment be clearly and palpably fraudulent, it will be a defence (*u*). As to how far the return is conclusive between the parties, or on the sheriff, see *ante*, 414. If the defendant has no goods in the sheriff's bailiwick, or the sheriff has not been informed that he has any, he should return *nulla bona* (*v*). If he has seized and sold goods to the amount of the sum to be levied, he must return that he has levied, and that he has the money ready, &c. (*w*). If the goods sold are not sufficient to satisfy the whole sum to be levied, he should return *fieri feci* as to so much, and *nulla bona* as to the residue (*w*). If he has taken goods, but cannot sell them, he should return that fact and their value (*x*), and that the goods remain in his hands for want of buyers. When the defendant has goods, but the plaintiff is prevented from taking them, by the allowance of a writ of error, he should not return *nulla bona*, but should return the fact of a writ of error having been sued out and allowed, as a cause for not levying them (*y*). He cannot return a rescue (*z*). He cannot return a seizure under that *and* another writ (*a*). As to his return of *mandavi ballivo*, see *ante*, 412. As to his return to a *fi. fa.* against an executor, see *post, Vol. II. Book III. Part II. Ch.* 5, *Sect.* 2; or to a *fi. fa.* against a clergyman, see *post, Vol. II. Book III. Part II. Ch.* 13.

Venditioni Exponas, &c.

Venditioni Exponas and Distringas Vicecomitem.] If the sheriff return that he has taken goods, but that they remain in his hands for want of buyers, you must then, if the sheriff be still in office, sue out a writ of *venditioni exponas*, in order to compel a sale of the goods (*b*). This writ is not a process distinct from the *fi. fa.*, but a part of it; and, therefore, a judge has power in vacation to order the return of it, and the sheriff may be attached for disobedience under

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(*p*) *Cheaseley* v. *Barnes*, 10 East, 73.

(*q*) See *ante*, 410.

(*r*) *Palmet* v. *Price*, 2 Salk. 590: *Farncombe* v. *Kent*, 2 Dowl. 464.

(*s*) *Wordall* v. *Smith*, 1 Camp. 332: *Dale* v. *Birch*, 3 Id. 347.

(*t*) *Tyler* v. *Duke of Leeds*, 2 Stark. Rep. 218.

(*u*) See *Penn* v. *Scholey*, 5 Esp. 243: *per* Lord *Tenterden*: *Harrod* v. *Benson*, 8 B. & C. 219.

(*v*) See form, Chit. Forms, 172.

(*w*) See form, Ib.: and see *Willet* v. *Sparrow*, 6 Taunt. 576; 2 Marsh. 293, *S. C.*

(*x*) See *Wintle* v. *Lord Chetwynd*, 7 Dowl. 554. The value stated is not material, for he may sell them on a *venditioni exponas* for less, and the judgment is only satisfied to the amount for which they are sold, if less than the value returned by the sheriff; (Cro. Jac. 515: Godb. 276); but in *R.* v. *Bird*, 2 Show. 87, it is said that if the sheriff value them too high, if nobody will buy them at that rate, the sheriff must. At all events, if the goods after such a return are rescued from or lost by the sheriff, in such a case he is answerable to the plaintiff for the value returned. (*Per Holt*, C. J., in *Clerk* v. *Withers*, 6 Mod. 293; 2 L. Raym. 1075, *S. C.*: and see *Cameron* v. *Reynolds*, Cowp. 406, *per* C. J.; but see *Leader* v. *Danvers*, 1 B. & P. 359).

(*y*) *Cleghorne* v. *Desanges*, 3 Moore, 83; Gow, 66. *S. C.*: see *ante*, 357.

(*z*) *Ante*, 412

(*a*) *Wintle* v. *Lord Chetwynd*, 7 Dowl. 554.

(*b*) See the form, Chit. Forms, 163; and of *venditioni exponas* to a county palatine, 166.

R. M., 3 *W*. 4, *s*. 13 (*c*). *Engross it on a plain piece of parchment; get it sealed by the sealer of the writs. There is a doubt whether this writ need be signed, and it had therefore better be so. Leave it at the sheriff's office to be returned.* If goods to the amount of part of the debt only be seized under the *fieri facias*, and the above return be made, the plaintiff may have a *venditioni exponas* for that part, and a *fi. fa.* for the residue, in one writ (*d*). And it is in general prudent to sue out this writ without delay; for, where the sheriff made his return to the *fi. fa.* in Michaelmas term, and the plaintiff did not sue out the *venditioni exponas* until the Trinity term following, and in the meantime the goods were seized under an extent, the court held that the sheriff was not compellable to make good the loss, although the delay was occasioned by indulgence given to the defendant, by the advice and with the concurrence of the sheriff's officer (*e*). If an act of bankruptcy of the defendant was committed prior to the seizure on the *fi. fa.*, the sheriff is not concluded by his return of the goods remaining in his hands for want of buyers (*f*). Unless, indeed, the sheriff was aware of the bankruptcy at the time of making his return (*g*).

Proceedings on Venditioni Exponas.

After the delivery of the *venditioni exponas* to the sheriff, he is bound to sell the goods, and have the money in court on the return-day of the writ (*h*); and he cannot a second time return that the goods remain in his hands for want of buyers; although if he do make such a return, the court will not on that account grant an attachment against him (*i*). One way of proceeding against the sheriff, if he do not sell and pay over the money on or before the return of the *venditioni*, is to sue out a *distringas* against him, directed to the coroner; and if he do not sell the goods, and pay over the money before the return of the writ, he shall forfeit issues to the amount of the debt (*j*). It would seem that, previously to applying for the *distringas*, the sheriff should be ruled to return the *venditioni exponas*, and if he do not return that writ an attachment should be moved for; but if he again return that the goods are in his hands for want of buyers, the *distringas* above mentioned may be resorted to. If there be laches on the part of the plaintiff, or collusion between him and the officer, the court will not grant the *distringas* (*k*). It is also to be observed, that an action on the case may be supported against the sheriff for his neglect in not selling the goods within a reasonable time (*l*).

In making sale of goods under a *venditioni exponas*, the sheriff is not bound by the value set upon the goods in his return to the *fi. fa.* (*m*); but otherwise if they be rescued from him, or the like, so that he cannot make sale of them (*n*).

(*c*) *Hughes* v. *Rees*, 4 M. & W. 468; 7 Dowl. 56, *S. C.*

(*d*) See the form, Chit. Forms, 167.

(*e*) *Ruston* v. *Hatfield*, 3 B. & Ald. 204; 1 Chit. Rep. 613, *S.C.*: *Clutterbuck* v. *Jones*, 15 East, 78.

(*f*) *Brydges* v. *Walford*, 6 M. & Sel. 48. See further, as to how far the return is conclusive, *ante*, 414.

(*g*) See *Field* v. *Smith*, 2 M. & W. 388.

(*h*) *Cameron* v. *Reynolds*, Cowp. 403; *Keightley* v. *Birch*, 3 Camp. 405, 524.

(*i*) *Leader* v. *Danvers*, 1 B. & P. 359.

(*j*) 2 Saund. 47 p.; Bac. Abr., Execution, (M): see *per Croke*, J., Cro. Jac. 515.

(*k*) *Ruston* v. *Hatfield*, 3 B. & Ald. 204; 1 Chit. Rep. 613, *S. C.*

(*l*) *Jacobs* v. *Humfrey*, 2 C. & M. 413: *Bales* v. *Wingfield*, 2 N. & M. 831.

(*m*) *Charter* v. *Peter*, Cro. El. 598: *Sly* v. *Finch*, Cro. Jac. 515: Godb. 276: but see *R.* v. *Bird*, 2 Show. 89: *ante*, 436, n. (*y*): *Wintle* v. *Lord Chetwynd*, 7 Dowl. 554, *per Patteson*, J.

(*n*) *Clerk* v. *Withers*, 2 L. Raym. 1075.

Distringas nuper Vicecomitem.

Where a sheriff goes out of office, after returning that he has levied, but that the goods remain in his hands for want of buyers, instead of suing out a *venditioni exponas*, the plaintiff may sue out a *distringas nuper vicecomitem*, directed to the present sheriff, commanding him to distrain the late sheriff to sell the goods(*o*). Or, if only a part of the goods were seized under the first writ, the plaintiff may have a *distringas* for that part, and a *fi. fa.* for the residue in one writ(*p*). The former sheriff must thereupon sell the goods and pay over the money, otherwise he will forfeit issues to the amount of the debt(*q*). Where, on the *distringas* the new sheriff returned that he had distrained issues to the value of 40*s*., and in consequence of the delay further costs had been incurred, the court increased the issues to 100*l*. to meet the costs incurred(*r*). So, in another case, on a motion to increase issues, the court allowed the sheriff to be distrained for the amount directed to be levied, and a further sum to cover the costs caused by the delay, and the costs of the application(*s*). The rule to increase issues is absolute in the first instance(*s*).

Alias, Pluries, &c.

Alias, Pluries, &c.] If *nulla bona* be returned, the party may sue out an *alias*, &c., or *testatum*, as mentioned *ante*, 419. Or, if the sheriff have levied part of the debt, the plaintiff, upon the writ being returned, may sue out a *fieri facias* for the residue(*t*). When the sheriff levies only part, you must get the writ returned (by ruling, or, in vacation, obtaining a judge's order on the sheriff to do so, if he will not do it voluntarily), before you can sue out any writ for the residue; because the second writ recites the first, and the sheriff's return to it; and strictly, the court have no power to award an *alias* until the prior writ is returned(*u*).

Where a plaintiff from mistake has taken out a *fi. fa.* for less than the sum for which he has obtained judgment, the court will, on conditions, allow him to take out a *fi. fa.* for the residue (*x*).

What other kinds of Execution may issue after Fi. Fa.

What other kinds of Execution may issue after fi. fa.] *After nulla bona* returned to a *fi. fa.*, the plaintiff may sue out an *elegit*. So, if *fieri feci* be returned as to part, the plaintiff may sue out an *elegit* for the residue(*y*).

After *nulla bona* returned to a *fi. fa.*, the plaintiff may sue out a *ca. sa.* in all cases where a *ca. sa.* can be adopted in the first instance. So, if *fieri feci* be returned as to part, the plaintiff may sue out a *ca. sa.* for the residue(*z*).

Proceedings against Proprietors of Newspapers.

It is right here to notice the enactment of the 11 *G*. 4 & 1 *W*. 4, *c*. 73, *s*. 3, which provides for the recovery of the amount of the judgment in an action against newspaper proprietors for a libel, in the event of a *fi. fa.* being ineffective; such enactment is as follows:—"That if any plaintiff, in any action for libel against any editor, conductor, or proprietor of

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(*o*) *Clerk* v. *Withers*, 6 Mod. 299; 2 Saund. 471: and see *Clutterbuck* v. *Jones*, 15 East, 78. See the form, Chit. Forms, 164.

(*p*) See the Form, Chit. Forms, 165.

(*q*) *Clerk* v. *Withers*, 6 Mod. 295.

(*r*) *Phillips* v. *Morgan*, 4 B. & Ald. 652.

(*s*) *Nowell* v. *Underwood*, 5 Dowl. 229.

(*t*) See the forms, Chit. Forms, &c., 156.

(*u*) *Ante*, 396, 399.

(*x*) *Hunt* v. *Pasmore*, 2 Dowl. 414.

(*y*) See the form, Chit. Forms, 189; and of the entry on the roll, 188.

(*z*) See the form, Chit. Forms, 193.

such newspaper, pamphlet, or other paper as aforesaid, shall make it appear by affidavit to his majesty's Court of Exchequer that he is entitled to have execution against the defendant upon any judgment in such action, but that he has not been able to procure satisfaction by writ of execution against the goods and chattels of such defendant, it shall be lawful for the said court, for the benefit of such plaintiff, to order and direct such proceedings to be had and taken upon such recognisances or bonds respectively as would be taken to obtain any fines or penalties due to his majesty secured by such recognisances and bond: provided always, that the expense of such proceedings shall be exclusively borne by such plaintiff as aforesaid." The plaintiff cannot avail himself of this act merely by procuring the sheriff to return *nulla bona* to a *fi. fa.* issued against the defendant; but he must convince the court by affidavit that every exertion has been made to obtain satisfaction from the defendant (*a*).

How far a Discharge of Judgment.

How far a Discharge of Judgment.] As soon as the sheriff seizes the defendant's goods under the writ, the defendant is thereby absolutely discharged to the extent of the levy, whether the sheriff sell the goods or return the writ, or not (*b*), or even although they afterwards be rescued from him (*c*); and he may plead this to a *scire facias;* or, if another writ be sued out against him for the same debt, he may be relieved upon motion. But if two be jointly and severally bound by a bond or otherwise, and an action is brought and execution issued against one of them, and his goods be seized but not sold, this will not discharge the other obligor, because it is no actual satisfaction (*d*). We have seen that in case of a mistake in not levying enough, the court may relieve the plaintiff (*ante*, 438).

Remedy for the Amount Levied.

Remedy for the Amount Levied.] Immediately upon the seizure, the sheriff acquires such a special property in the goods, that he may maintain *trover* or trespass against any person who takes them (*e*). The sheriff is consequently liable to the plaintiff for the amount of the levy; and, after a demand made, it may be recovered from him either by application to the court (*f*), or by action of debt, account, or *assumpsit* (*g*). Or an action for treble damages may be maintained against him on the 28 *Eliz. c.* 4, if he retain the money to cover illegal charges for executing the writ (*h*). If the action were brought before the money has been demanded of the sheriff, the court or a judge, upon application, will stay the proceedings, upon payment of the money levied, without costs (*i*). And it seems such action ought not to be brought before the return-day of the writ (*k*); which, however, is now immedi-

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(*a*) *Bennett* v. *Thompson*, 2 Dowl. 137; 1 C. & M. 857, *S. C.*

(*b*) *Taylor* v. *Baker*, 2 Mod. 214: 2 Bac. Abr., Execution, (D): 2 Rol. R. 37.

(*c*) 2 Saund. 343.

(*d*) *Dyke* v. *Mercer*, 2 Show. 394: 2 L. Raym. 1072, *per Gould*, J.

(*e*) *Wilbraham* v. *Snow*, 2 Saund. 47; 1 Sid. 438.

(*f*) Tidd, 9th ed. 1019.

(*g*) *Perkinson* v. *Gilliford*, W. Jon. 430; Ro. Abr. 598, 921: *Cockram* v. *Welbye*, 2 Show. 79; 2 Mod. 212, *S. C.*: *Speake* v. *Richards*, 2 Show. 281; Hob. 206, *S. C.*: and see *Dale* v. *Birch*, 3 Camp. 347.

(*h*) *Buckle* v. *Bewer*, 3 B. & C. 688.

(*i*) *Jefferies* v. *Sheppard*, 3 B. & Ald. 696.

(*k*) *Per Parke*, J., *Morland* v. *Pellatt*, 8 B. & C. 727; 2 Man. & R. 411.

ately after it is executed. In an action to recover the sum levied, the sheriff may deduct his poundage (*m*). An action on the case does not lie against the sheriff (who has not been ruled to return the writ) for neglecting to have the money in court according to the exigency of the *fi. fa.* (*n*). Where the plaintiff had appointed a special bailiff to manage the sale of goods under a *fi. fa.*, it was held the sheriff was discharged (*o*).

Contribution.

Contribution.] As to this, see *ante*, 417.

Irregular Execution.

Irregular Execution.] As to this, see *ante*, 418.

Restitution.

Restitution.] As to this, see *ante*, 418.

3. *Elegit.*

3. Elegit.

This writ has been considerably affected, both in its form and effect, by the act for abolishing arrest on mesne process, and extending the remedies of creditors, &c. (1 & 2 *V. c.* 110).

It is to be observed, however, that the 11th section of that act provides, "that as against purchasers, mortgagees, or creditors who shall have become such before the time appointed for the commencement of this act, (1st October, 1838), such writ of *elegit* shall have no greater or other effect than a writ of *elegit* would have had in case this act had not passed." And further, by the 19th section, (which see *ante*, p. 339), no judgment is to affect land, by virtue of the act, as against purchasers, mortgagees, or creditors, unless registered in pursuance of that section. It is, therefore, still necessary to keep in mind the species and the amount of property which could have been extended previously to this act, and, accordingly, the law applicable to both cases will be here noticed.

What, and what Property it affects.

Elegit first given by Stat. Westm. 2, c. 18.

What, and what Property it affects.] By stat. *Westm.* 2, (13 *Ed.* 1), *c.* 18, "where a debt is recovered or acknowledged in the king's court, or damages awarded, it shall be in the election of him that sueth, to have a *fieri facias* to the sheriff to levy the debt upon the lands and chattels of the debtor, *or* that the sheriff shall deliver to him all the chattels of the debtor, (saving only his oxen and beasts of his plough), and the one-half of his land, until the debt be levied, upon a reasonable price or extent." From the election given to the plaintiff by this statute, and from the entry of the award of this execution on the roll, "*quod elegit sibi executionem*," &c., the writ of *elegit* derives its name (*p*). The effect of the writ has been greatly extended by subsequent statutes. And first,

Effect of extended by 29 Car. 2, c. 3.

By the tenth section of the Statute of Frauds, (29 *Car.* 2, *c.* 3), in order to subject trust estates to execution, it is enacted, "that it shall and may be lawful for every sheriff or other officer to whom any writ or precept is or shall be directed, at the suit of any person or persons, of, for, and upon

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(*m*) *Longvill* v. *Jones*, 1 Stark. 346.

(*n*) *Morland* v. *Leigh*, 1 Stark. Rep. 389.

(*o*) *Pallister* v. *Pallister*, Tidd, 9th ed. 1019; 1 Chit. Rep. 614, n.: *Higgins* v. *M'Adam*, 3 Y. & J. 14.

(*p*) See forms of the writ, Chit. Forms, 180 *et seq.*

any judgment, statute, or recognisance hereafter to be made or had, to do, make, and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments, as any other person or persons be in any manner of wise seised or possessed, or hereafter shall be seised or possessed, in trust for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said party against whom execution hereafter shall be so sued had been seised of such lands, tenements, rectories, tithes, rents, or other hereditaments of such estate as they be seised of in trust for him at the time of the said execution sued, which lands, tenements, rectories, tithes, rents, and other hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed freed and discharged from all incumbrances of such person or persons as shall be so seised or possessed in trust for the person against whom such execution shall be sued."

Further extended by 1 & 2 V. c. 110, s. 11.

And by the 11th section of 1 & 2 *V. c.* 110, after reciting that "the existing law is defective in not providing adequate means for enabling judgment-creditors to obtain satisfaction from the property of their debtors; and it is expedient to give judgment-creditors more effectual remedies against the real and personal estate of their debtors than they possess under the existing law," it is enacted, "that it shall be lawful for the sheriff or other officer to whom any writ of *elegit*, or any precept in pursuance thereof, shall be directed, at the suit of any person, upon any judgment which at the time appointed for the commencement of this act shall have been recovered, or shall be thereafter recovered in any action in any of her majesty's superior courts at Westminster, to make and deliver execution unto the party in that behalf suing of all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might without the assent of any other person exercise for his own benefit, in like manner as the sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of *elegit* is sued out; which lands, tenements, rectories, tithes, rents, and hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the court out of which such execution shall have been sued out as a tenant by *elegit* is now subject to in a court of equity: Provided always, that such party suing out execution, and to whom any copyhold or customary lands shall be so delivered in execution, shall be liable and is hereby required to make, perform, and render to the lord of the manor or other person entitled all such and the like payments and services as the person against whom such execution shall be issued would have been bound to make, perform, and render in case such execution had not issued;

and that the party so suing out such execution, and to whom any such copyhold or customary lands shall have been so delivered in execution, shall be entitled to hold the same until the amount of such payments, and the value of such services, as well as the amount of the judgment, shall have been levied: Provided also, that as against purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this act, such writ of *elegit* shall have no greater or other effect than a writ of *elegit* would have had in case this act had not passed."

Changes effected by 1 & 2 V. c. 110.

The principal changes produced by this enactment of 1 & 2 *V.* *c.* 110 in the effect of the *elegit* are,—

1. Creditors may extend all Debtor's Land instead of a Moiety.

1st. That in most cases the *elegit* creditor may now extend all his debtor's land instead of a moiety. Before the act the *elegit* creditor was entitled to extend only a moiety (*q*). And if there were two *elegit* creditors, and the first had a moiety, the other could only have had a moiety of the remaining moiety (*r*); and if more were extended, the inquisition would have been void (*s*). If, however, two *elegits* issued on judgments signed in the same term, were delivered to the sheriff, together, whether at the suit of the same or different plaintiffs, a moiety of the entire might have been extended on each (*t*).

2. Copyhold Lands may be extended.

2ndly. That (subject to the rights of the lord of the manor) he may extend his debtor's customary and copyhold lands. These could not have been extended before the act (*u*); nor could even a term for years of copyhold lands made by license of the lord (*x*).

3. Lands over which Debtor has a disposing Power may be extended.

3rdly. That he may extend lands, over which his debtor has any disposing power which he may, without the assent of any other person, exercise for his own benefit. Before the act, estates tail, even in possession, were not liable to be extended after the death of the debtor. Also, where an estate was limited as A. should appoint, and in default of appointment to A. in fee, it was held that A. might defeat the effect of a judgment on the estate by an execution of the power of appointment (*y*). Also, if one joint tenant suffered a judgment, and died before execution, it could not have been executed afterwards on the lands held in joint tenancy; though if execution were sued in the lifetime of the conusor, it would bind the survivor (*z*). It would seem that the statute extends to these cases, inasmuch as in each of them the debtor has sole power over the estate, except indeed in the case of an estate tail in remainder, where the consent of the protector is necessary: no decision, however, has yet been made on the subject.

(*q*) After the lands were valued by the jury, the moiety was set out by the sheriff by metes and bounds, and delivered to the plaintiff. (*Sparrow* v. *Mattersock*, Cro. Car. 319). If he delivered more or, it seems, even less than a moiety, (*Berry* v. *Wheeler*, 1 Sid. 91, 239: *Puttin* v. *Purbeck*, 2 Salk. 563; 2 L. Raym 718; 12 Mod. 355, *S. C.*, *quære* as to *less?*), or did not set it out by metes and bounds, (*Farray* v. *Durrant*, 1 B. & Ald. 40), the execution would have been void. It was not, however, necessary to set out a moiety of each particular tenement, but only certain tenements, &c., making in value a moiety of the whole. (*Denne* v. *Abingdon*, Doug. 473).

(*r*) *Huit* v. *Cogan*, Cro. Eliz. 423.

(*s*) *Morris* v. *Jones*, 3 D. & R. 603; 2 B. & C. 232, *S. C.*

(*t*) *Doe Cheese* v. *Creed*, 2 Moo. & P. 648.

(*u*) *Morris* v. *Jones*, 3 D. & R. 603; 2 B. & C. 232, *S. C.*: *Heydon's case*, 3 Co. 9: Copyh. 149: 1 R. Ab. 888.

(*x*) 1 R. Abr. 888.

(*y*) *Doe Wigan* v. *Jones*, 10 B. & C. 459; 5 Man. & R. 563: see *Skeeles* v. *Shirley*, 3 Myl. & Cr. 112.

(*z*) Co. Lit. 184.

4. Trust Estates bound from Time of entering Judgment.

4thly, and lastly. That trust estates as well as others are now bound from the time of entering the judgment, and not merely from the time of issuing the elegit. The words of the Statute of Frauds "at the time of the said execution sued," were held to refer to the seisin of the trustee, and therefore, if he had conveyed the lands by the direction of the *cestui que trust* before execution, though seised in trust at the time of the judgment, the lands could not have been taken in execution (*a*). Since 1 & 2 *V. c.* 110, the *elegit* cannot be defeated by any conveyance after judgment.

What Lands may now, in general, be extended.

As to what is now extendible:—besides the description of property expressly named in the statutes, it was held even before 1 & 2 *V. c.* 110., that the following may be extended, *viz.* estates in reversion on leases for lives or years (and the plaintiff shall have the rent (*b*).) Rent-charges, for they issue out of the land (*c*). Lands in ancient demesne (*d*). The wife's lands which the husband has during the coverture (*e*). The lands of a bishop (*f*). A term for years may be either extended or treated as part of the personalty (*g*).

Property which cannot even now be extended.

There seem to be no words in 1 & 2 *V. c.* 110, to include the following descriptions of property, which, before that act, could not have been extended, *viz.* an advowson in gross, because it cannot be valued at any certain rent towards payment of the debt (*h*). The glebe belonging to an ecclesiastical benefice, or the churchyard, because these are each *solum deo consecratum* (*i*). A rent-seck for it cannot be delivered "*ut liberum tenementum*" (*k*). Any tenement which cannot be granted over, as the office of filazer (*l*), or the like. As to trust estates, the words of the present statute (except in the instance already mentioned) are nearly similar to those of the Statute of Frauds, (29 *Car.* 2, *c.* 3, *s.* 10, *supra*), and it was held that that statute extended only to cases of clear trust, and therefore not to an equity of redemption (*m*). The 29 *Car.* 2, was also held not to include a mere equitable interest in a chattel (*n*), nor a trust created by the debtor in favour of himself, and another person (*o*). And where lands were vested in trustees in trust for the debtor, and for raising a sum of money for another person, and the trustees permitted the debtor to receive the rents, it was held that a tenant by *elegit* who had extended a moiety of the land on a judgment against the debtor, could not sue for the rent (*p*).

Form of.

Form of.] As to the direction, *teste*, and return day of this writ, see *ante*, 403, 404. As to the New Forms, published by the judges, pursuant to 1 & 2 *V. c.* 110, *s.* 20, see *ante*, 402. The writ, like other writs of execution, must strictly pursue

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(*a*) *Hunt* v. *Coles*, Comyn. R. 226.

(*b*) *Bishop of Bristow's case*, 3 Leon. 113; Moor. 36; 1 Rol. Abr 894, pl. 5.

(*c*) Bro. elegit, 13: *Martin* v. *Wilks*, Moor, 32: see *Wotton* v. *Hurst*, Cro. El. 752.

(*d*) *Cox* v. *Barnsby*, Hob. 47; Moore, 211; Brownl. 234; 4 Inst. 270; 2 Id. 397.

(*e*) Dalt. (Sheriff), 136.

(*f*) Dalt. 136.

(*g*) *Fleetwood's case*, 8 Rep. 171; 2 Inst. 395; Dalt. 137: see further, *post*, 445

(*h*) Gilb. Exec. 39. But it is charged in equity under the 13th section. (See 3 P. Wms. 401).

(*i*) Gilb. Exec. 40; *Anon.*, Jenk. 207: *per* Lord *Alvanley*, *Arbuckle* v. *Cowtan*, 3 B. & P. 327.

(*k*) *Walsall* v. *Heath*, Cro. El. 656: *Heydon's case*, 3 Rep. 9. *Qu.*, since the new form of writ, which has not the words as his freehold?

(*l*) *Anon.*, Dyer, 7.

(*m*) *Plunket* v. *Penson*, 2 Atk. 290: *Lyster* v. *Dollond*, 1 Ves., jun., 9, 431; 3 B. C. C. 478: see *Scott* v. *Sholey*, 8 East, 467.

(*n*) *Scott* v. *Sholey*, 8 East, 467.

(*o*) *Doe Hull* v. *Greenhill*, 4 B. & Ald. 684.

(*p*) *Harris* v. *Booker*, 4 Bing. 96; 12 Moo. 283.

the judgment, and be warranted by it; see *ante*, 400, and the instances there.

Testatum unnecessary.

The plaintiff may award upon the roll writs of *elegit* for the whole debt, into as many different counties as he pleases, without being under the necessity of suing out *testatum* writs of *elegit*, and may execute all or any of them at his pleasure (*q*).

When to be Sued out.

Generally.

When to be Sued out.] As to this, in general, see *ante*, 396 *et seq.* It has been held that this writ may be sued out even after a year from the signing of the judgment, without a *scire facias*, by awarding an *elegit* on the roll as of a previous term; and continuing it by *vicecomes non misit breve*, to the term of which the *elegit* is tested (*r*); and there are precedents for such a course (*s*); but in a later case it was held that a *sci. fa.* was necessary after a year and a day (*t*), and therefore the proper course is to sue out the *elegit* within the year; and if not intended to be then executed, let it be returned and filed within the year, as in other cases of writs of execution, and afterwards continued down on the roll, to the term of which the *elegit* intended to be executed bears *teste* (*u*). Or if the year have elapsed, without any writ of execution being sued out, returned, and filed, you may revive the judgment by *scire facias* (*x*), and then sue out an *elegit*.

After Death of one of several Defendants.

If judgment be obtained against two, and one of them die before execution, the judgment survives as to the personalty, but not as to the realty; that is, the judgment binds the goods of the survivor only, but it binds the lands both of the survivor and of the deceased. Therefore, if you intend to proceed in the personalty, you must have your *fi. fa.* executed upon the goods of the survivor alone, as mentioned *ante*, 435; but, if in the realty, then, after a *scire facias* against the survivor, and the heir and terretenants of the deceased, the plaintiff may sue out an *elegit* against both, (for he cannot proceed in the realty against the survivor alone), and thereupon extend the lands of the deceased, as well as those of the survivor (*y*). But it is said, that, if all the defendants die, and one leaves lands and the others not, the plaintiff may sue out an *elegit* against the heirs and terretenants of him who left the lands alone.

How Sued out and Indorsed.

How Sued out and Indorsed.] *Engross the writ on a plain piece of parchment; get it sealed by the sealer of the writs. It need not be signed. At the time you get the writ sealed, you must produce to the sealer of the writs the* postea, *judgment-paper, or inquisition* (*z*). *Indorse it to levy the debt, &c., as directed* ante, 420, 421. There is no occasion to indorse on it the defendant's addition and place of abode, the rule of *H. T.*, 2 & 3 *G.* 4 (*a*), not applying to *elegits*. *Then deliver it to the sheriff or officer to be executed. Appoint with him a time for its execution.*

When, where, and how Executed.] As to when and where writs of execution may in general be executed, see *ante*, 407,

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(*q*) *Anon.*, Dyer, 162 b.: *Farncombe* v. *Kent*, 2 Dowl. 465. See the form of this award upon the roll, Chit. Forms, 186.

(*r*) See *Seymour* v. *Greenvill*, Carth. 283: Tidd, 9th ed. 1104.

(*s*) Clift. 874, 883.

(*t*) *Putland* v. *Newman*, 6 M. & Selw. 179.

(*u*) See *ante*, 396.

(*x*) See Vol. II. Book III. Part I. Ch. 3.

(*y*) 2 Saund. 50 a, n. (4).

(*z*) R. H., 2 W. 4, r. 75, *ante*, 421: R. H., 2 & 3 G. 4, *ante*, 421.

(*a*) See *Clarke* v. *Palmer*, 9 B. & C. 153: *ante*, 420.

421; as to how far doors may be broken open, see *ante*, 409; as to the necessity of producing the warrant, see *ante*, 410.

When, where, and how.

Attend at the time appointed for executing the writ, with evidence of the value of the defendant's goods (if any, and you claim to have them delivered to you); also, of the particulars of the defendant's lands, &c. The inquisition may be prepared beforehand, according to the facts, with blanks to be filled up on execution (*b*). *The proceedings are somewhat like those on a writ of inquiry.* No notice need be given to the debtor (*c*).

The Inquiry and Execution of the Writ.

Upon the receipt of the *elegit*, the sheriff must impannel a jury, who are to inquire of all the goods and chattels of the debtor, and appraise the same, and also to inquire as to his lands and tenements, and their value; and upon such inquisition had, the sheriff is to deliver to the execution-creditor all the goods and chattels of the debtor, (except his oxen and beasts of the plough), at the value set upon them by the jury (*d*); and if the goods be sufficient to satisfy the debt, the lands cannot be extended (*e*). If, however, the goods be insufficient, the sheriff is to proceed to make and deliver execution to the execution-creditor of all the lands, &c. (*f*), of the debtor, after being valued by the jury in like manner as he delivered execution of a moiety before the last act 1 & 2 *V.* c. 110, and must return the writ, in order that the inquisition may be recorded in the court out of which the *elegit* issued (*g*). The inquisition must find the lands with certainty; the place and county where they lie, and where the inquisition is taken (*h*); the estate the defendant has in them (*i*); whether seised in severalty, or as joint tenant, or tenant in common (*k*); and their value (*l*). If the sheriff return the *elegit* that there are no lands, he need not return the inquisition (*m*).

Inquisition may be good in Part and bad in Part.

If the sheriff extend lands, &c., not extendible by law, and also extends lands which are extendible, the inquisition may be good as to the latter, though bad as to the former (*n*). As to setting out a moiety by metes and bounds, before 1 & 2 *V.* c. 110, see *ante*, 442, n. (*q*).

Term of Years, how extended.

A term of years may either be delivered to the plaintiff at an extended annual value, as part of the lands of the defendant; or it may be delivered to the plaintiff as part of the defendant's chattel property, the jury having first appraised it at a gross sum (*o*). But even in the latter case, the defendant may, if he wish it, save the term, by tendering the sum at which it has been appraised, at any time before delivery, or, it is said, even afterwards by a tender in court (*p*); if delivered to the plaintiff after such tender made, the defendant may be relieved by *auditâ querelâ*, or by application to the court. Whether extended as lands, or appraised and delivered as chattels, the inquisition, in both cases, but particularly in

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(*b*) See forms, Chit. Forms, 183.

(*c*) Tidd, 9th ed. 1036.

(*d*) *Palmer's case*, 4 Co. 74: *Fulwood's case*, Id. 65: *Semayne's case*, 5 Co. 91: *Anon.*, Dyer, 100: 2 Inst. 396: Co. Litt. 389.

(*e*) 2 Inst. 395: see *Sparrow* v. *Mattersock*, Cro. Car. 319.

(*f*) As to what may be extended, see *ante*, 440 to 443.

(*g*) 2 Bac. Abr., Execution, (C 2): Co. Lit. 389. b.: 2 Inst. 396: *Anon.*, Dy. 100: *ante*, 410.

(*h*) *Raysing's case*, Dy. 208.

(*i*) See Moore, 8.

(*k*) *Heard* v. *Baskerfield*, Hut. 16; Brownl. 38.

(*l*) *Sparrow* v. *Mattersock*, Cro. Car. 319.

(*m*) *Stonehouse* v. *Ewen*, 2 Str. 874: see *post*, 446.

(*n*) *Morris* v. *Jones*, 3 D. & R. 603; 2 B. & C. 242, *S. C.*

(*o*) 2 Inst. 395: *Fleetwood's Case*, 8 Co. 171: Dalt. 137.

(*p*) Saund. 68 c.

the former, should find the commencement and duration of the term with certainty (*q*).

The sheriff delivers only legal, not actual possession. As to how actual possession is to be obtained, see *post*, 447.

When and how returned.

When and how returned.] We have already noticed (*ante*, 410), when and how the sheriff may be compelled to return the writ, and how the return is to be made. Unlike other writs, we have seen that an *elegit* must in all cases be returned (*r*). If lands have been extended under it, the inquisition must also be returned and filed, otherwise not (*s*); but where chattels have been appraised and delivered to the plaintiff, the sheriff should return to the writ, that he delivered the goods at a reasonable price fixed by the jury (*t*). If any objection be intended to be made to the inquisition, for matter *extrinsic*, it must be made before the inquisition is filed (*u*). The defendant may compel the plaintiff to enter the return on the roll (*x*).

Poundage and Expenses.

Poundage and Expenses.] As to these, see *ante*, 414 *et seq.*

What Writs may issue after it.

Generally.

What Writs may issue after it.] If no land be extended upon an *elegit*, the plaintiff may, of course, have an *elegit* into another county (*y*); or even if lands be extended upon the first *elegit*, the plaintiff, on a suggestion that the defendant has more lands either in the same or in another county, may have another *elegit* directed to the sheriff of such county (*z*). But where land is extended upon an *elegit*, no other writ of execution but an *elegit* can be sued out against the defendant's person or property, unless the plaintiff be evicted from the lands extended (*a*).

Where the Elegit is ineffective.

But if the *elegit* be ineffective, as, if the sheriff return that he has taken an inquisition of the lands, but could not deliver them because they were already extended, the plaintiff may then have execution by *ca. sa.* or *fi. fa.* (*b*). Or, if the inquisition be avoided for matter intrinsic, the plaintiff shall have a new writ of *elegit*, or *ca. sa.* or *fi. fa.*, at his option. Or, if it be void for matter appearing upon the face of it, then, as the plaintiff can never obtain actual possession of the land under it, he should get the court to vacate the writ and award another; which may be done either upon a suggestion of the matter, or upon *scire facias* (*c*). So, if the sheriff return *nihil* to an *elegit*, the plaintiff may have execution by *fi. fa.* or *ca. sa.* (*d*), or he may sue out another *elegit* (*e*). Or, if the sheriff return that he has levied upon

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(*q*) Ib.: *Palmer* v. *Humphrey*, Cro. El. 584: *Palmer's case*, 4 Co. 74: Gilb. Execution, 35.

(*r*) *Ante*, 410.

(*s*) *Stonehouse* v. *Ewen*, 2 Str. 874.

(*t*) *Anon.*, Dy. 100 a, pl. 71; and in marg. See forms of the return and inquisition, Chit. Forms, 183; of the award of the *elegit* upon the roll, and entry of return and inquisition thereon, Id. 184.

(*u*) 2 Inst. 396: 2 Ch. Ca. 183: but see *Anon.*, 1 Vent. 259.

(*x*) *Casseldine* v. *Munday*, 2 Dowl. 169.

(*y*) See form of writ, Chit. Forms, 185.

(*z*) *Foster* v. *Jackson*, Hob. 57; Ro. Abr. 404: *Hunger* v. *Frey*, Moore, 341; Sty. 454, 455: see *Farncombe* v. *Kent*, 2 Dowl. 464. And see the form of the writ, Chit. Forms, 185; and of the award thereof upon the roll, Id. 186.

(*a*) Bro. Abr., *Elegit*, 15: 1 Ro. Abr. 896: *Anon.*, Hob. 2: *Foster* v. *Jackson*, Id. 58: *Cowley* v. *Lideot*, 2 Bulst. 97: *Blumfield's case*, 5 Co. 87: *Crawley* v. *Lidgeat*, Cro. Jac. 338: 2 Saund. 68 b, c.

(*b*) Ro. Abr. 905.

(*c*) See Townsend, Judgm. 129, 130: 2 Saund. 68 c: 16 & 17 C. 2, c. 5, s. 2: 8 G. 1 c. 25, s. 4. See form of entry of quashing the inquisition for defects in it, and awarding a new writ, Chit. Forms, 188.

(*d*) *Knowles* v. *Palmer*, Cro. El. 160.

(*e*) *Anon.*, Hob. 2: *Crawley* v. *Lidgeat*, Cro. Jac. 339: 2 Saund. 68 c.

the goods for part, and return *nihil* as to the lands, the plaintiff may have execution for the residue, either by *ca. sa.* or *fi. fa.* (*f*), or by another *elegit* (*g*); or he may have an action of debt on the judgment (*g*). So, although an *elegit* be awarded on the roll, yet if no writ in fact issue (*h*), or if it have issued, but nothing be done or returned on it (*i*), the plaintiff is not thereby precluded from having execution by *ca. sa.* or *fi. fa.*, if he wish it.

Better to issue Fi. Fa. first.

In most cases, it is more advisable to sue out a *fi. fa.* against the debtor's goods in the first instance; and if they are not sufficient to satisfy the debt, then to sue out an *elegit* against his land (*k*).

How the Creditor shall obtain Possession.

How the Execution Creditor shall obtain Possession.] The sheriff delivers only legal possession of the lands, (or rather a right of entry), and not actual possession (*l*). The execution creditor may enter and take possession under the *elegit*; but, if he cannot do so without force, then he should proceed by ejectment (*m*). *Before bringing the ejectment get the writ returned and filed, and enter upon the roll an award of the writ and the inquisition.*

Where he is Evicted.

If tenant by *elegit* be evicted before the debt be wholly levied, he shall recover it again by ejectment; or he may have a *scire facias* and re-extent, by *stat. H.* 8, *c.* 5 (*n*).

Creditor's Interest is Chattel.

Although the *elegit* founded on the statute of Westminster (but not 1 & 2 *V. c.* 110) says that the plaintiff shall hold the lands "*as* his freehold," yet the tenant by *elegit* has not a freehold, but a chattel interest only, which goes to his executors (*o*).

How the Defendant shall recover back his Land.

How the Defendant shall recover back his Land.] As soon as the plaintiff shall have fully satisfied his judgment, out of the extended value of the land, the defendant may recover back his lands from him, either by an action of ejectment, or by a *sci. fa. ad rehabendam terram.* Or, before he has so satisfied his judgment, the defendant, upon tendering to him in court whatever may be deficient in the amount of the judgment, may recover his lands by a *scire facias ad rehabendam terram.* Or the debtor may proceed by bill in equity. Or he may apply to the court to refer it to one of the masters to ascertain the amount of the rents and profits received, and order that, if it appear that the debt, &c., is satisfied, possession shall be delivered to the defendant (*p*). This

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(*f*) *Beacon* v. *Peck*, 1 Str. 226: *Lancaster* v. *Fidder*, 2 L. Raym. 1451: *Foster* v. *Jackson*, Hob. 58: *Crawley* v. *Lidgeat*, Cro. Jac. 338.

(*g*) *Glascock* v. *Morgan*, 1 Lev. 92; 1 Sid. 184, *S. C.*

(*h*) See 2 Saund. 68 c.

(*i*) *Cooper* v. *Langworth*, Moore, 545.

(*k*) 2 Saund. 69 n. One reason for this may be, that a *fi. fa.* is executed by sale by the sheriff; but the *elegit* by the appraisement of the goods by a jury, and delivery to the party. (Sid. 184: Lev. 92: 1 L. Raym. 346).

(*l*) *Brown* v. *Rivers*, Doug. 473: *Jefferson* v. *Dawson*, 3 Keb. 243: *Taylor* v. *Cole*, 3 T. R. 295.

(*m*) In *Rogers* v. *Pitcher*, 6 Taunt. 207, *Gibbs*, C. J., expressed himself to be of opinion that there is no necessity for a tenant by *elegit* to bring ejectment to obtain possession, but that he might enter at once, excepting where the tenant in possession held under a lease prior to the plaintiff's judgment. And see *Taunton* v, *Costar*, 7 T. R. 431: *Turner* v. *Meymott*, 1 Bing. 158; 7 Moore, 574, *S. C.*: *Doe* v. *Maisey*, 8 B. & C. 767: but see *Bellamy* v. *Say*, 6 C. & P. 284: and *Doe Stephen* v. *Lord*, 6 Dowl. 256.

(*n*) See Co. Lit. 289. b., 290. a.: *Fulwood's case*, 4 Co. 66 a: *Crawley* v. *Lidgeat*, Cro. Jac. 338: and see 8 G. 1, c. 25, s. 4. The remedy given by stat. Westminster, was by writ of *novel disseisin*, and after that by writ of *redisseisin* if needs be, but these are now abolished, 3 & 4 W. 4. c. 27.

(*o*) Co. Lit. 42, 43: 2 Inst. 396: 2 Bla. Com. 161.

(*p*) *Price* v. *Varney*, 5 D. & R. 612; 3 B. & C. 733, *S. C.*

application would have been complied with even before 1 & 2 *V. c.* 110; and the 11th section of that statute expressly subjects the *elegit* creditor to such account in the court out of which the execution is sued, as a tenant by *elegit* was subject to in a court of equity before the act. If the lands be recovered back by a suit in equity, the plaintiff will be allowed interest on his judgment; but, on the other hand, he will be obliged to account, not for the extended value merely, but for the actual profits of the land while in his possession (*q*). And the same course would be pursued before the master, except, that with regard to judgments entered up before 1st October, 1838, interest would, perhaps, only be reckoned from that day, pursuant to 1 & 2 *V. c.* 110, *s.* 17. If, on the other hand, the lands be recovered back by ejectment or *sci. fa.*, the plaintiff will have to account only for the extended value of the land, which is usually very much below the real value; and, under 1 & 2 *V. c.* 110, *s.* 17, he will be entitled to interest, (at £4 per cent.), either from 1st October, 1838, or the day of entering the judgment, according as judgment was signed before or after that day. The application for a reference to the master appears to be the most advisable mode of proceeding.

4. *Levari Facias.*

4. Levari Facias. The *levari facias* commands the sheriff to levy or make of the lands and chattels of the defendant the sum recovered by the judgment (*r*). The sheriff, however, is not therefore authorized to sell or extend the lands, or deliver them to the creditor; but must collect the debt from the issues and profits of the land, and from the sale of the chattels. He may, therefore, collect the rents from the tenants, cut down corn and other crops growing upon that part of the land in the debtor's possession (*s*), may seize and sell all the defendant's goods and chattels, and all the beasts (even those of a stranger (*t*)) he may find levant and couchant upon the land (*u*).

Superseded by Elegit. Excepting in the case of outlawry (*x*), however, this writ has been completely superseded in practice by the writ of *elegit;* and it would be useless, therefore, to treat further of it in this place.

5. *Capias ad Satisfaciendum.*

5. Ca. sa. What, and when it lies. *What, and when it lies.*] This writ commands the sheriff to take the body of the defendant, and him safely keep, so that he may have his body in court immediately after the execution thereof, or on a particular return-day in term, to satisfy the plaintiff the amount of the judgment.

Against Bail, Infants, Feme Covert. Bail may be taken in execution upon a *ca. sa.* (*y*), although they could not be holden to bail (*z*). So an infant (*a*), or

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(*q*) *Godfrey* v. *Watson*, 3 Atk. 517; Amb. 520; 2 Ves. 589: *Lewis* v. *Morgan*, 3 Y. & J. 394.

(*r*) See the form of the writ, 10 Went. 340: Tidd's Forms, 6th ed. 402.

(*s*) Godb. 290: Plowd. 441 a: Finch, 101: *Britton* v. *Cole*, Comb. 470: 2 Inst. 453.

(*t*) *Britton* v. *Cole*, 1 Salk. 395; 1 L. Raym. 305, *S. C.*

(*u*) 2 Saund. 68, n. (1).

(*x*) See *post*, Vol. II. Book IV. Part I. Ch. 2.

(*y*) *Goodchild* v. *Chaworth*, 2 Str. 822, 1139.

(*z*) *Post*, 469.

(*a*) *Gardiner* v. *Holt*, 2 Str. 1217: *Daw* v. *Clark*, 1 C. & M. 860.

feme covert, may be taken on a *ca. sa.*; and if a *ca. sa.* be sued out against husband and wife, the wife may be taken on it; and the court will not discharge her (*b*), unless she has no separate property out of which the demand can be satisfied, or where there appears to be collusion between the husband and the plaintiff to keep her in custody (*c*); the general rule being that the wife shall be discharged, if in custody, before execution, but not after it (*d*).

Attorney, &c.

An attorney, or officer of the court, though he cannot be arrested on mesne process, may be so on a *capias ad satisfaciendum*.

Where it does not lie.

A *ca. sa.* does not lie in actions against any member of the royal family, nor in actions against peers or peeresses, or against members of the House of Commons during their time of privilege, or against corporators or hundredors sued as such (*e*). Where judgment of *respondeas ouster* was given on a plea of peerage, and a verdict had been afterwards obtained for the plaintiff, the court refused to set aside, on an affidavit of peerage, a writ of *ca. sa.* issued against the defendant (*f*). Also it lies not against ambassadors or their servants (*g*); nor against seamen or soldiers in her majesty's service, unless in an action for a debt of 30*l.* or upwards, contracted previously to their entering the service (*h*); nor against bankrupts who have obtained their certificates, for any debt which might have been proved under their commission; and, if arrested, they shall be discharged upon application to a judge at chambers, on production of their certificate (*i*); nor against insolvents discharged under the Insolvent Act; and if arrested, a judge may discharge him upon certain proofs of his right to such discharge (*k*); nor against an insolvent under the judgment entered up on the warrant of attorney executed by him on obtaining his discharge (*l*); nor against executors or administrators for the debts of their testator or intestate, unless a *devastavit* have been returned (*m*); nor against an heir for a debt to be levied on the lands descended (*n*); nor against the servants in ordinary or menial servants of the king, or of a queen regnant, unless leave have previously been obtained of the lord chamberlain of the king's or queen's household (*o*).

Discharge of Persons wrongfully taken under.

If a *ca. sa.* be sued out and executed in a case where it does not lie, the court or a judge will discharge the defendant. The affidavits in support of the application must shew that the defendant has been actually arrested (*p*). It is not advisable

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(*b*) *Roberts* v. *Andrews*, 3 Wils. 124; 2 W. Bl. 720, *S. C.*: *Finch* v. *Dubbin*, 2 Str. 1237: *Langstaff* v. *Rain*, 1 Wils. 149: *Beriman* v. *Gilbert*, Barnes, 203.

(*c*) *Sparkes* v. *Bell*, 8 B. & C. 1; 2 M. & R. 124, *S. C.*: *Pitts* v. *Miller*, 2 Str. 1167.

(*d*) *Roberts* v. *Andrews*, 3 Wils. 124; 2 W. Bl. 720, *S. C.* Where a married woman was sued as a *feme sole*, and suffered judgment by default, and was taken in execution, the court refused to discharge her out of custody, and left her to her writ of error, saying, that she ought not to have suffered the plaintiff to have incurred the expense of a writ of inquiry. (*Moses* v. *Richardson*, 8 B. & C. 421).

(*e*) See *post*, 473.

(*f*) *Digby* v. *Alexander*, 9 Bing. 412; 1 M. & Scott, 559, *S. C.*

(*g*) 7 Ann. c. 12, s. 3: and see *post*, 466.

(*h*) See *post*, 474, 475.

(*i*) 6 G. 4, c. 16, s. 126: see *post*, 470: *Sherwood* v. *Benson*, 4 Taunt. 631: *Baker* v. *Ridgway*, 9 Moore, 114; 2 Bing. 41, *S. C.*

(*k*) 1 & 2 V. c. 110, s. 90.

(*l*) *Rivett* v. *Lark*, 3 Dowl. 62.

(*m*) 2 H. 6, 12: Bro. Abr., Executors, 12: and see *post*, 473.

(*n*) 2 Saund. 7, n. 4.

(*o*) *Bartlett* v. *Hebbes*, 5 T. R. 686: and see *Luntley* v. *Battine*, 2 B. & Ald. 234: and the cases *post*, 464.

(*p*) *Green* v. *Rohan*, 4 Dowl. 659.

for the sheriff to discharge a bankrupt or other person privileged from arrest, when arrested on a *ca. sa.*, unless he be a member of the royal family, or a member of parliament, or an ambassador, or his servant, for he does it on his own responsibility (*q*).

Form of.

Form of.] As to the direction, teste, and return of this writ, see *ante*, 403, 404. In form, it must strictly pursue the judgment, and be warranted by it (*r*); therefore, if a defendant be sued by a wrong name, and omit to take advantage of the misnomer, he may be arrested on a *ca. sa.* by such wrong name, and the sheriff may justify the caption under the writ (*s*); although for such an arrest upon mesne process, the defendant might maintain an action for false imprisonment (*t*).

Alias, pluries, and testatum Ca. Sa.

Alias, Pluries, &c.] Upon a *non est inventus* returned to the first *ca. sa.*, the plaintiff may sue out an *alias* writ, and after that a *pluries*, directed to the same sheriff; or he may sue out a *testatum ca. sa.* directed to the sheriff of a different county; and each of these may have a clause of *non omittas* in it, if necessary. When a *testatum* writ is requisite, it is usual to sue out the *capias* and *testatum* at the same time, and to leave the former to be returned *non est inventus*, and the latter to be executed (*u*). If there be a mistake in suing out a *testatum* writ in the first instance, or a *ca. sa.* into a different county, instead of a *testatum*, the mistake may be rectified in the same manner as in the case of a *fi. fa.*, mentioned *ante*, 419.

Regularly, the *alias*, &c., should be tested on the return-day of the preceding writ; but this is not material, as the parties have no day in court upon writs of execution.

When to be Sued out.

When to be Sued out.] As to this, see *ante*, 396. It may be here observed, that a *ca. sa.* issued before the return of a *fi. fa.* which has been executed, is irregular; but a *ca. sa.* may issue before the return, or even at the same time as a *fi. fa.*, but they cannot both be executed (*x*). A *ca. sa.* cannot issue after an *elegit*, if lands have been taken under such writ (*y*).

How Sued out and Indorsed.

How Sued out and Indorsed.] *Engross your writ on plain parchment, and get it sealed by the sealer of the writs.* It need not be signed (*z*). *At the time you get it sealed, you must produce to the sealer of the writs the* postea, *judgment paper, or inquisition* (*a*), *and, if any, the judge's certificate for immediate execution. Indorse it thus:* "*Levy the whole,* (*or £ ——*), *P. A.*, (*James-street*), *plaintiff's attorney.*" You must not indorse the writ to levy any expenses or poundage, unless the action were for a penalty, as an action on a bond or the like, and your execution be for less than the penalty; or unless the defendant has by warrant of attorney or *cognovit*, or otherwise,

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(*q*) *Sherwood* v. *Benson*, 4 Taunt. 631.

(*r*) See *ante*, 400. See forms, Chit. Forms, 190 to 200.

(*s*) *Crawford* v. *Satchwell*, 2 Str. 1218.

(*t*) See *Finch* v. *Cocken*, 3 Dowl. 678.

(*u*) See *ante*, 419. See the forms, Chit. Forms, 195, 196.

(*x*) *Ante*, 399.

(*y*) Bac. Abr., Execution (D): *ante*, 446.

(*z*) R. H., 2 W. 4, r. 75, *ante*, 420.

(*a*) R. H., 2 W. 4, r. 75, *ante*, 420: R. H., 2 & 3 G. 4, *ante*, 420, 421.

expressly agreed to the levy of them. If you make this indorsement to levy the expenses, poundage, &c., do as you would do on a *fi. fa.* (*b*). *If the writ be sued out of the Queen's Bench, indorse on it the party's addition and place of abode, or such other description of him as you may be able to give* (*c*). A *ca. sa.* has been set aside for not complying with this latter rule (*d*), and the sheriff is not bound to execute the writ, and this although, at the time of receiving it, he made no objection to the want of the indorsement (*e*). And the defendant may take advantage of the want of the indorsement, the rule requiring it being for his benefit, and if his place of abode cannot be discovered, he may be described of his last place of abode (*f*). But the court refused to discharge a defendant out of custody on a *testatum capias ad satisfaciendum*, on the ground of the want of an indorsement on the original *capias*, pursuant to this rule (*g*). The application to take advantage of a non-compliance with the rule must, it seems, in all cases be made within two terms (*h*). There is also a rule of *M. T.*, 1 *W.* 4, *r.* 2. *s.* 1, in the Exchequer, requiring the *name and address of the attorney issuing the writ to be indorsed or written thereon, and also the day, month, and year in which the same was issued* (*ante*, 421).

Against Seamen of R. N. or Soldiers.

If the action were against a seaman or soldier in her majesty's service, for a debt contracted previously to his having entered the service, you must make an affidavit that the debt, damages, and costs amount to 30*l.* or upwards, and that the debt was contracted previously to the defendant's having entered her majesty's service; and a memorandum of such oath must be indorsed on the writ before it can be executed (*i*).

Obtaining Warrant on, &c.

As soon as your writ is prepared and sealed, *leave it at the sheriff's office, with directions to give the warrant to the officer you intend should execute it; or give it in the first instance to the officer, who will procure the warrant* (*k*) *on it at the sheriff's office.* The officer will then execute the writ by arresting the defendant.

When, where, and how Executed.

When, where, and how Executed.] As to when the writ may be executed, see *ante*, 407. The mode of executing it, and every thing relating to the arrest, the privilege of the defendant, &c., are for the most part the same as in the case of a writ of *capias* on mesne process (*l*); excepting, that, upon an arrest in execution, the officer may carry the defendant at once to the county gaol, and upon mesne process he cannot do so for twenty-four hours after the arrest (*m*). The defendant, however, is usually carried to the house of the officer who arrests him, or of some other officer of the sheriff within the county, &c., and confined there until the return of the writ, if not sooner discharged, or removed to the Queen's Bench prison, or the Fleet, by *habeas* (*n*).

(*b*) *Ante*, 420.

(*c*) R. H., 2 & 3 G. 4, *ante*, 420, 421.

(*d*) *Clarke* v. *Palmer*, 9 B. & C. 153; 4 Man. & R. 141: *Bettyes* v. *Thompson*, 7 Dowl. 323.

(*e*) *Henrick* v. *Nanney*, 1 Dowl. 58.

(*f*) *Bettyes* v. *Thompson*, 7 Dowl. 323.

(*g*) *Davidson* v. *Dunne*, 4 Dowl. 119: and see *Barber* v. *French*, 5 Nev. & M. 658.

(*h*) *Constable* v. *Fothergill*, 2 Dowl. 591: see *Esdaile* v. *Davies*, 6 Dowl. 465.

(*i*) See *post*, 474, 475.

(*k*) See the form, Chit. Forms, 198.

(*l*) See *post*, 523.

(*m*) 32 G. 3, c. 28, s. 2, *post*, 523: *Evans* v. *Atkins*, 4 T. R. 555.

(*n*) See *Houlditch* v. *Birch*, 4 Taunt. 668.

The Sheriff has no right to receive Debt and Costs.

Payment of the sum indorsed on the writ to the sheriff or his officer, or to the marshal or warden, is not deemed a payment to the plaintiff, and cannot, therefore, be a satisfaction of the judgment (*o*), as such a payment on a *fi. fa.* would have been (*p*). And the sheriff should not receive the debt and costs, for if he do, and, before payment over to the plaintiff, let the defendant go, it will be an escape (*q*). But payment to the attorney on record for the plaintiff will satisfy the judgment (*r*).

Escape.

Escape.] As to what is an escape, it should be observed that if the sheriff carry a defendant in his custody out of the county, except in conveying him by the most convenient route to the county gaol, he will be guilty of suffering an escape (*s*); and even might be liable to an action by the defendant for a false imprisonment (*t*). Allowing the defendant arrested on a *ca. sa.* to go about his affairs, even as it seems in the custody of the officer, is an escape (*u*). And if the sheriff, or other officer in whose custody the defendant is, suffer him to go out of the limits of the prison, for any the shortest time, although with a keeper, it is an escape (*x*), unless it be under the authority of a writ of *habeas corpus*, or (if the defendant be in the custody of the marshal or warden) of a day rule (*y*). And it makes no difference in this respect, whether the defendant were at large before or after the return of the *ca. sa.* (*z*).

Where Defendant may be retaken.

If the escape be *negligent*, the gaoler may make fresh pursuit; and if he retake him before any action is brought for the escape, he shall be excused (*a*); and for this purpose, if the defendant were in custody of the marshal or warden, an escape warrant may be obtained, upon application to a judge at chambers, which will enable the marshal or warden or other person obtaining it to retake the defendant in any part of England, and lodge him in the debtors' prison for the county where he is taken (*b*). So, if the defendant, after a negligent escape, return within the limits of the prison before an action is brought for the escape, the gaoler shall be excused (*c*). But if the escape be *voluntary*, the gaoler can never retake the defendant, even though the defendant were let go by mistake (*d*); and he would be liable to an action for false imprisonment if he did (*e*); and as the retaking is a nullity, lapse of time is no bar to the prisoner's discharge, if retaken (*f*). But in either of these cases the plaintiff, instead of proceeding

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(*o*) Freem. 842: 12 Mod. 230: *Morton's case*, 2 Show. 139: *Slackford* v. *Austen*, 14 East. 468: *Allanson v. Atkinson*, 1 M. & Sel. 583.

(*p*) *Rook* v. *Wilmot*, Cro. El. 209: *ante*, 423.

(*q*) *Slackford* v. *Austen*, 14 East, 468.

(*r*) *Morton's case*, 2 Show. 139: and see *Crozer* v. *Pilling*, 6 D. & R. 129; 1 B. & C. 26, *S. C.*

(*s*) *Boyton's case*, 3 Rep. 44: *Boothman* v. *Earl of Surrey*, 2 T. R. 5.

(*t*) Bro. Escape, 11.

(*u*) *Benton* v. *Sutton*, 1 B. & P. 24: *Balden* v. *Temple*, Hob. 202.

(*x*) 1 Ro. Abr. 806: 3 Co. 44: Plowd. 36: and see 8 & 9 W. 3, c. 26.

(*y*) 8 & 9 W. 3, *c.* 26: see *Rose* v. *Green*, 1 Bur. 437: and 2 Bac. Abr., Escape (B).

(*z*) *Hawkins* v. *Plomer*, 2 W. Bl. 1048: see 1 Saund. 35 a; 2 Id. 61 c, n. (4).

(*a*) 1 Ro. Abr. 808: *Whiting* v. *Reynel*, Cro. Jac. 657; W. Jon. 144: and see *Stonehouse* v. *Mullins*, 2 Str. 873.

(*b*) 1 Ann. c. 6: 5 Ann. c. 9, s. 3: see 3 Bac. Abr., Escape (E 3).

(*c*) Comyn, 554: *Bonafous* v. *Walker*, 2 T. R. 126: and see *Lenthal* v. *Lenthal*, 2 Lev. 109: *James* v. *Pierce*, Id. 132; 1 Vent. 269, *S. C.* See *Davis* v. *Chapman*, 7 Dowl. 429; 5 Bing. N. C. 453, *S. C.*, as to the mode of pleading in such cases.

(*d*) *Filewood* v. *Clement*, 6 Dowl. 507.

(*e*) *Vintner* v. *Allen*, Carter, 212: *Ravenscroft* v. *Eyles*, 2 Wils. 295: *Atkinson* v. *Jameson*, 5 T. R. 25.

(*f*) *Filewood* v. *Clement*, 6 Dowl. 508.

against the gaoler, may sue out a fresh *ca. sa.* against the defendant, or any other writ of execution against his lands or goods; or he may have an action of debt on the judgment (*g*). The new sheriff is not answerable for the escape of a debtor taken in execution in the time of his predecessor, and not delivered over to him (*h*).

Discharge by Consent of Plaintiff.

If the defendant be discharged out of prison with the plaintiff's consent, it is of course no escape (*i*). But in order to excuse the gaoler in this case, it is necessary that the plaintiff's consent be given previously to or at the time of the discharge, and not subsequently to it (*k*).

Search for other Writs before Discharge.

Whenever the sheriff, or his officer, receives an order for the defendant's discharge, search should be made in the sheriff's office to ascertain whether or not there be any other writs lodged against the defendant; for a person in custody at the suit of one plaintiff is in custody at the suit of any other person who delivers a writ to the sheriff before the discharge of the defendant (*l*).

Remedy for Escape.

The remedy against the sheriff or gaoler, for the escape, is by action of debt, or action on the case (*m*). Debt is in general the preferable form of action; because a verdict for the plaintiff therein must be for the full amount of the sum recovered in the original action (*n*).

Rescue no Excuse.

Rescue.] As to a rescue: it is necessary to observe that the sheriff cannot excuse himself for a rescue of a person in execution, by returning the rescue, as he can in case of a rescue upon mesne process (*o*). If the defendant be rescued, therefore, you may either have an action against the sheriff or gaoler in whose custody he was (*p*), or you may sue out a fresh *ca. sa.*, or an execution against the defendant's goods, &c., at your option (*q*).

When and how Returned.

When and how Returned.] We have seen (*ante*, 410), when and how the sheriff may be compelled to return the writ of execution in general, and how the return is to be made. The sheriff seldom, if ever, returns a *ca. sa.*, unless ruled or ordered by a judge to do so; although, in strictness, he should make his return to every writ directed to him, whether ruled or ordered to do so or not. There is a material distinction in this respect between a *ca. sa.* or *fieri facias*, and writs of mesne process; for the sheriff may justify under these writs of execution, although he have not returned them; but he cannot plead a writ of mesne process in justification of an arrest under it, unless he have returned it (*r*).

(*g*) *Allanson* v. *Butler*, 1 Sid. 330: *Buxton* v. *Home*, 1 Show. 174: *Basset* v. *Saller*, 2 Mod. 136: *Sudall* v. *Wytham*, Lutw. 1264: 8 & 9 W. 3, c. 26.

(*h*) *Davidson* v. *Seymour*, 1 M. & M. 34: see the recent act, 3 & 4 W. 4, c. 99, s. 7, *ante*, 14.

(*i*) 2 Bac. Abr., Escape (E 3).

(*k*) *Scott* v. *Peacock*, 1 Salk. 271: *Buxton* v. *Home*, 1 Show. 174.

(*l*) *Frost's case*, 5 Rep. 89: *Benton* v. *Sutton*, 1 B. & P. 24: see *Watson* v. *Carroll*, 4 M. & W. 592; 7 Dowl. 217, *S. C.*

(*m*) See 2 Bac. Abr., Escape, (F), (G).

(*n*) 1 Saund. 37, 38: *Bonafous* v. *Walker*, 1 T. R. 129: *Robertson* v. *Taylor*, 2 Chit. Rep. 454.

(*o*) *Ante*, 412.

(*p*) 1 Ro. Ab. 807: *Crompton* v. *Ward*, 1 Str. 409: *O'Neal* v. *Marson*, 5 Bur. 2812.

(*q*) *Mounson* v. *Clayton*, Cro. Car. 240, 255: 1 Ro. Abr. 904: *Drury's case*, 8 Co. 142.

(*r*) 21 H. 7, 22, 21: *Hoe's case*, 5 Co. 90: *Freeman* v. *Bluet*, 12 Mod. 849; 1 L. Raym. 632; 1 Salk. 409; Holt, 408, *S. C.*: *ante*, 435.

What Return should be made.

When the sheriff has been ruled to return the writ, if he have taken the defendant, he returns *cepi corpus* (*s*), or that the defendant is so ill that the sheriff cannot remove him without endangering his life (*t*); or if he have not been able to find him, he returns *non est inventus* (*u*); or if he could not execute the writ, on account of some privilege enjoyed by the defendant, or the like, he returns the fact specially, as, that the defendant had become bankrupt and obtained his certificate, or the like (*v*). If he return *non est inventus*, or make a special return, you may, if you think proper, contest the truth of it, in an action for a false return. Excepting in cases of members of the royal family, peers, members of the House of Commons, ambassadors or their servants, it is not usual, or in general advisable, for the sheriff to take notice of the defendant's privilege, but to arrest him, and leave him to apply to the court or a judge to be discharged, if he be entitled to it (*x*). If the *ca. sa.* did not contain a clause of *non omittas*, and the sheriff have sent it to the bailiff of a liberty within his county to be executed, he may return this matter on the writ, together with the bailiff's answer, if he have received it (*y*). A return of a rescue is bad (see *ante*, 412).

False Return.

If the sheriff's return be untrue, the plaintiff may maintain an action on the case against him for his false return (*z*).

Outlawry.

If the sheriff have not taken the defendant on the *ca. sa.*, the plaintiff may, if he wish, proceed to outlawry (*a*).

Poundage and Expenses.

Poundage and Expenses.] As to these, see *ante*, 414, 416.

What Writs may issue after it.

Generally.

What Writs may issue after it.] If the *ca. sa.* be not executed, the plaintiff may, of course, sue out any other writ of execution, or he may have an *alias* or *pluries ca. sa.* (*b*). But if it be once executed, no other writ of execution can be sued out and executed by the plaintiff against the defendant's goods or lands, whilst he remains in custody for the same debt (*c*).

Where Defendant dies in Execution.

At common law, if the plaintiff had the defendant taken in execution, he could not afterwards, if the defendant died, have execution against his goods, &c.; but now, by stat. 21 *J.* 1, *c.* 24, if a party die in execution, the other party, at whose suit he was in custody, may sue out execution against his lands or goods, in the same manner as if the deceased had never been charged in execution. A *fi. fa.* in such a case, if issued in vacation, may be tested on the last day of the preceding term, if the judgment were signed before that day, notwithstanding the 3 & 4 *W.* 4, *c.* 67, *s.* 2 (*d*). Also, in such a case, a *fi. fa.* issued after his death, tested and returnable while he was alive and in execution, and returned by the plaintiff's attorney, will

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(*s*) See form, Chit. Forms, 199.

(*t*) See *Baker* v. *Davenport*, 4 B. & Ald. 27: *Cavenagh* v. *Collett*, 8 D. & R. 606: *Perkins v. Meacher*, 1 Dowl. 21: and see form, Chit. Forms, 199.

(*u*) A return that the defendant "is not *to be* found in my bailiwick," is bad. (*R.* v. *Shff. of Kent*, 2 M. & W. 316; 5 Dowl. 451, *S. C.*)

(*v*) See forms of returns, Chit. Forms, 199.

(*x*) *Post*, 465, 466, 469, 471.

(*y*) *Ante*, 412. See the form, Chit. Forms, 199.

(*z*) *Ante*, 414.

(*a*) See Vol. II. Book IV. Part I. Ch. 2

(*b*) See *Wood* v. *Harburne*, Yelv. 52.

(*c*) *Ante*, 399.

(*d*) *Ante*, 404: *Brocher* v. *Pond*, 2 Dowl. 472.

support a *testatum* issued under the above statute of *Jac.* into a foreign county (*e*).

How far a Discharge of Judgment.

How far a Discharge of Judgment.] The effect of taking the party in execution is, that it operates as a satisfaction of the debt, so that the creditor has no other remedy on the judgment to recover it, unless the party die, or escape, or be rescued (*f*). Therefore a commission of bankruptcy cannot be sued out against the debtor for the same debt (*g*), nor can it be set off in an action brought by the debtor (*h*), and the court have refused to stay proceedings in a second action for the same cause, where the plaintiff was in execution for the costs of a nonsuit in the prior action (*i*). And by the 16th section of 1 & 2 *V. c.* 110, "if any judgment-creditor, who under the powers of this act shall have obtained any charge, or be entitled to the benefit of any security whatsoever, shall afterwards, and before the property so charged or secured shall have been converted into money or realized, and the produce thereof applied towards payment of the judgment-debt, cause the person of the judgment-debtor to be taken or charged in execution upon such judgment, then and in such case such judgment-creditor shall be deemed and taken to have relinquished all right and title to the benefit of such charge or security, and shall forfeit the same accordingly."

1 & 2 V. c. 110, s. 16.

But a *ca. sa.* is no actual satisfaction, so as to bar the plaintiff from taking out execution against other persons liable to the same debt and damages (*k*).

Where Plaintiff discharges the Defendant out of Custody.

If the plaintiff discharge the defendant out of custody, he can never afterwards have him arrested upon the same judgment; and this although the defendant agree that he may be again arrested (*l*); or even if he discharge a defendant arrested on a joint *ca. sa.* against several, he can neither retake him nor afterwards arrest any of the others (*m*). This, of course, has reference only to cases where the plaintiff voluntarily discharges the defendant; and, where one of two defendants was discharged under an insolvent act, this was holden not to operate as a discharge of the other; for the discharge in that case was not the act of the plaintiff, but an act of law (*n*). And if the discharge of the defendant out of custody were on account of any irregularity in the process, he might be again taken on a regular writ (*o*). Also, if the defendant obtain his discharge by fraud, (as by concocting a fraudulent commission

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(*e*) *Farncombe* v. *Kent*, 2 Dowl. 464.

(*f*) *Crawley* v. *Lidgeat*, Cro. Jac. 338: *Beacon* v. *Peck*, 1 Str. 226: *Lancaster* v. *Fielder*, 2 L. Raym. 1451: *Foster* v. *Jackson*, Hob. 59: *Cohen* v. *Cunningham*, 8 T. R. 123: *Taylor* v. *Waters*, 5 M. & Sel. 103: *Beavan* v. *Robins*, 8 D. & R. 42: *Baker* v. *Ridgway*, 9 Moore, 122.

(*g*) *Cohen* v. *Cunningham*, 8 T. R. But the court cannot discharge the defendant on the ground of a commission sued out. (*M'Master* v. *Kell*, 1 B. & P. 302).

(*h*) *Taylor* v. *Waters*, 5 M. & Sel. 103. As to the set-off on motion, see *Phillipson* v. *Caldwell*, 6 Taunt. 176: but see *Peacock* v. *Jeffery*, 1 Taunt. 426: *Simpson* v. *Hanley*, 1 M. & Sel. 696.

(*i*) *Beavan* v. *Robins*, 8 D. & R. 42.

(*k*) *Foster* v. *Jackson*, Hob. 59.

(*l*) 1 Ro. Abr. 307: *Vigers* v. *Aldrick*, 4 Burr. 2482: *Jaques* v. *Withey*, 1 T.R. 557: *Tanner* v. *Hague*, 7 T. R. 420: *Blackburn* v. *Stupart*, 2 East, 243: 2 B. & Ald. 297: see *Atkinson* v. *Baynton*, 1 Scott, 404; 1 Hodges, 7; 1 Bing. N. C. 444, *S. C.*: *Da Costa* v. *Davis*, 1 B. & P. 242; where the question as to whether an agreement to render the body again in execution in consideration of a discharge from custody in execution was valid, was discussed.

(*m*) *Clarke* v. *Clement*, 6 T. R. 525: *Ballam* v. *Price*, 2 Moore, 235.

(*n*) *Nadin* v. *Battie*, 5 East, 147.

(*o*) See *M'Cormack* v. *Melton*, 3 Dowl. 215; 1 C., M. & R. 525, *S. C.*: Com. Dig., Execution, (H): *Fish's case*, Godb. 372: *Fish* v. *Wiseman*, Latch. 193: Gilb. Execution, 54: *Mackie* v. *Warren*, 3 Moo. & P. 279; 5 Bing. 176, *S. C.*

of bankruptcy, which is afterwards superseded, and procuring the plaintiff to prove under it and let him go), and the plaintiff, on discovering the fraud, arrest him on a fresh *ca. sa.* the court will not discharge him on motion (*p*). Again, it, would seem that the effect of a discharge extends only to the debt for which the defendant is in custody at the time; and, therefore, where a warrant of attorney was given for payment of a sum by instalments, with a power to issue execution from time to time for the whole or any part, and the defendant being in execution on a *ca. sa.* for one instalment, was discharged by the plaintiff on the undertaking of a third person that he should be forthcoming, if necessary, for a second execution, the court held that the undertaking was valid, and that the plaintiff, notwithstanding the discharge, might arrest the defendant for any subsequent instalment (*q*). And by the statute of 8 & 9 *W.* 3, *c.* 11, where breaches are assigned in debt on bond conditioned to perform covenants, the defendant may, in case of further breaches, be taken in execution a second time upon the original judgment (*r*).

It may be also here observed, that the holder of a bill of exchange may sue a prior indorser, notwithstanding he has ineffectually taken in execution the body of a subsequent indorser, and afterwards set him at liberty (*s*).

Irregular Ca. Sa.

Irregular Ca. Sa.] As to this, see *ante*, 417.

6. *Execution for the Defendant.*

6. Execution for Defendant.

If judgment be given for the defendant, he may have the same writs of execution for the amount of the costs awarded him, as the plaintiff might have had for his damages and costs, if he had judgment (*t*). And this, even though the plaintiff sue as executor (*u*). The defendant, however, must bear the expenses of the execution, and cannot levy the same on the plaintiff (*x*). Except perhaps where the plaintiff, in consideration of forbearance or the like, expressly agrees that they may be levied.

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Sect. 5.

Entry of Satisfaction on the Roll.

Entry of Satisfaction on the Roll.

As soon as the judgment is satisfied, by payment, levy, or otherwise, the plaintiff, if required, must give the defendant a warrant or authority, directed to some attorney of the court in which the judgment is, authorizing him to enter up satisfaction on the roll (*y*). This warrant must be upon a 20*s*. stamp, and may be had at the stationer's; *fill it*

(*p*) *Baker* v. *Ridgway*, 9 Moore. 122

(*q*) *Atkinson* v. *Bayntun*, 1 Scott, 404; 1 Hodges, 7; 1 Bing. N C. 444, *S. C.*

(*r*) *Per Tindal*, C. J. Ib

(*s*) *Hayling* v. *Mulhall*, 2 Bla. Rep. 1235: *Smith* v. *Knox*, 3 Esp. 46: see *English* v. *Darley*, 2 B. & P. 62: *Claridge* v. *Dalton*, 4 M. & Sel. 226.

(*t*) 23 H. 8, c. 15, s. 1: 4 J. 1, c. 3, s. 2. See the forms of writs of execution after verdict for defendant, Chit. Forms, 201 to 203.

(*u*) 3 & 4 W. 4, c. 42.

(*x*) *Ante*, 415.

(*y*) In *Wood* v. *Hurd*, 2 Bing N. C. 45; 3 Scott, 368; 5 Dowl. 188, *S. C.*; it was held by the Court of Common Pleas that this warrant was indispensably requisite *up* (*z*), *and get it executed in the same manner as any other warrant of attorney.* It may be directed to any attorney without an order to change (*a*). Then, in the Court of Q. B., *make out a satisfaction-piece upon a piece of unstamped parchment, like a bail-piece* (*z*), *and take it and the warrant to one of the masters, who will enter the same in his book of remembrances, and keep the satisfaction-piece, for the purpose of being entered on the roll, which must of course be previously made up and carried in* (*b*). In the Common Pleas, *after filling up and executing the warrant as above directed, the roll must be carried in, if that be not already done. Mark in the margin of the warrant the number of the roll,* "Roll 473," *and the day judgment was signed. Then, if it be term time, desire one of the masters to carry the roll into court, and he will there enter satisfaction on the roll; pay him his fees. But if in vacation, apply to one of the masters, or his clerk, who will prepare a judge's fiat, and attend with you before a judge, and get it signed* (*c*). *He will then enter satisfaction on the roll.*

Where a Warrant cannot be obtained.

Where a judgment has been satisfied and the usual warrant to enter up satisfaction on the roll cannot be obtained, on account of the plaintiff's absence, death, or the like, the defendant must clearly prove that the judgment is satisfied before satisfaction can be entered (*d*). Where the plaintiff was dead, and administration had not been taken out, the court refused to allow satisfaction to be entered, though the defendant's attorney swore that the plaintiff had received a sum from the defendant in full satisfaction (*e*). And the Court of C. P. refused to order satisfaction on the roll in a case where four out of five plaintiffs had given their consent, although the fifth plaintiff was resident in America and could not be found, and the attorney for the plaintiffs consented (*f*).

In Trover for Deeds, on Delivery of Deeds, &c.

In trover for title-deeds, the Court of Queen's Bench in one case allowed satisfaction to be entered upon the defendants giving up the deeds, paying costs as between attorney and client, and putting the plaintiff in as good a position as he was in before the conversion (*g*).

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Sect. 6.

Setting off Judgments, Costs, &c.

Setting off Judgments of superior Courts, 457.
Setting off Interlocutory Costs, and Monies in Q. B., C. P., and Exch., 459.
Setting off Costs in other Cases, 460.

Judgments of superior Courts.

Setting off Judgments of the Superior Courts.] Where there are cross judgments in the same, or different actions in

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in that court, it being the invariable practice to require it. It was, however, said by counsel on the application, that the production of this warrant was not required in the other courts.

(*z*) See the forms, Chit. Forms, 203.

(*a*) *Marr* v. *Smith*, 4 B. & Ald. 466.

(*b*) See form of entry on the roll, Chit. Forms, 204. When a *cognovit* or warrant of attorney has been filed as directed by the 3 G. 4, c. 39, if the debt for which security was given be satisfied or discharged, a judge is authorized to order a memorandum of satisfaction to be indorsed on such *cognovit* or warrant, or on the copy filed. (3 G. 4, c. 39, s. 8: see *post*, Vol. II. Book II. Part IV. Ch. 1).

(*c*) See the form of the fiat, Chit. Forms.

(*d*) *De Bastos* v. *Willmott*, 1 Hodges, 15: and see *Speach* v. *Slade*, 8 Moore, 461: Tidd, 9th ed. 1041.

(*e*) *Speach* v. *Slade*, 8 Moore, 461.

(*f*) *Davis* v. *Jones*, 5 Dowl. 503.

(*g*) *Combe* v. *Sandon*, 1 D. & R. 281.

the same, or different courts (*h*) between parties substantially the same, the one may be set off against the other. This may be effected by applying to the court in which the opposite party has obtained judgment for a rule to shew cause why satisfaction should not be entered on the roll on the applicant's acknowledging satisfaction for the same amount on his judgment, (or *vice versâ*, if the applicant's judgment be less (*i*)), the other party's attorney being first satisfied his lien upon the judgment for costs in that particular suit (*k*). This has been allowed, although the applicant had the other party in custody, in execution on his own judgment (*l*). And the same, although the opposite party was dead, and her administrator had issued an elegit and commenced an ejectment thereon to enforce the judgment (*m*).

Costs of successful Defendant.

In an action against two, if the plaintiff succeed against one, and fail as against the other, the defendant who fails may set off the costs of the defendant who succeeded (*n*). In a case where an action of trespass was brought against three, and two of them allowed judgment to go by default, and the third went to trial and obtained a verdict, the court, upon application of the third defendant, and upon affidavit that the other two had acted under his authority, compelled the plaintiff to set off the damages and costs he had recovered against the two defendants, against the costs he was liable to pay to the third (*o*). It may be well to observe here, that where there are several defendants, and one alone employs an attorney for all, the others are not entitled to claim any costs, nor of course to set them off (*p*).

The Proceedings need not be between the same Parties.

It is not necessary that the two proceedings in which the costs, &c., have been incurred, should be between exactly the same parties, as in the case of a set-off under the statute of set-off, provided the funds to be ultimately resorted to in both actions be substantially the same (*q*). Where B. brought an action against A., and recovered, and A. brought an action against B. and C., and recovered, the court, upon the application of A., allowed him to set off the damages and costs recovered by him in his action against B. and C., against the damages and costs recovered by B. in his action against him, subject to the lien of B.'s attorney (*r*). So, where A. brought an action against B., which was defended at the joint expense of C. and D., (they being the parties really interested), and A. was non-suited; and C. brought an action against A., and was nonsuited; the court, upon the application of C., allowed him to set off the costs of the first nonsuit against the costs of the second (*s*). So, where upon two policies of insurance, underwritten by the same persons for A., two sets of actions were brought, and each set was consolidated; and A., the plaintiff, was entitled to costs in one, and had to pay costs in the other; the court allowed the costs in the latter action to be set off against the costs in the former, as in substance, under the

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(*h*) See *Brydges* v. *Smith*, 8 Bing. 29: *Murphy* v. *Cunningham*, 1 Anst. 271.

(*i*) See *Barker* v. *Braham*, 2 W. Bl. 869; 3 Wils. 396, *S. C.*

(*k*) See *ante*, 88: *Middleton* v. *Hill*, 1 M. & Sel. 240: Tidd, 339.

(*l*) *Simpson* v. *Hanley*, 1 M. & Sel. 696.

(*m*) *Brydges* v. *Smith*, 8 Bing. 29.

(*n*) *George* v. *Elston*, 1 Scott, 518; 3 Dowl. 419; 1 Hodges, 63; 1 Bing. N. C. 513, *S. C.*

(*o*) *Schoole* v. *Noble*, 1 H. Bl. 23: and see *George* v. *Elston*, 1 Scott, 518; 3 Dowl. 419; 1 Hodges, 63; 1 Bing. N. C. 513, *S. C.*

(*p*) *Starling* v. *Cogent*, 3 Dowl. 782.

(*q*) See *per Tindal*, C. J., 1 Dowl. 250.

(*r*) *Mitchell* v. *Oldfield*, 4 T. R. 123: and see *Glaister* v. *Hewer*, 8 T. R. 69.

(*s*) *O'Connor* v. *Murphy*, 1 H. Bl. 657.

consolidation rule, the same persons were the defendants in both, although in form one action appeared to be against B., and the other against C. (*t*). But the funds to be ultimately resorted to in both actions must be substantially the same, otherwise the set-off will not be allowed. Therefore, the court have refused to allow the damages and costs in an action by A. against B. and C. to be set off against damages and costs recovered by the assignees of B. against A. (*u*). So the costs of a judgment against the plaintiff after he has become bankrupt, cannot be set off against the costs of an action by the bankrupt's assignees against the defendant (*x*). And where the plaintiff sued out a *fi. fa.* and the sheriff under an indemnity from trustees to whom the defendant had previously assigned all his effects returned *nulla bona;* the plaintiff sued the sheriff for a false return, and the sheriff obtained a verdict; the court refused to allow the plaintiff's judgment to be set off against the sheriff's (*y*).

The Judgment set off must be in esse at the time.

The judgment offered to be set off must in general be actually in existence at the time of making the application, for the court will not allow costs to which a party may probably be entitled in one action, to be set off against costs to which he is absolutely liable in another. Therefore, the amount of a verdict on which a rule for a new trial is pending, cannot be set off against the amount of a judgment (*z*). And the court of Common Pleas refused to set off a sum payable *in futuro* against costs payable *in presenti* under the same award (*a*). And the Court of Exchequer refused to stay proceedings for the purpose of allowing such costs to be set off when they should become due (*b*). Perhaps, however, under special circumstances, such as the insolvency of the opposite party, the court might suspend execution by him until the right of the applicant to costs in the other action should be decided (*c*).

Attorney's Lien.

As to the attorney's lien on setting off judgments, see title "Attornies" (*ante*, 88).

Setting off Interlocutory Costs and Monies in Q. B., C. P., and Exch.

Setting off Interlocutory Costs and Monies in Q. B., C. P., and Exch.] Where costs accrue to both parties in the same cause, upon *interlocutory* proceedings, or to one upon some *interlocutory* proceeding, and to the other upon verdict, the court will allow the costs in the one case to be set off against the costs, &c., in the other; and without satisfying the attorney's lien, for the attorney has a lien only on the balance which is ultimately to be paid to his client in that particular suit (*d*). And in general, *interlocutory* costs may be set off against *final* costs, where the payment of them, at the time they were adjudged, is not, strictly speaking, a condition precedent to other proceedings (*e*).

(*t*) *Nunez* v. *Modizliani*, 1 H. Bl. 217.

(*u*) *Doe* v. *Darnton*, 3 East, 149.

(*x*) *West* v. *Pryce*, 10 Moore, 154; 2 Bing. 455, *S. C.*

(*y*) *Hewitt* v. *Pigott*, 1 Dowl. 250: 1 M. & Scott, 122; 8 Bing. 61, *S. C.*

(*z*) *Masterman* v. *Malin*, 5 Moo. & P. 324; 7 Bing. 435; 1 Dowl. 222, *S. C.*: *Garrick* v. *Jones*, 2 Dowl. 157: and see *Philipson* v. *Caldwell*, 6 Taunt. 176.

(*a*) *Young* v. *Gye*, 10 Moore, 198.

(*b*) *Johnson* v. *Lakeman*, 2 Dowl. 646: see *Doe Martin* v. *Pucker*, 2 C. & M. 457; 4 Tyr. 144, *S. C.*

(*c*) 7 Bing. 435, marginal note. See in equity *Taylor* v. *Cooke*, 1 Younge, 201.

(*d*) See *ante*, 88: *Stevens* v. *Weston*, 3 B. & C. 535; 5 D. & R. 399, *S. C.*: *Vansandau* v. *Burt*, 1 D. & R. 168: *Howell* v. *Harding*, 8 East, 362.

(*e*) *Holliday* v. *Lawes*, 3 Bing. N. C. 774: *Doe* v. *Carter*, 1 M. & Scott, 516; 8 Bing. 330; 1 Dowl. 269, *S. C.*: see *Abernethy* v. *Paton*, 5 Bing. N. C. 276.

A defendant has been allowed to set off costs for not proceeding to trial, when taxed, against damages ultimately recovered by the plaintiff (*f*). So, where a plaintiff, after giving notice of trial, withdrew his record, and the defendant obtained a rule for the payment of the costs of the day which were taxed; at the next assizes the plaintiff obtained a verdict, and a new trial was afterwards granted on payment of costs; the court held that the defendant might set off the costs due to him against those payable on the rule for the new trial (*g*). When, by an order of *Nisi Prius*, a verdict is entered in favour of the plaintiff for nominal damages and the costs of the action, and the plaintiff is to pay the defendant a certain sum, that sum may be set off against the costs in the cause (*h*). But where a defendant was, by a judge's order, allowed to proceed to trial upon payment to the plaintiff of a certain sum of money, with costs up to the date of the order, and the plaintiff consented to the trial proceeding on those terms, before the costs had been paid; the court held that the defendant, having obtained a verdict, was bound to pay those costs, and could not set them off against the costs afterwards taxed for him on the *postea* (*i*). And where a plaintiff, in returning home from the trial of his cause, was arrested for the costs of a nonsuit in another action, and paid a sum of money to be let free, the court ordered the defendant to refund that sum, and refused to allow his costs to be set off against it (*k*).

Setting off Costs in other Cases.

In Equity.

Setting off Costs in other Cases.] Where a bill in equity was dismissed with costs, and the plaintiff brought an action in this court for the same cause and recovered, the court, upon application of the defendant, ordered that the costs in equity should be set off against the damages and costs in law, the lien of the plaintiff's attorney being first satisfied (*l*). The Court of Exchequer, however, have refused to allow costs in Chancery to be set off against costs of a *rule* in that court (*m*).

Of Awards.

A set-off will also be allowed, subject to the attorney's lien, where the rights of the parties arise from separate awards (*n*), or where the right of one arises from an action and the other from an award (*o*).

In Lord Mayor's Court and of Indictment.

Even where the costs on one side were costs incurred in the mayor's court in London (*p*), or the costs of an indictment (*q*), the Court of Common Pleas have allowed them to be set off.

(*f*) *Lang* v. *Webber*, 1 Price, 375.

(*g*) *Doe Dangerfield* v. *Allsop*, 9 B. & C. 760.

(*h*) *Newton* v. *Newton*, 1 M. & Scott, 366; 8 Bing. 202; 1 Dowl. 264, *S. C.*: see *Doe Swinton* v. *Sinclair*, 5 Dowl. 26, *per cur.*

(*i*) *Aspinall* v. *Stamp*, 3 B. & C. 108; 4 D. & R. 716, *S. C.* The distinction between this case and that in 9 B. & C. 760, seems to be, that here the plaintiff's costs sought to be set off had been incurred at the time when the order was made.

(*k*) *Pitt* v. *Coombs*, 1 Har. & W. 13.

(*l*) *Harrison* v. *Bainbridge*, 4 D. & R. 363; 2 B. & C. 800, *S. C.*: and see *Hall* v. *Ody*, 2 B. & P. 28: *Emdin* v. *Darley*, 1 New Rep. 22: *Webber* v. *Nicholas*, 12 Moore, 87; 4 Bing. 16, *S. C.* But in a recent case in the Common Pleas, it was held that an application to set off a portion of a debt secured by a judgment in that court against the costs, incurred by the dismissal of petitions presented by the plaintiff against the defendant in the Court of Bankruptcy, must be made to the latter court. (*Woodroffe* v. *Wootton*, 6 Law, J., N. S. 176). See, as to lien on the costs in equity, *Smith* v. *Brocklesby*, 1 Anst. 621.

(*m*) *Wenham* v. *Fowle*, 2 Dowl. 444.

(*n*) MS., E. 1814.

(*o*) *Doe Swinton* v. *Sinclair*, 5 Dowl. 26: *Caddell* v. *Smart*, 4 Dowl. 760.

(*p*) *Emerson* v. *Dashley*, 2 H. Bl. 253.

(*q*) *Emdin* v. *Darley*, 1 N. R. 22.

BOOK I.

PART II.

BAILABLE PROCEEDINGS.

INTRODUCTION.

Changes effected in Bailable Proceedings, &c., by 1 & 2 V. c. 110.

THE act for abolishing arrest on mesne process in civil actions, except in certain cases, (1 & 2 *V. c.* 110), has introduced some important changes into the law relative to bailable proceedings.

Arrest on Mesne Process abolished except in certain Cases.

The 1st section of the act, after reciting that "the present power of arrest upon mesne process is unnecessarily extensive and severe, and ought to be relaxed," enacts, "that from and after the time appointed for the commencement of this act, (1st October, 1838), no person shall be arrested upon mesne process in any civil action in any inferior court whatsoever, or (except in the cases and in the manner hereinafter provided for) in any superior court."

All Actions to be commenced by Writ of Summons.

The 2nd section enacts, "that all personal actions in her majesty's superior courts of law at Westminster shall be commenced by writ of summons." So that the writ of *capias*, as a means of commencing an action, is now altogether abolished, except in case of proceeding against an insolvent under the 85th section (*r*), in which case indeed it is in effect for the reasons mentioned in a previous part of this work (*s*), rather a mode of keeping the insolvent in custody, than of commencing an action against him, though it may be used for the latter purpose.

A Judge may order Defendant to be Arrested.

A new writ of *capias* has, however, been introduced by the 3rd section of the act, an order for issuing which, and arresting and holding the defendant to bail under it, may be obtained at any time after the commencement of the suit and before final judgment, in all actions in which the defendant was previously liable to arrest, (whether with or without a judge's order), on satisfying a judge, by affidavit, that the cause of action amounts to 20*l.* or upwards, and that the debtor is about to quit England, unless forthwith apprehended. On this *capias* the defendant may be arrested and held to bail in nearly the same way as under the former writ of *capias*.

Certain Prisoners entitled to be Discharged.

The 7th section, which will be presently more fully noticed, entitles all prisoners in custody on mesne process on 1st October, 1838, who had not filed petitions under the Insolvent Act, to be discharged.

(*r*) See *Turnor* v. *Darnell*, 7 Dowl. 346; 5 M. & W. 28, *S. C.*

(*s*) *Ante*, 134, 135.

It may not be amiss here to state the considerations which should be attended to in proceedings to hold the defendant to bail.

Points to be attended to in Proceedings to hold the Defendant to Bail.

In the first place, the practitioner should ascertain whether the defendant be or be not privileged from arrest. This privilege is treated of in the FIRST Chapter of this Part. The next consideration will be, whether the cause of action be such for which he may be arrested. This will form the subject of the SECOND Chapter. Thirdly, must be considered whether the facts of the case are such as to afford a probable cause for believing that the defendant is about to quit England unless he be forthwith apprehended. This subject will be considered when treating of the affidavit to hold to bail, in the THIRD Chapter. If the defendant be not privileged, and the cause of action and facts of the case afford ground for an arrest, then the practitioner should prepare the affidavits necessary to support an application to a judge at chambers for an order to arrest the defendant. The requisites of these affidavits will be stated in the THIRD Chapter. An order to arrest the defendant should then be obtained at chambers, as pointed out in the FOURTH Chapter.

If the defendant be privileged, or if the cause of action be such that he ought not to have been arrested for it, or if he was not about to quit England, or if the affidavit be defective, then the defendant may get discharged out of custody, or may get the bail-bond (if any) cancelled. The law and practice on this subject will be found in the FIFTH Chapter of this Part.

The order to arrest the defendant being obtained, the next proceeding to be considered is the *process* by which you may arrest the proposed defendant. The nature and form of such process, and the mode of issuing, will form the subject of the SIXTH Chapter.

These two proceedings having been adopted, the *third* proceeding to be considered is the *arrest* itself; the mode of effecting which will form the subject of the SEVENTH Chapter.

After a defendant has been arrested, he is either *discharged*, upon giving a bail-bond to the sheriff, or perhaps upon giving security to the plaintiff for his appearance, or upon depositing with the sheriff the sum sworn and a sum to answer the costs, or without any bail or security, or he escapes, or is rescued, or is lodged in the prison of the county, &c. These several subjects will be considered in the EIGHTH Chapter.

The next proceeding to be considered, in order to bring the defendant before the court, is the *proceeding against the sheriff*, by ruling him to return the writ, and to bring in the body, which if he fail to do, an attachment may be issued against him. These proceedings will form the subject of the NINTH Chapter.

If the defendant, having given a bail-bond to answer for his appearance, (*i. e.* to put in and perfect bail above), as required by the writ, fail to do so, you (the practitioner on the plaintiff's part) are next to consider whether you will not, as you may generally do, take an assignment of the bail-bond, and proceed on it against the defendant, and his sureties who joined with him in it. The proceedings on this bond, as well by the plaintiff in the action when he has taken an assignment of it, as by the sheriff himself when the plaintiff has not so taken it, will be treated of in the TENTH Chapter.

If proceedings be adopted by the plaintiff, either against the sheriff or upon the bail-bond, you (acting for the sheriff, or the sureties in the bond, or the defendant) are to consider whether they may not be *set aside* for some irregularity, or upon payment of costs, &c., if they be regular. The law and practice on this subject will be found in the ELEVENTH Chapter.

Next must be considered the putting in and perfecting *special bail*, (or, as it is sometimes called, *bail above*), or paying money into court in lieu of it. This will be found treated of in the TWELFTH Chapter of this Part.

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CHAPTER I.

PRIVILEGE FROM BEING HOLDEN TO BAIL.

1. *Consequences of the Privilege*, 463.
2. *Who Privileged.*
    - *The Royal Family, &c.*, 464.
    - *Peers, id.*
    - *Members of the House of Commons*, 465.
    - *Ambassadors and their Servants*, 466.
    - *Aliens*, 467.
    - *The Judges, Sergeants, Barristers, &c.*, 467.
    - *Attornies and Officers of the Court*, 468.
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2. *Who Privileged*—continued.
    - *Bankrupts*, 470.
    - *Insolvent Debtors*, 471.
    - *Baron and Feme, id.*
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    - *Executors, Administrators, and Heirs, id.*
    - *Infants and Lunatics, id.*
    - *Seamen*, 474.
    - *Soldiers and Marines*, 475.
    - *Where the Defendant has been before arrested for same cause*, 476.
    - *Where Defendant has been wrongfully arrested or detained*, 479.

1. *Consequences of the Privilege.*

Consequences of Privilege of not being holden to Bail.

THERE are some cases, where the defendant, by reason of the dignity of his station, or of other circumstances, is privileged from arrest. Where a defendant is thus privileged from arrest, if he be arrested in contravention of such privilege, the court, or a judge at chambers, will in general order him to be discharged out of custody; and it is said that an action for false imprisonment lies against a sheriff for refusing to discharge a defendant after a judge's order for that purpose (*t*). But trespass is not maintainable for merely holding a privileged person to bail; though, if the party were aware of the privilege, an action on the case might, perhaps, be maintained (*u*). The order for discharge on the ground of privilege only extends to the action mentioned in it, and the sheriff is justified in detaining the prisoner on writs at the suit of other parties which were in his hands at the time of arrest, and not included in the

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(*t*) 1 Chit. Rep. 245: see, however, *Watson* v. *Carroll*, 4 M. & W. 592; 7 Dowl. 217, *S. C.*

(*u*) See *Noel* v. *Isaac*, 1 C., M. & R. 753: *Whalley* v. *Pepper*, 7 C. & P. 506.

order (*x*). The order for the discharge may be made with or without the condition, that the person discharged shall cause a common appearance to be entered (*y*). The order to discharge a party arrested, while attending judicial proceedings, may be made either by the court in which the cause is pending, or that out of which the process issued (*z*).

The cases in which this privilege is enjoyed shall be considered under the following heads. The cases in which a party has a mere *temporary* or *local* privilege from arrest will be treated of while considering the arrest itself.

2. Who privileged.

2. *Who privileged from being holden to Bail.*

The Royal Family, &c.

The Royal Family, &c.] The royal family cannot be holden to bail (*a*). Also the servants in ordinary or menial servants of the king, or of a queen regnant, cannot be arrested (*b*), even although they be in trade (*c*), unless upon notice first given to, and leave obtained, from the lord chamberlain of the royal household (*d*). A chaplain to the king is privileged (*e*); so is a lord of the bedchamber (*f*); so is a page of the presence in ordinary (*g*); so is a clerk of the kitchen (*h*); so is a candle and fire lighter to the yeomen of the guards at St. James's Palace (*i*); but this privilege does not extend to the servants of a queen consort, queen dowager, &c. (*k*), or to a gentleman of the queen's privy chamber (*l*); or to the fort major, or deputy governor of the Tower of London (*m*); or, as it seems, to the wardens of the Tower (*n*); or to a herald (*o*). The reason for the privilege is, that their continual service and attendance upon the royal person is necessary (*p*). If it be doubtful whether the party is entitled to be privileged from arrest, the court will not discharge him on motion, but leave him to sue out his writ of privilege (*q*).

Peers.

Peers.] Peers of the realm of England are privileged from arrest, both upon mesne process and in execution (*r*). But, it seems, a peer by patent, if sued by his christian and surname, and not by his title of nobility, cannot claim this privilege, if he have never sat in parliament (*s*). Peeresses are also entitled to the same privilege, whether they are peeresses by

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(*x*) *Watson* v. *Carroll*, 4 M. & W. 592; 7 Dowl. 217.

(*y*) Bagley's Pract. 109.

(*z*) *Attorney-General* v. *Skinners' Company*, 1 Ccop. 1.

(*a*) 2 Inst. 50.

(*b*) *Rex* v. *Moulton*, 2 Keb. 3: *R.* v. *Frampton*, 485; T. Raym. 152: *Bartlett* v. *Hebbes*, 5 T. R. 686: and see *R.* v. *Stobbs*, 3 T. R. 735.

(*c*) *King* v. *Foster*, 2 Taunt. 167.

(*d*) See Tidd, Pract. 9th ed. 190.

(*e*) *Pain* v. *Dibdin*, 1 Gale, 58; 1 C., M. & R. 821; 3 Dowl. 448, *S. C.*

(*f*) *Aldridge* v. *Barry*, 3 Dowl. 450, n.

(*g*) *Reynolds* v. *Pocock*, 4 M. & W. 371; 7 Dowl. 4, *S. C.*

(*h*) *Bartlett* v. *Hebbes*, 5 T. R. 686.

(*i*) *Hatton* v. *Hopkins*, 6 M. & Sel. 271.

(*k*) *Starkie's case*, 1 Keb. 842: *Rex & Capel* v. *Baud*, Id. 877.

(*l*) *Luntley* v. *Battine*, 2 B. & Ald. 234: *Tapley* v. *Battine*, 1 D. & R. 79.

(*m*) *Batson* v. *M'Lean*, 2 Chit. Rep. 48: *Sard* v. *Forrest*, 1 B. & C 189: 2 D. & R. 250, *S. C.* *Semble*, that he cannot be arrested within the Tower unless by the Governor's leave.

(*n*) *Bidgood* v. *Davies*, 6 B. & C. 84: 9 D. & R. 153, *S. C.*: see *Bell* v. *Jacobs*, 1 Moo & P. 309; 4 Bing. 523, *S. C.*: Tidd, 9th ed. 190: see last note.

(*o*) *Leslie* v. *Disney*, 1 C., M. & R. 578; 3 Dowl. 437, *S. C.*

(*p*) 2 Inst. 631: and see Chitty, jun., Prerog. Cr. 374.

(*q*) *Luntley* v. *Battine*, 2 B. & Ald. 234: *Pitt's case*, 2 Stra. 985: *Leslie* v. *Disney*, 1 C., M. & R. 578; 3 Dowl. 437, *S. C.* In this latter case, *Bosanquet*, J., at chambers, discharged the defendant out of custody on the ground of his privilege. His Lordship did so in several other actions against the same defendant, after consulting with *Patteson*, J.; both of them considering that there was no writ of privilege to be had in such a case.

(*r*) *Countess of Rutland's case*, 6 Co. 52: *Earl of Shrewsbury's case*, 9 Co. 49 a, 68 a: *Foster* v. *Jackson*, Hobart, 61: *Earl of Lonsdale* v. *Littledale*, 2 H. Bl. 272: *Couche* v. Lord *Arundel*, 3 East, 127.

(*s*) Lord *Banbury's case*, 2 L. Raym. 1247; 2 Salk. 512, *S. C.*

birth, by creation, or by marriage (*t*), but if a peeress by marriage afterwards marry a commoner, she thereby loses all her privileges, as well as her title of nobility (*u*). This privilege from arrest is extended to Scotch peers and peeresses by stat. 5 *A. c.* 8, *art.* 23, whether such peers have been chosen to sit in parliament or not (*x*); and to Irish peers and peeresses, by stat. 39 & 40 *G.* 3, *c.* 67, *art.* 4 (*y*). If arrested, the court or a judge will discharge them on application for that purpose; the privilege especially in the case of an Irish peer, being *primâ facie* made out (*z*); and the court or judge, on such application, will not go into the defendant's right to his title: being a peer *de facto*, and having acted as such, or voted at the election of Scotch peers, will suffice to entitle him to his discharge (*a*). In general, the court will not put the party to the necessity of entering an appearance (*b*). It seems the sheriff would not be a trespasser in making the arrest (*c*).

The servants of peers also were formerly privileged from arrest; but this was abolished by stat. 10 *G.* 3, *c.* 50, *s.* 10 (*d*).

Members of the House of Commons.

Members of the House of Commons.] Members of the House of Commons are privileged from arrest during the session of parliament, and for a convenient time before and after it (*e*). It is said that the privilege *eundo et redeundo* continues for forty days (*f*); which seems, however, to have been doubted (*g*). The House of Commons, indeed, have always avoided deciding the limits of their privilege in this respect; and the question as to the extent of it can perhaps be determined by them only. In 1586, when Mr. Martin, a member, was arrested twenty days before the meeting of parliament, the house ordered him to be discharged; but when the question was put, whether they should limit a time for the continuance of this privilege, the proposition was negatived (*h*). It is clear, however, that the members enjoy this privilege after a dissolution, as well as after a prorogation (*i*).

Discharge of, from Arrest.

If a member be arrested during the period of privilege, the court or a judge will discharge him on application for that purpose, and will not oblige him to sue out a writ of privilege (*i*). He must, however, in general, produce the return of his writ of election (*l*); affidavits of that fact not being deemed sufficient (*m*).

Members of Convocation.

Members of convocation seem also to enjoy the same privilege, in this respect, as members of the House of Commons (*n*).

(*t*) *Countess of Rutland's case*, 6 Co. 52: *Huntingdon's case*, Vent. 298: see *Countess Rivers' case*, Style, 252, *contra*.

(*u*) Co. Lit. 16. b.

(*x*) *Lord Mordington's case*, Fortesc. 165.

(*y*) *Coates* v. *Lord Hawarden*, 7 B. & C. 388; 1 M. & R. 110, *S. C.*

(*z*) *Storey* v. *Birmingham*, 3 D. & R. 488. In *Davies* v. *Lord Rendlesham*, 1 Moore, 410: 7 Taunt. 679, *S. C.*, where an Irish peer was sued by bill, the Court of Common Pleas refused to set aside the proceedings, but left him to plead his privilege.

(*a*) *Digby* v. *Lord Stirling*, a Scotch peer, 8 Bing. 55; 1 M. & Scott, 116; 1 Dowl. 248, *S. C.*

(*b*) *Holiday* v. *Pitt*, 2 Str. 990.

(*c*) *Tarlton* v. *Fisher*, Dougl. 671.

(*d*) See *Connelly* v. *Smith*, 1 Chit. Rep. 83: *Chester* v. *Upsdale*, 1 Wils. 278.

(*e*) *Executors of Skewys* v. *Chamond*, 1 Dyer, 60: *Holiday* v. *Pitt*, 2 Str. 985: *Phillips* v. *Wellesley*, 1 Dowl. 9: see 1 Bla. Com. by Chitty, 165.

(*f*) *Earl of Athol* v. *Earl of Derby*, 2 Lev. 72; 1 Brownl. 91.

(*g*) *Barnes* v. *Ward*, 1 Sid. 29.

(*h*) Scobell, 109, 110.

(*i*) *Holiday* v. *Pitt*, 2 Str. 985; Fortesc. 159; 2 Comyns, 444, *S. C.*

(*l*) Id.: and *Fenwick* v. *Fenwick*, 2 W. Bl. 788.

(*m*) See also Dyer, 59 b, 60 a.

(*n*) 8 H. 6, c. 1: 1 Eq. Ca. Abr. 349,

Candidates and Voters at Elections.

It seems that a candidate to be elected a member of the House of Commons is not privileged from arrest, either in going to, remaining at, or returning from the election (*o*); and it would seem that voters are not privileged.

Ambassadors and their Servants.

Ambassadors and their Servants.] Ambassadors and other public ministers of foreign princes or states, at this court, and their "domestics and domestic servants" are privileged from arrest; and all process, &c., against them for that purpose is void (*p*). If a person thus privileged be arrested, the court or a judge at chambers will order him to be discharged without entering an appearance; or, if he have given a bail-bond, they will order it to be given up to be cancelled (*q*). This statute, however, does not extend, generally speaking, to consuls or their servants (*r*); nor to such of the domestic servants of an ambassador, &c., as are subject to the bankrupt laws (*s*); nor to persons holding situations inconsistent with the office of such a domestic (*t*), nor to any person colourably only, and not *bonâ fide* in the service of such ambassador (*u*); nor to a courier or messenger, for he is not a domestic (*x*). But it is not necessary that the servant should reside in the ambassador's house (*y*), provided he do the duties of his office there (*z*): and it seems that a chorister, *bonâ fide* employed by an ambassador in the performance of religious worship in his chapel, is thus privileged under the above statute (*a*) nor is it material whether the servant be a foreigner or a native of this country (*b*).

Punishment of those who Arrest.

The plaintiff, attorney, officer, and others concerned in suing out process against such public ministers or their servants shall, upon a summary conviction (*c*) before the court appointed for that purpose by the statute, suffer such pains, penalties, and corporal punishment as to such court shall seem meet (*d*). Provided that no officer, &c., shall be so punished, unless the name of such servant have been registered at the office of the secretary of state, and from thence transmitted to the office of the sheriffs of London and Middlesex (*e*). But although the name of such person be regularly registered as the act directs, yet, if he be not in the *bonâ fide* and actual service of the ambassador, and such as the statute otherwise protects, he may be holden to bail, and the sheriff is bound to execute the process against him (*f*).

Sheriff refusing to Arrest.

If the sheriff refuse to execute process against a defendant,

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(*o*) See *London case*, 2 Peck, 268: Wordsworth on Elect. 234.

(*p*) 7 A. c. 12, s. 3.

(*q*) *Cross* v. *Talbot*, 8 Mod. 288. The privilege given by the act is the privilege of the ambassador and not of the servant. (*Fisher* v. *Begrez*, 2 C. & M. 240; 2 Dowl. 279, *S. C.*)

(*r*) *Viveash* v. *Becker*, 3 M. & Sel. 284.

(*s*) 7 A. c. 12, s. 5: and see Rep. Pract. C. B. 65, 134: *Toms* v. *Hammond*, Barnes, 370: *Cain* v. *Molineux*, Id. 374: *Triquet* v. *Bath*, 1 W. Bl. 471; 3 Burr. 1478, *S. C.*; Id. 1731.

(*t*) *Masters* v. *Manby*, 1 Burr. 401: *Darling* v. *Atkins*, 3 Wils. 33.

(*u*) *Malachi Carolina's case*, 1 Wils. 78: *Lockwood* v. *Coysgarne*, 3 Burr. 1676: *Flint* v. *De Logant*, Tidd, 9th ed. 191.

(*x*) *Deserisay* v. *O'Brien*, Barnes, 375.

(*y*) *Widmore* v. *Alvares*, Fitzg. 200: *Evans* v. *Higgs*, 2 Str. 797; 2 L. Raym. 1524, *S. C.*: see *Novello* v. *Toogood*, 1 B. & C. 544; 2 D. & R. 833, *S. C.*

(*z*) *Semb.* Id.

(*a*) *Fisher* v. *Begrez*, 1 C. & M. 117; 1 Dowl. 568, *S. C.* In the same case, where defendant was arrested on a *ca. sa.*, the court held he was not a *bonâ fide* servant, having, as it seems, become one purposely to avoid arrest, &c.

(*b*) *Lockwood* v. *Coysgarne*, 3 Burr. 1676.

(*c*) See *Triquet* v. *Bath*, 3 Burr. 1480.

(*d*) 7 A. c. 12, s. 4.

(*e*) Id. s. 5: see *Heathfield* v. *Chilton*, 4 Burr. 2017: *Hopkins* v. *Roebuck*, 3 T. R. 79. Secretary privileged, Id.

(*f*) *Seacomb* v. *Brownley*, 1 Wils. 20:

who claims this privilege, but who is not *bonâ fide* an ambassador's servant, and such as is protected by the statute, the plaintiff may maintain an action against him, or rule him to return the writ; and in either case the question of the defendant's title to the privilege he claims will be brought fully before the court.

Discharges of Ambassadors from Arrest.

If a servant of an ambassador be arrested, he, or the ambassador, or some one on behalf of the latter, may move the court or a judge for the servant to be discharged out of custody, or that the bail-bond (if he have given one) may be delivered up to be cancelled. The affidavit in support of such an application should shew that the application is made by the ambassador, or some one on his behalf, or else it should make out a clear case of a *bonâ fide* service as a *domestic* servant of such ambassador (*g*), and that he was such at the time of the arrest (*h*): it should also state the capacity in which he was hired (*i*), and that he performed the duties of such office (*j*). It would not suffice for him merely to state that his name was registered at the office of the secretary of state, and from thence transmitted to the sheriff's office (*k*).

Aliens.

Aliens.] Aliens are not in general privileged from arrest. Formerly, indeed, by several statutes (*l*), aliens who had fled to this country on account of the revolution or troubles in France, or in any country conquered by the arms of France, were prohibited from being holden to bail, or taken in execution, for any debt or other cause of action contracted or arising in parts beyond the seas other than the dominions of his majesty, whilst such aliens were not within the said dominions; and if any alien was arrested contrary thereto, he was to be discharged upon application to the court, or to a judge in vacation (*m*). These statutes, however, have been suffered to expire. One foreigner may arrest another in this country for a debt which accrued in a foreign country while both resided there, though the law of the foreign country does not allow of arrest for debt (*n*). In an action, however, between parties on a contract made between them in a foreign country, the contract is to be interpreted according to the foreign law, although the remedy must be taken according to the law here (*o*).

The Judges, Serjeants, Barristers, &c.

The Judges, Serjeants, Barristers, &c.] The judges and serjeants of the superior courts cannot, it seems, be holden to bail; but barristers may, unless they be going to attend, or be attending, or be returning from attending, a cause or proceeding in court. In one case, a barrister was discharged from

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Devallo v. *Plomer*, 3 Camp. 47.

(*g*) *Fisher* v. *Begrez*, 2 C. & M. 240; 2 Dowl. 279, *S. C.*: *Toms* v. *Hammond*, Barnes, 370: *English* v. *Caballero*, 3 D. & R. 25.

(*h*) *Heathfield* v. *Chilton*, 4 Bur. 2015.

(*i*) *Holmes* v. *Gordon*, Hardw. 3: *Widmore* v. *Alvares*, Fitzg. 200.

(*j*) *Seacomb* v. *Brownley*, 1 Wils. 20: *Malachi Carolina's case*, Id. 78: *Triquet* v. *Bath*, 3 Bur. 1478, 1731: *Potier* v. *Croza*, 1 W. Bl. 48: *Crosse* v. *Talbot*, 8 Mod. 288; 1 Barnard, 79, 80, 401.

(*k*) *Fisher* v. *Begrez*, 1 C. & M. 117; 1 Dowl. 588, *S. C.*

(*l*) 38 G. 3, c. 50, s. 9: 41 G. 3, c. 106: and 43 G. 3, c. 155, s. 28.

(*m*) See *Sinclair* v. *Phillippe*, 2 B. & P. 363.

(*n*) *De la Vega* v. *Vianna*, 1 B. & Ad. 284, overruling *Melan* v. *Duke de Fitz James*, 1 B. & P. 138: see also *Imlay* v. *Ellefsen*, 2 East, 455: *post*, 470.

(*o*) *De la Vega* v. *Vianna*, 1 B. & Ad. 284: *Mackenzie* v. *Macleod*, 10 Bing. 385: *Trimbey v. Vignier*, 1 Bing. N. S. 151.

arrest on the circuit (*p*); and, in another case, he was discharged from arrest while returning from sessions at which he had been engaged as counsel for a prisoner (*q*). The sheriff cannot take notice of their privilege (*r*).

Attornies and Officers of the Court.

Attornies and Officers of the Court.] The attornies and other officers of the court cannot be holden to bail (*s*): even where it appeared that a defendant, an attorney, was about to quit the kingdom, the court refused to order special bail (*t*). And an attorney does not lose this privilege from arrest, though he be sued jointly with a person not privileged (*u*). But an attorney who has left off practice (*x*), or who has not taken out his certificate for one whole year (*y*), or who is already in custody for debt (*z*), is not entitled to this privilege. And, therefore, it has been ruled, that an attorney, who had not practised for several years, might be arrested, though, after suing out the writ, and before the arrest, he re-commenced his practice and took out his certificate (*a*). An attorney's certificate having been, by his agent's mistake, filed in the Court of Queen's Bench, in which court he had not been admitted, instead of the Court of Common Pleas; and he, being sued for a debt in an inferior court, sued out a writ of privilege, the court ordered it to be quashed, and a *procedendo* issued (*b*). An attorney, however, does not lose his privilege in this respect by not taking out his certificate, unless he have omitted to take it out for one whole year (*c*). He is entitled to this privilege in a *qui tam* action, as well as in other actions (*d*); but not where the action is wholly at the Queen's suit (*e*). In the Exchequer of Pleas, it was holden that an attorney of the Queen's Bench or Common Pleas might have been arrested and held to bail at the suit of a sworn or side clerk of the Exchequer, upon a *capias* of privilege issuing out of that court (*f*); and the privileges of the sworn clerks not being abolished by the Administration of Justice Act (*g*), which opened the Court of Exchequer to all attornies, and gave leave to practise there without employing clerks in court, it was holden that they might, notwithstanding that act, have arrested other attornies who became indebted to them in the same way as they did before (*h*): but the writ of *capias* of privilege being now abolished, it may admit of doubt whether they would be permitted to arrest attornies of the other courts.

(*p*) *Hippesley's case*, 1 H. Bla. 636.

(*q*) *Lumley* v. ——, 2 Dowl. 51; 1 C. & M. 579, *S. C.*

(*r*) See Co. Lit. 131: *Duncombe* v. *Church*, 1 Salk. 1: *Tarlton* v. *Fisher*, Doug. 671: *Cameron* v. *Lightfoot*, 2 W. Bla. 1190: *Walters* v. *Rees*, 4 Moore, 36: *Watson* v. *Carroll*, 4 M. & W. 592.

(*s*) See *Brown's case*, 2 Salk. 544. In *Cottam* v. *Symonds*, E. T. 1837, where the defendant, who was the bag-bearer of the Court of Exchequer, was arrested on mesne process, the court discharged him out of custody.

(*t*) *Redman's case*, 1 Mod. 10.

(*u*) *Pitt* or *Keep* v. *Pocock* or *Biggs*, 2 C. & M. 146; 2 Dowl. 278, *S. C.*: *vide* the prior decisions, *Branthwait* v. *Blackerby*, 2 Salk. 544; Dyer, 277: *Ramsbottom* v. *Harcourt*, 4 M. & Sel. 585: *Walker* v. *Rushbury*, 9 Price, 16: *Bowyer* v. *Hoskins*, 1 Y. & J. 199.

(*x*) *Goldsmith* v. *Bayard*, 2 Wils. 232: *Goodwin* v. *Gibbons*, 4 Burr. 2109: *Dyson* v. *Birch*, 1 B. & P. 4: *Brooke* v. *Bryant*, 7 T. R. 25: *Anon.*, 1 Dowl. 208, in which it was held, that a single instance of practice was not sufficient to entitle him to his privileges.

(*y*) *Brooke* v. *Bryant*, 7 T. R. 25.

(*z*) *Byles* v. *Wilton*, 4 B. & Ald. 88.

(*a*) *Brooke* v. *Bryant*, 7 T. R. 25; *Fairman* v. *Bryant*, Id. 26.

(*b*) *Nixon* v. *Hewitt*, 10 Moore, 270.

(*c*) See *Skirrow* v. *Tagg*, 5 M. & Sel. 281: and *ante*, 48.

(*d*) *Britten* v. *Teasdaile*, Barnes, 48.

(*e*) 2 Ro. Abr. 274.

(*f*) *Walker* v. *Rushbury*, 9 Price, 16: *Bowyer* v. *Hoskins*, 1 Y. & J. 199.

(*g*) 11 G. 4 & 1 W. 4, c. 70, s. 10.

(*h*) *Stokes* v. *White*, 2 Dowl. 703; 1 C. M. & R. 223; 4 Tyr. 786, *S. C.*

Discharge of Attornies from Arrest.

If an attorney of the Court of Queen's Bench be arrested by virtue of process issuing thence, the court will, on motion, or a judge in vacation, on summons, order him to be discharged out of custody, on entering an appearance (*i*). But before 1 & 2 *V. c.* 110, if he were sued in another court, or the attorney of another court were sued in the Court of Queen's Bench and arrested, he must have put in bail, sued out his writ of privilege from the court in which he was an attorney, and pleaded it in abatement (*j*). And, in a case where an attorney of the Queen's Bench had been arrested on process issuing out of the Common Pleas, it was held, that the former court could not relieve him summarily (*k*). It may be made a question, whether the court would not now in such cases interfere summarily, both on account of the express provisions of 1 & 2 *V. c.* 110, *s.* 6, and from the consideration that the arrest may now in many cases take place after the time for pleading in abatement has expired, and also that the privilege may not have existed at that time. It is conceived, however, that as the arrest can take place only in cases where the defendant is about to go abroad, and in which, therefore, the reason of his privilege is no longer applicable, the court will not interfere any further than before the act.

Sheriff not bound to notice their Privilege.

In neither case was the sheriff, nor it would seem is he now, obliged to take notice of his privilege, or discharge him, even upon the production of his writ of privilege (*l*), unless where before 1 & 2 *V. c.* 110, the arrest was made under process of an inferior court, in which case the writ of privilege should have been allowed *instanter* (*m*). This last case cannot occur since 1 & 2 *V. c.* 110, *s.* 1.

Action for arresting him on.

Trespass is not maintainable for holding an attorney to bail, notwithstanding his privilege (*n*). But if the party knew him to be an attorney, perhaps an action on the case might be supported for wilfully and maliciously holding to bail (*o*).

Mode of issuing Writ of Privilege.

When a writ of privilege is necessary, *engross it on plain parchment* (*p*). *Get it signed by one of the masters; also get it sealed at the seal office.*

Parties to a Suit, Witnesses, &c.

Parties to a Suit, Witnesses, &c.] Every person connected with a cause, and attending in the course of it, whether compelled to attend by process or not, such as parties, witnesses, bail, attornies, &c., are privileged from arrest, whilst going to, attending, and returning from court. This privilege will be more fully considered in the Second Chapter of this Part.

Bail.

Bail.] In actions on bail-bonds, replevin-bonds, and recognisances of bail, the defendant cannot be holden to bail (*q*). Even where an action on a bail-bond was brought against the

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(*i*) *Wheeler's case*, 1 Wils. 298: *Nicholas* v. *Earl*, 8 T. R. 395: *Barber* v. *Palmer*, 6 T. R. 524: *Pearson* v. *Henson*, 4 D. & R. 73.

(*j*) *Snee* v. *Humphrey*, 1 Wils. 306: *Brown's case*, 2 Salk. 544: *Mayor of Basingstoke* v. *Bonner*, 2 Str. 864; 2 L. Raym. 1567, *S. C.*

(*k*) *Ex p. Whitehead*, 1 Dowl. 3.

(*l*) *Crossley* v. *Shaw*, 2 W. Bl. 1085: *Forster* v. *Cale*, 1 Str. 76: *Comerford* v. *Price*, Doug. 314; Rep. Pr. C. B. 2: *Duncomb* v. *Church*, 1 Salk. 1.

(*m*) Rep. Pr. C. B. 2: *Crossley* v. *Shaw*, 2 W. Bl. 1087.

(*n*) *Noel* v. *Isaac*, 1 C., M. & R. 753; 5 Tyr. 376, *S. C.*: 10 Co. 76 b: 6 Id. 52 a: *Cameron* v. *Lightfoot*, 2 Bla. Rep. 1190; see Tidd, New Pract. 176.

(*o*) *Whalley* v. *Pepper*, 7 C. & P. 506.

(*p*) See the form, Chit. Forms, 14.

(*q*) *Brandon* v. *Robson*, 6 T. R. 336: *Ormond* v. *Brierley*, 1 Salk. 99.

defendant in the original action, the court discharged him on entering an appearance (*s*). But if the plaintiff obtain judgment in an action on such bond or recognisance, he may hold the defendants to bail in an action on the judgment (*t*).

Bankrupts.

Bankrupts.] The *temporary* privilege of a bankrupt from arrest during his examination will be hereafter considered. If the bankrupt *obtain his certificate*, and be afterwards arrested for *any debt provable under his fiat*, upon application to a judge at chambers, or to the court, he will be discharged out of custody, on entering an appearance (*u*); unless it appear that the certificate has been obtained by fraud (*x*), or that there are other good grounds for disputing its validity (*y*), in which case the court or a judge will not interfere, but will leave the defendant to plead his bankruptcy and certificate (*z*). And where the bankrupt was taken under an attachment for not performing an award, the court refused to discharge him, without giving the other party time to shew that the certificate was fraudulently obtained (*a*). So, also, where judgment was entered up in Trinity term, and execution issued in Michaelmas term; on the 13th Nov. in the same term, the bankrupts obtained their certificate, and *on the same day* the sheriff's officer levied, and the debt and costs were paid into court under a judge's order to abide the event of a motion: the court refused to interfere by ordering the money to be paid out of court, but left the parties to their *auditâ querelâ* (*b*). But where the certificate was obtained after issue and before judgment, and the bankrupt was then rendered by his bail, he was held entitled to his discharge in a summary way, although he had not pleaded his certificate *puis darrein continuance* (*c*). Where an attorney was in custody, under an attachment for non-payment of money pursuant to a rule of court, it was held, that he was entitled to be discharged from custody on having become bankrupt and obtained his certificate, even though he received the money in the course of his employment as attorney (*d*). Where the debt was contracted in England, and the bankruptcy and certificate in Ireland (*e*), or in a foreign country, the court will not discharge the defendant (*f*); nor will they, it seems, discharge him, although the debt were contracted in a foreign country, whilst both parties were resident there, and the defendant there became bankrupt, and obtained his certificate (*g*). Even, if a bankrupt, after obtaining his certificate, subsequently promise, in writing or

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(*s*) *Mellish* v. *Petherick*, 8 T. R. 450.

(*t*) *Prendergast* v. *Davis*, Id. 85.

(*u*) 6 G. 4, c. 16, ss. 126, 121. As to what deeds are provable, see Arch. B. L. 70, 105, 208. The goods, as well as the person, of the bankrupt are protected by the certificate.

(*x*) *Sowley* v. *Jones*, 2 W. Bl. 725: *Martin* v. *O'Hara*, Cowp. 823: *Vincent* v. *Brady*, 2 H. Bl. 1.

(*y*) *Stacey* v. *Federici*, 2 B. & P. 390: see *Summers* v. *Jones*, 6 Dowl. 139.

(*z*) *Coombes* v. *Blachall*, 1 Stra. 477: *Hewes* v. *Mott*, 6 Taunt. 329: *Graham* v. *Benton*, 1 Wils. 41.

(*a*) *Nowers* v. *Colman*, Buck. 5.

(*b*) *Hanson* v. *Blakey*, 1 Moo. & P. 261: and see *Ex p. Cullingford*, 8 B. & C. 220.

(*c*) *Humphreys* v. *Knight*, 6 Bing. 572.

(*d*) *R.* v. *Edwards*, 9 B. & C. 652.

(*e*) *Sed quære*, since the Union?

(*f*) *Quin* v. *Keefe*, 2 H. Bl. 553: *Dixon* v. *Baldwen*, 5 East, 177: *Pedder* v. *M'Master*, 8 T. R. 609: *Philpotts* v. *Reed*, 1 B. & B. 13; 3 Moore, 244, *S. C.*

(*g*) See *De la Vega* v. *Vianna*, 1 B. & Ad. 284: *Maule* v. *Murray*, 7 T. R. 470: *Imlay* v. *Ellefsen*, 2 East, 453. But there would be a defence to the action; (see *Potter* v. *Brown*, 5 East, 124); and as to a *cessio bonorum*, see *Phillips* v. *Allan*, 8 B. & C. 477; 2 M. & R. 576, *S. C.*

otherwise, to pay a former debt, it seems the court, if he be arrested upon such promise, will discharge him on entering an appearance (*h*). He is entitled to his discharge notwithstanding he has neglected to plead his bankruptcy, and has given a cognovit payable at a time subsequent to that at which the plaintiff might have obtained judgment (*i*). Before the court will discharge him his certificate must be enrolled (*j*).

Insolvent Debtors.

Insolvent Debtors.] A debtor discharged under an insolvent act cannot be holden to bail for any debt from which he may have thus been legally discharged. This privilege is always guaranteed to him in express terms by the insolvent acts (*k*). And where a defendant is arrested for a debt in respect of which he has been discharged under the insolvent acts, and given a bail-bond, the court, or a judge at chambers, will order the bail-bond to be delivered up to be cancelled, whether the defendant be in actual custody or not (*l*). Even if an insolvent debtor, after being discharged under an insolvent act, subsequently promise to pay a former debt, the court or a judge, if he be arrested upon such promise, will discharge him on entering an appearance (*m*); and this, though the promise be by a bill of exchange or note, which is in the hands of the plaintiff, a *bonâ fide* indorsee (*n*). But a discharged insolvent may be arrested by his surety for the arrears of an annuity accruing subsequently to his discharge (*o*).

Sheriff not liable for Arresting them.

Although certificated bankrupts, or persons discharged under insolvent acts, are privileged from arrest, yet the sheriff or his officer is not liable to an action of false imprisonment for arresting them (*p*).

Baron and Feme.

Baron and Feme.] If a married woman be arrested upon mesne process, the court or a judge will in general discharge her on entering an appearance, or order the bail-bond, if any, to be given up to be cancelled, whether she be arrested with or without her husband (*q*); or upon process against her and her husband jointly, or against her alone (*r*), and this, although her husband constantly reside abroad (*s*); or although she and her husband live apart under articles of separation, and he allow her a separate maintenance (*t*); or even

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(*h*) *Bailey* v. *Dillon*, 2 Bur. 736: *Peers* v. *Gadderer*, 1 B. & C. 116; 2 D. & R. 240, *S. C.*: *Wilson* v. *Kemp*, 3 M. & Sel. 595: and see *Gould* v. *Williams*, 4 Dowl. 91.

(*i*) *Oswald* v. *Williams*, 5 Dowl. 159.

(*j*) *Jacobs* v. *Phillips*, 2 Dowl. 716: *Oswald* v. *Williams*, 5 Dowl. 91.

(*k*) 1 & 2 V. c. 110, s. 90: see *Edwards* v. *Tucker*, 4 D. & R. 216: *Sammon* v. *Miller*, 9 B. & C. 770.

(*l*) *Norton* v. *Moseley*, 9 D. & R. 107; 6 B. & C. 106, *S, C.*: *sed vide Done* v. *Smith*, 3 D. & R. 600.

(*m*) *Wilson* v. *Kemp*, 3 M. & Sel. 595: *Butt* v. *Vine*, 4 D. & R. 154: *Gould* v. *Williams*, 4 Dowl. 92: *sed vide Horton* v. *Moggeridge*, 6 Taunt. 563.

(*n*) *Kay* v. *Masters*, 1 Dowl. 86.

(*o*) *Freeman* v. *Burgess*, 4 Bing. 416; 1 Moo. & P. 91, *S. C.*: and see *Miller* v. *Green*, 8 Bing. 92; 2 C. & J. 142, *S. C.*: *Guy* v. *Newson*, 2 C. & M. 140: *Brookes* v. *Hutchinson*, 1 Dowl. 493.

(*p*) *Tarlton* v. *Fisher*, 2 Doug. 671: *Sherwood* v. *Benson*, 4 Taunt. 631.

(*q*) *Crooks* v. *Fry*, 1 B. & Ald. 165: *Taylor* v. *Whittaker*, 2 D. & R. 225: *Edwards* v. *Rourke*, 1 T. R. 486: *Pritchett* v. *Cross*, 2 H. Bl. 17: *Anon.*, Cro. Jac. 445; *Whitfield* v. *Holmes*, 1 Lev. 216: *Freame* v. *Mitford*, 1 C. & M. 54.

(*r*) *Edwards* v. *Rourke*, 1 T. R. 486; *Anon.*, Cro. Jac. 445: *Whitfield* v. *Holmes*, 1 Lev. 216: *Waters* v. *Smith*, 6 T. R. 451: *Pitt* v. *Thompson*, 1 East, 16: *Haly* v. *Morgan & Wife*, MSS., Exch., 25th Nov. 1831, though the cause of action arose before marriage.

(*s*) 1 East, 17, n.: see *De Gaillon* v. *L'Aigle*, 1 B. & P. 8.

(*t*) *Marshall* v. *Rutton*, 8 T. R. 545: *Wardell* v. *Gooch*, 7 East, 582: and see *Hookham* v. *Chambers*, 3 B. & B. 92.

although, at the time she obtained the credit, she appeared and acted as a *feme sole*, if she did not deceitfully represent herself as such in order to obtain the credit (*u*); or if, by mistake, she alleged her belief that her husband was dead (*x*); or if the plaintiff, at the time of giving the credit, knew her to be a married woman (*y*). But if she have deceitfully and fraudulently imposed herself on the plaintiff as a *feme sole*, for the purpose of obtaining credit (*z*), or if she have given a bill of exchange as a *feme sole* (*a*), or if the fact of coverture be doubtful (*b*), the court or a judge will not interfere in this summary manner to relieve her, but will leave her to her plea of coverture, in the ordinary course of proceeding.

Husband alone should be Arrested.

If the process be against the husband and wife, he alone should be arrested; and he shall not be discharged until he put in bail for both (*c*). But in the Common Pleas it seems that, though the wife were arrested, the court would not discharge her (*d*).

Discharge of Married Women taken in Execution.

It may be as well here to notice, that it is the practice to discharge the wife when taken in *execution* as well as on mesne process. But if interlocutory judgment has been obtained against a woman when *sole*, after which she marries, final judgment may be entered up, and execution taken out against her when married (*e*). And a married woman, taken in execution with her husband, for a debt due from her before marriage, is not entitled to be discharged, unless it appear that she has no separate property; even although the husband has been discharged under the Insolvent Act (*f*). It must be considered, however, that this latter case was an application to the equitable jurisdiction of the court; and it was subsequently decided when the legal question came before the court on demurrer, that, by a discharge under the Insolvent Debtors' Act, debts contracted by the wife *dum sola* are extinguished, and do not revive against her on the death of her husband; and that what is called "the separate property of the wife," consisting of property in which the legal ownership is in others, though held for her benefit, cannot, in a court of law, affect the operation of the discharge of the husband in extinguishing the ante-nuptial debts of the wife (*g*).

Application for Discharge, when made.

The application for the discharge of the married woman should be made *before judgment*, or, at all events, before writ of inquiry executed, otherwise she would be left to her writ of error (*h*).

Affidavit in Support of.

The *affidavit in support of the application* must state positively that she is married, and to whom, and that her husband is living; and not state it by way of inference or argument,

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(*u*) *Collins* v. *Rowen*, 1 New Rep. 54: *Hollingdale* v. *Lloyd*, 6 Dowl. 565.

(*x*) *Pitt* v. *Thompson*, 1 East, 16.

(*y*) *Waters* v. *Smith*, 6 T. R. 451: *Wardell* v. *Gooch*, 7 East, 582: *Wilson* v. *Serres*, 3 Taunt. 307: *Slater* v. *Mills*, 5 Moo. & P. 603; 7 Bing. 606, *S. C.*

(*z*) *Partridge* v. *Clarke*, 5 T. R. 194: *Freame* v. *Mitford*, 1 C. & M. 54: and see *Luden* v. *Justice*, 1 Bing. 344; 8 Moore, 346, *S. C.*: *Hall* v. *Barber*, 1 Dowl. 8: *Simon* v. *Winnington*, Id. 16.

(*a*) *Jones* v. *Lewis*, 7 Taunt. 55.

(*b*) *Partridge* v. *Clarke*, 5 T. R. 194: *Pearson* v. *Meadon*, 2 W. Bl. 903.

(*c*) *Anon.*, 1 Vent. 49: *Anon.*, 1 Mod. 8: *Roberts* v. *Andrews*, 1 W. Bl. 720; 3 Wils. 124, *S. C.*: *Crooks* v. *Fry*, 1 B. & Ald. 165.

(*d*) See *Robarts* v. *Mason*, 1 Taunt. 254; Tidd, 9th ed. 194.

(*e*) See *Cooper* v. *Hunchin*, 4 East, 521.

(*f*) *Sparkes* v. *Bell*, 8 B. & C. 1; 2 M. & R. 124, *S. C.*

(*g*) *Lockwood* v. *Salter*, 2 N. & M. 255; 5 B. & Ad. 303, *S. C.*: Bagley's Prac. 115. See *post*, Vol. II. Book III. Part II. Ch. 8.

(*h*) *Moses* v. *Richardson*, 8 B. & C. 421.

as, for instance, that she is married, "as by the certificate hereunto annexed will appear," or the like (*i*); and the Court of Common Pleas require the woman herself, in all cases, to swear to the coverture (*k*).

Costs of.

The court, or judge, does not, in general, make the plaintiff pay the *costs of the application*, unless, perhaps, where he knew of the coverture at the time of the arrest (*l*). Nor even then, if the married woman has been guilty of any deception or fraud on him (*m*). Nor will they, in general, order the married woman to pay the plaintiff's costs of the application (*n*).

Corporators and Hundredors.

Corporators and Hundredors.] Members of a corporation aggregate cannot be holden to bail for anything done by them in their corporate capacity (*o*). Also hundredors cannot be holden to bail in actions against them on the statute of 7 & 8 *G.* 4, *c.* 31 (*p*).

Executors, Administrators, and Heirs.

Executors, Administrators, and Heirs.] Executors, administrators, and heirs, cannot in general be holden to bail in actions against them for the debts of the deceased; because the action in such a case is not so properly against them personally, as against the effects of the deceased in their possession (*q*). But if they give a sufficient promise in *writing* (see 29 *Car.* 2, *c.* 3) to pay such debts, they thereby make their own property liable for the payment of them, and they may consequently be holden to bail thereon (*r*); or, if an executor or administrator be guilty of a *devastavit*, he may afterwards be holden to bail in an action by a creditor upon a judgment, suggesting such *devastavit* (*s*); for he thereby has rendered his effects liable for the debt, and may be sued in the *debet* as well as *detinet*. In this case, however, a judge's order was necessary for the purpose of holding the defendant to bail, even before 1 & 2 *V.* c. 110, *s.* 3; and the judge may be satisfied of the *devastavit*, either by the sheriff's return, (if the *devastavit* have been returned), or by affidavit of the fact (*t*).

Infants and Lunatics.

Infants and Lunatics.] An infant should not be holden to bail for any debt or other matter, where the plea of infancy would be a legal bar to the action. If holden to bail, however, the court, or a judge, it should seem, would not discharge him, but would put him to plead his infancy (*u*).

Nor is insanity considered a sufficient ground for discharging a defendant (*x*), even although the fact of insanity have been established by a commission of lunacy, previously to the arrest (*y*).

(*i*) *Harvey* v. *Cooke*, 5 B. & Ald. 747.

(*k*) *Jones* v. *Lewis*, 7 Taunt. 55.

(*l*) *Wilson* v. *Serres*, 3 Taunt. 307.

(*m*) See *Slater* v. *Mills*, 7 Bing. 606; 5 Moo. & P. 603; 1 Dowl. 230, *S. C.*

(*n*) *Carlisle* v. *Starr*, 9 Price, 161.

(*o*) Bro. Abr., Corporation, pl. 43.

(*p*) See *post*, Vol. II. Book III. Part III. Chap. 2, Sect. 2: *Steward* v. *Howey*, 3 Keb. 126.

(*q*) R. M., 15 C. 2, r. 2: 3 Bl. Com. 292: 2 Brownl. 293: *Smale* v. *Warne*, 3 Bulst. 316.

(*r*) *Mackenzie* v. *Mackenzie*, 1 T. R. 716.

(*s*) *Page* v. *Price*, 1 Salk. 98; 1 Sid. 63: *Seaton* v. *Gilbert*, 2 Lev. 145: *Anon.*, 1 Vent. 355: and see a form of affidavit, Chit. Forms, 224.

(*t*) *Dupratt* v. *Testard*, Carth. 264: and see *Leonard* v. *Simpson*, 2 Bing. N. C. 176; and *post*, Vol. II. Book III. Part. III. Ch. 5.

(*u*) *Madox* v. *Eden*, 1 B. & P. 480.

(*x*) *Nutt* v. *Verney*, 4 T. R. 121: *Kernot* v. *Norman*, 2 T. R. 390.

(*y*) *Steel* v. *Alan*, 2 B. & P. 362.

Seamen of R. N

Seamen.] No *petty officer* or *seaman* on board any of her majesty's vessels shall be holden to bail or arrested in execution for any debt whatsoever, contracted subsequently to his having entered the service; nor for any debt under 30*l.* at least, over and above all costs of suit, contracted previously to his having so entered (*z*). But for any debt above 30*l.*, contracted previously to his entry into the service, the plaintiff, or some person on his behalf, may make affidavit before a judge or commissioner, that the sum justly owing from the defendant to the plaintiff, or the debt (including damages and costs) for which execution is intended to be issued, amounts to 30*l.* at least, and that the debt was contracted previously to the defendant's belonging to her majesty's service; a memorandum of which oath shall be marked on the back of the process or writ (*a*). Upon this affidavit, together with that required by 1 & 2 *V. c.* 110, the plaintiff may obtain an order to arrest the defendant.

Discharge, &c., of, from Arrest.

If such seaman, &c., shall be arrested, contrary to these provisions, any of the judges of the court out of which the process or execution shall have issued, (or, since 1 & 2 *V. c.* 110, *s.* 6, it would seem, any judge of the superior courts at Westminster), upon complaint either of the defendant or of one of his superior officers, may examine into the same by the oath of the parties or otherwise, and, by warrant under his hand and seal, may discharge the defendant, without payment of any fees, upon due proof that he belongs to one of her majesty's vessels, and that he is arrested contrary to the intent of the act; and may also award to the defendant such costs as he shall think reasonable (*b*). Or, if in such a case the defendant have put in special bail, the court, or a judge, upon application, will order an *exoneretur* to be entered upon the bail-piece (*c*). But where such a defendant had given a bail-bond, and the plaintiff proceeded against the bail upon the bond to judgment, the court held that the bail were too late in applying to them for relief (*d*). It has been holden, however, that such a defendant may be rendered by his bail in their own discharge (*e*).

Seamen to be conveyed to one of her Majesty's Ships.

If such a defendant pay the debt for which he has been arrested, give a bail-bond, or be otherwise entitled to be discharged out of custody, the sheriff, &c., in whose custody he shall be, instead of discharging him, shall, under the penalty of 100*l.*, have him conveyed to the commander of one of her majesty's ships, or some authorized commissioned officer, in order that he may be kept to serve on board the fleet as before (*f*).

Armourers, Gunners, &c., are Seamen.

Armourers, gunners, &c., enlisted as common seamen, are within the meaning of these provisions (*g*). So is every seaman whose name is on the ship's books, notwithstanding he may have absented himself (*h*).

(*z*) 3 & 4 W. 4, c. 5, s. 3: 3 & 4 W. 4, c. 6, s. 3; 32 G. 3, c. 33, s. 22; 1 G. 2, st. 2, c. 14, s. 15.

(*a*) 1 G. 2, st. 2, c. 14, s. 15.

(*b*) Ib.: 32 G. 3, c. 33, s. 22.

(*c*) *Robertson* v. *Paterson*, 7 East, 405: and see *Methuen* v. *Martin*, Say. 107.

(*d*) *Bryan* v. *Woodward*, 4 Taunt. 557.

(*e*) *Bond* v. *Isaac*, 1 Burr. 339.

(*f*) 44 G. 3, c. 13, ss. 1 & 4: see *Sturmy* v. *Smith*, 11 East, 25.

(*g*) *Barnsley* v. *Archer*, Barnes, 114.

(*h*) *Studwell* v. *Bunton*, Id. 95.

Entering Appearance for such Seamen.

In cases where such a defendant cannot be holden to bail, according to the above statutes, then, upon giving notice in writing of the cause of action to such seaman, or by leaving it at the place where he usually resided previously to his entering his majesty's service, the plaintiff may enter a common appearance for the defendant, so as to entitle him to proceed to judgment, and to have execution other than against the person of the defendant (*i*).

Soldiers and Marines.

Soldiers and Marines.] The annual mutiny acts in general make the same regulations as to soldiers which the above statutes do as to seamen, &c. (*k*). By the last annual Mutiny Act, *2 & 3 V. c. 5, s. 3,* "no person whatever enlisted into her majesty's service as a soldier shall be liable to be arrested or taken therefrom, by reason of the warrant of any justice, or other process, for not supporting, or for leaving chargeable on any parish, township, or union, any wife, or any child or children, or (except in the case of an apprentice) on account of any breach of contract or engagement to serve or work for any employer; and no person enlisted as a soldier, or serving as a non-commissioned officer or drummer on the permanent staff of the disembodied militia, shall be liable to be taken out of her majesty's service by any process or execution whatsoever, other than for some criminal matter, unless an affidavit shall be made by the plaintiff, or some one on his behalf, for which no fee shall be taken, before some judge of the court out of which such process or execution shall issue, or before some person authorized to take affidavits in such courts, of which affidavit a memorandum shall, without fee, be indorsed upon the back of such process, that the original debt for which the action has been brought or execution sued out amounts to the value of 30*l.* at least, over and above all costs of suit in the action or actions on which the same shall be grounded; and any judge of such court may examine into any complaints made by a soldier, or by his superior officer, and by warrant under his hand discharge such soldier without fee, he being shewn to be duly enlisted, and to have been arrested contrary to the intent of this act, and shall award reasonable costs to such complainant, who shall have for the recovery thereof the like remedy as would have been applicable to the recovery of any costs which might have been awarded against the complainant in any judgment or execution as aforesaid; provided that any plaintiff, upon notice of the cause of action first given in writing to any soldier, or left at his last quarters or place of residence before such listing, may file a common appearance in any action to be brought for or upon account of any debt whatsoever, and proceed therein to judgment and outlawry, and have execution other than against the body."

There is a similar enactment with regard to persons enlisted

(*i*) 1 G. 2, st. 2, c. 14, s. 16.

(*k*) As to the denomination of soldiers within the meaning of these mutiny acts, see *Lloyd* v. *Wooddall*, 1 W. Bl. 29; 1 Wils. 216, *S. C.*: *Bayley* v. *Jenners*, 1 Str. 2: *Johnson* v. *Lowth*, 1 Str. 7; 10 Mod. 346, *S. C.*: *Flanders* v. *Nicholls*, Barnes, 432: *Bowler* v. *Owen*, 2 T. R. 270: *R.* v. *Archer*, 1 Burr. 636, 637, 446: *R.* v. *Dawes*, 8 East, 105: and see *Rickman* v. *Studwick*, 2 L. Raym. 1246: *Bryan* v. *Woodward*, 4 Taunt. 557.

into his majesty's service as marines in the last annual act, 2 & 3 *V. c.* 7, *s.* 3, as to marines.

Where the Defendant has been before Arrested for same Cause of Action.

Where the Defendant has been before Arrested for the same Cause of Action.] *Nemo debet bis vexari pro eâdem causâ.* If a defendant be once arrested, he cannot, in general, be arrested again at the suit of the same plaintiff, for the *same cause* of action (*l*), unless, perhaps, the whole proceedings have been set aside for irregularity (*m*); or unless by a rule of court or a judge's order, which in some instances is allowed upon the terms of the plaintiff's discontinuing and paying the defendant his costs (*n*); and sometimes without those terms. Formerly, indeed, the defendant might, in the Queen's Bench, have been arrested a second time for the same cause in a second action, where the plaintiff in the first action was nonprossed, or nonsuited, or discontinued it; for the plaintiff, it was said, suffered enough by paying the costs in the first action, and therefore ought not to be in a worse situation than before; but the practice was different in the Common Pleas (*o*); and, by a general rule of all the courts, of *H. T.*, 2 *W.* 4, *r.* 7, "after *nonpros*, *nonsuit*, or *discontinuance*, the defendant shall not be arrested a second time without the order of a judge (*p*)." It would seem that the defendant, if about to quit England, may now be arrested a second time, on obtaining an order under 1 & 2 *V. c.* 110, *s.* 3, in all cases in which he might have been arrested before that act, "whether upon the order of a judge or without such order." If a defendant be superseded for the laches of the plaintiff, he cannot afterwards be holden to bail for the same cause of action; and this, although the second arrest be in a different form of action, provided it be for the same cause (*q*). When a plaintiff arrested a defendant for the amount of two items, and recovered for one only, offering no evidence on the other, the court discharged the defendant on entering an appearance, upon the plaintiff arresting him a second time for the item in respect of which no evidence had been offered in the first action (*r*). And where the plaintiff made a mistake in the affidavit of debt for which the defendant was discharged on entering an appearance, and the plaintiff again arrested him in a second action on a fresh affidavit, the defendant was again discharged on account of the previous arrest (*s*). If the court or a judge, before 1 & 2 *V. c.* 110, allowed a second arrest, on the terms of discontinuing the first action, &c., and the first action were discontinued, the second arrest might have taken place on the same affidavit of debt as the first, if sworn before the same officer (*t*). This, however, would not be the case now; for the facts on which the pro-

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(*l*) See R. M., 15 Car. 2, s. 2, *post*, 479: *Belifante* v. *Levy*, 2 Str. 1209: *Housin* v. *Barrow*, 6 T. R. 218: *M'Clure* v. *Pringle*, 13 Price, 8; M'Clel. 2, *S. C.*

(*m*) See *Holliday* v. *Lawes*, 3 Bing. N. C. 541; 5 Dowl. 485, *S. C.*: *Nyas* v. *Noy*, 2 Jurist, 547.

(*n*) See *Richards* v. *Stuart*, 10 Bing. 322: *Olmius* v. *Delaney*, 2 Str. 1216.

(*o*) See Tidd, New Prac. 118.

(*p*) See the former cases of *Wheelwright* v. *Joseph*, 5 M. & Sel. 93: *Bates* v. *Barry*, 2 Wils. 381: *White* v. *Gompertz*, 5 B. & Ald. 905; 1 D. & R. 556, *S. C.*: *Belifante* v. *Levy*, 2 Str. 1298: *Turton* v. *Hayes*, 1 Str. 439: *Kearney* v. *King*, 1 Chit. Rep. 273.

(*q*) *Imlay* v. *Ellefsen*, 3 East, 309: see *Musgrave* v. *Medex*, 8 Taunt. 24: *England* v. *Lewis*, 3 D. & R. 189.

(*r*) *Hamilton* v. *Pitt*, 7 Bing. 230; 4 Moo. & P. 868; 1 Dowl. 299, *S. C.*

(*s*) *Bostock* v. *White*, *cor.* *Tenterden*, C. J., at chambers, 6th Sept. 1830.

(*t*) *Richards* v. *Stuart*, 10 Bing. 322.

bable cause for believing that the defendant is about to quit England depends must, of course, be different on the second occasion, and there must be a fresh affidavit as to them. Notice of discontinuance of a bailable action is not necessary previously to the second arrest, pursuant to the rule or order allowing it (*u*).

Arrest on fresh Security.

Where the defendant is arrested, and is discharged from arrest on giving a fresh security, he may be again arrested on such fresh security, for that would not be an arrest for the *same cause* of action (*x*).

Arrest got rid of by Fraud, no bar to a second Arrest.

When a party gets rid of an arrest by subterfuge or fraud, the plaintiff might before 1 & 2 *V. c.* 110, have arrested him again, without any rule of court or order. Thus, where a defendant, on being arrested, gave the plaintiff a draft for part of the debt on a person with whom he had no connexion, and promised to settle the remainder in a few days; the draft not being paid when presented for payment, the plaintiff sued out a new writ on the former affidavit (*y*), and had the defendant arrested on it; and the court held that he was justified in doing so, for the draft was a fraud upon him (*z*). But in another similar case, where the security given by the defendant was merely worthless, and there was no fraud, the court would not sanction the defendant's second arrest upon the original cause of action (*a*). The same principles will probably be acted on in cases arising on the 1 & 2 *V. c.* 110, *s.* 6.

Second Arrest after Compromise.

Where the first action is compromised, and a second action brought for the same cause, the court or a judge will not discharge the bail-bond taken on an arrest, unless the proceedings appear to be vexatious (*b*). And where a defendant is let out of custody at his own request, to give him an opportunity of attending to his business, he might before 1 & 2 *V. c.* 110, have been again arrested on the same affidavit (*c*).

Where Defendant Discharged from first Arrest without Default of Plaintiff.

If the defendant be discharged out of custody for some act for which the plaintiff is not answerable, as, for an alteration in the sheriff's warrant, or the like; the defendant, in such case, may be again holden to bail for the same cause of action (*d*). Where the defendant had given a bond conditioned to pay a sum of money if a sentence of a vice-admiralty court should be affirmed on appeal; and the appeal being afterwards dismissed for want of prosecution, the defendant was arrested and holden to bail on the bond; the appeal, however, was afterwards restored upon petition, and the action consequently was suspended and the bail discharged; but being again dismissed, the plaintiff commenced a new action on the bond, and again held the defendant to bail: and the court, under these circumstances, refused to discharge him (*e*). Where the judgment in the first action has been reversed for error (*f*), the plaintiff

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(*u*) *Price* v. *Day*, 3 Dowl. 463; 1 C., M. & R. 837; 5 Tyr. 456, *S. C.*

(*x*) *Hamber* v. *Cooper*, 1 Gale, 103; 3 Dowl. 671; 2 C., M. & R. 148, *S. C.*: *sed vide Taylor* v. *Wasteneys*, 2 Str. 1218.

(*y*) See *Richards* v. *Stuart*, 10 Bing. 322.

(*z*) *Puckford* v. *Maxwell*, 6 T. R. 52: *Cantellow* v. *Freeman*, 1 C. & M. 536; 2 Dowl. 2; 3 Tyr. 579, *S. C.*

(*a*) *Wilson* v. *Hamer*, 8 Bing. 54; 1 M. & Scott, 120; 1 Dowl. 248, *S. C.*

(*b*) *Brown* v. *Davis*, 1 Chit. Rep. 161.

(*c*) *Penfold* v. *Maxwell*, 1 Chit. Rep. 275: *Cantellow* v. *Trueman*, 2 Dowl. 2; 1 C. & M. 536; 3 Tyr. 579, *S. C.*: and see general rule, *Anon.*, 1 Chit. Rep. 274.

(*d*) *Housin* v. *Barrow*, 6 T. R. 218.

(*e*) *Woodmeston* v. *Scott*, 1 New Rep. 13.

(*f*) *Cartwright* v. *Keely*, 7 Taunt. 192.

may, after payment of costs, hold the defendant to bail in a new action for the same cause (*g*).

Where Defendant merely served in first Action.

If the defendant before 1 & 2 *V. c.* 110, had not been holden to bail, but merely served with process, in the first action, the plaintiff might have held him to bail in a second action for the same cause; for such a case is clearly not within the rule above mentioned (*h*). And this might have been done, even before the first action was discontinued (*i*), subject, however, to a plea in abatement of the pendency of the first action at time of suing out the *capias* (*j*).

After Arrest in Foreign Country.

A defendant who has been arrested in a foreign country may be again arrested in this country for the same cause of action (*k*). And where a defendant, who had been arrested in a foreign country on a judgment obtained there, escaped and came to this country, the Court of Queen's Bench decided that he might be holden to bail here in an action on the judgment (*l*). But, after an arrest in Ireland (*m*) or Scotland, the defendant cannot, in general, be again arrested here for the same debt, neither of them being deemed a foreign country for such a purpose. Where the defendant had surrendered upon a foreign attachment sued out in the mayor's court in London, and the plaintiff thereupon abandoned the suit, and held the defendant to bail in an action in this court for the same cause, the court refused to discharge the defendant on entering a common appearance (*n*).

Second Arrest by Executors.

Where the plaintiff arrests the defendant, and dies, his executors may again arrest the defendant for the same cause (*o*). So, where the plaintiff becomes bankrupt before interlocutory judgment, the defendant may be arrested and held to bail by the assignees in a second action for the same cause (*p*). But where the defendant has been arrested in an action brought in the name of a bankrupt by the authority of his assignees, he cannot afterwards be arrested at the suit of the assignees for the same cause of action, unless the first action has been discontinued, and the costs taxed and paid (*q*).

Double Arrest in two Counties.

Where a plaintiff sued out writs into two counties, and arrested the defendant upon both, who gave bail upon each arrest, the Court of Common Pleas directed that the bail given upon the first arrest should stand; but that the proceedings upon the second arrest should be set aside with costs to be paid by the plaintiff (*r*).

Waiver by putting in Bail.

Before 1 & 2 *V. c.* 110, an undertaking to put in bail waived the objection to a second arrest, being for the same cause of action, without a judge's order (*s*). Since that act, however, it may be questioned whether (in cases not within *s.* 85) an arrest on mesne process without a judge's order be not a nullity, and therefore incapable of being waived.

(*g*) *Turton* v. *Hayes*, Str. 439.

(*h*) *Davison* v. *Cleworth*, 1 Chit. Rep. 275: and see *Ryves* v. *Bunning*, 3 Dowl. 817.

(*i*) *Bishop* v. *Powell*, 6 T. R. 616: *Anon.*, 1 Dowl. 59: *Brickline* v. *Smallwood*, 3 Dowl. 569; 1 H. & W. 187, *S. C.*: *Chapman* v. *Vandevelde*, 3 Dowl. 313.

(*j*) *Prescott* v. *Stevens*, 1 Dowl. 57: Bac. Abr., Abatement, (M.)

(*k*) *Maule* v. *Murray*, 7 T. R. 470: and see *Imlay* v. *Ellefsen*, 2 East, 453.

(*l*) *Aliven* v. *Furnival*, 1 Dowl. 614.

(*m*) *Gunn* v. *M'Clintock*, 2 Dowl. 660.

(*n*) *Bromley* v. *Peck*, 5 Taunt. 852, n.: *Wood* v. *Thompson*, Id. 851: see *Paine* v. *Gawdery*, 3 D. & R. 33: *Musgrave* v. *Medex*, 8 Taunt. 24: but see *England* v. *Lewis*, 3 D. & R. 189.

(*o*) *Mellin* v. *Evans*, 1 C. & J. 82.

(*p*) *Barnes* v. *Maton*, Tidd, 9th ed. 175, 176; 15 East, 631, *S. C.*

(*q*) *Carter* v. *Hart*, 1 Chit. Rep. 276.

(*r*) *Bullock* v. *Morris*, 2 Taunt. 67.

(*s*) *Holliday* v. *Lawes*, 5 Dowl. 485.

Where the Defendant has been wrongfully Arrested or detained in Custody.

Where the Defendant has been wrongfully Arrested or detained in Custody.] If the defendant be wrongfully taken without process, or on void process (*t*), or after it is no longer in force (*u*), or whilst he was privileged from arrest, or the like (*v*), he cannot be lawfully detained in custody under other process at the suit of the same plaintiff, though regularly issued. Thus, where a defendant was arrested on an attachment out of Chancery for not paying costs, and on the same day a *capias utlagatum* was lodged with the sheriff at suit of the same plaintiff, and the arrest under the attachment was afterwards set aside by the Court of Chancery for irregularity, the defendant was held entitled to be discharged from the *capias utlagatum* also (*x*). Where, by the contrivance of the plaintiff's attorney, a party had been arrested on a Sunday on a criminal process, for the purpose of effecting his arrest on civil process, and he was detained in custody till the Monday, and then arrested on the civil process, the court ordered him to be discharged out of custody (*y*); but they would not have done so if there had been no such contrivance (*z*). Where defendant was arrested at suit of M. by S., who had a warrant from the late sheriff, but none from the present; and there was, at the same time, another writ in the sheriff's office against the defendant, the warrant on which from the present sheriff was directed to N. N., delivered this warrant to S., and the under-sheriff substituted S.'s name, and detained the defendant at suit of the plaintiff; it was held by the Court of Common Pleas that defendant was entitled to be discharged from custody at suit of the plaintiff (*a*). But on an application by the same defendant to the Court of Exchequer, it appearing, on affidavit, that at the time of substituting S.'s name, the sheriff was not aware that S. had already arrested the defendant, that court held that the defendant was not entitled to be discharged (*b*).

Also, by rule of *M. T.*, 15 *C.* 2, *s.* 2, it is ordered, that, if a defendant be lawfully *delivered* from arrest upon any process, he shall not be arrested again at the same time, by virtue of another process, at the suit of the *same* plaintiff: and if any attorney shall herein offend, his name shall be struck off the roll; and he and the plaintiff shall receive such punishment as to the court shall seem just. If, therefore, the defendant be entitled to his discharge, the same plaintiff cannot, while he is in custody, or while he is returning from custody, and until he completely regain his liberty, lodge a detainer, or arrest him on process, though for a totally different cause of action (*c*). But if the defendant delay going out of custody, it seems, he might, in such a case, be arrested. And it was held before 1 & 2 *V. c.* 110, that the plaintiff might lodge a detainer against the defendant in custody upon mesne process, after

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(*t*) *Barlow* v. *Hall*, 2 Anstr. 461: *Birch* v. *Prodger*, 1 New Rep. 135: *Att.-Gen.* v. *Dorkings*, 11 Price, 156: *Att.-Gen.* v. *Carl Cass*, Id. 345: *Ex p. Scott*, 9 B. & C. 446: 4 M. & N. 361, *S. C.*

(*u*) And see *Ex p. Ross*, 1 Rose, 261: *R.* v. *Blake*, 4 B. & Ad. 355: *Loveridge* v *Plaistow*, 2 H. Bl. 29.

(*v*) *Barratt* v. *Price*, 9 Bing. 566; 1 Dowl. 725, *S. C.*

(*x*) *Hall* v. *Hawkins*, 4 M. & W. 591, 7 Dowl. 200, *S. C.*

(*y*) *Wells* v. *Gurney*, 8 B. & C. 769: see *Anon.*, 1 Dowl. 157: *Goodman* v. *London*, 2 Id. 504.

(*z*) *Jacobs* v. *Jacobs*, 3 Dow. 677: *Goodwin* v. *Lordon*, 1 A. & E. 378. In *Mackie* v. *Warren*, 2 Moo. & P. 279; 5 Bing. 176, *S.C.*, the Court of C. P. refused to discharge a defendant from custody under a *ca. sa.* on the ground that he had been before irregularly taken up on, and discharged from, criminal process at the instance of the plaintiff.

(*a*) *Pearson* v. *Yewens*, 5 Bing. N. C. 489.

(*b*) *Robinson* v. *Yewens*, 5 M. & W. 149.

(*c*) See *Farmer* v. *Jenkinson*, Cook, 34: *Webb* v. *Dorwell*, Barnes, 400.

his bail has justified, the defendant not having *completed* his discharge, but being still within the prison; and that he was not entitled to be discharged upon an affidavit that the sum for which the detainer was lodged was due at the time of the first arrest (*d*).

In case of wrongful Arrest by third Party.

The above rules do not apply to detainers or arrests by *third persons*, unless there be some collusion between them and the plaintiff (*e*), or unless the first arrest was illegal by the *wrongful act of the sheriff himself* (*f*). And where a defendant had been wrongfully arrested upon a Sunday on a charge of forgery without any warrant, it was held that he might be lawfully arrested upon *civil* process, as he was leaving the police office after he had been ordered by the magistrate to be discharged (*g*).

No Privilege redeundo from lawful Custody.

The above rules also apply, it seems, only to cases where the defendant was discharged from *unlawful* custody; when he is discharged from lawful custody it is otherwise, and he has no privilege from arrest *redeundo* (*h*).

◆

CHAPTER II.

IN WHAT ACTIONS THE DEFENDANT MAY BE HOLDEN TO BAIL.

The Amount and Nature of the Cause of Action in general, 480.
In Assumpsit, 481.
In Debt, 482.
In Covenant, 484.
In Detinue or Trover, *id.*
In Trespass, *id.*
In Case, *id.*

THE courts have always exercised, and still have the power to exercise, a general control over the right of the plaintiff to hold to bail (*i*).

The Amount and Nature of the Cause of Action.

The Amount and Nature of the Cause of Action.] The amount of the cause of action must be 20*l.* or upwards (*j*).

As to the nature of it, the 3rd section of 1 & 2 *V. c.* 110, restricts the power of arrest to those actions in which the defendant was liable to arrest before the passing of the act, whether upon the order of a judge or without such order. And before that act the general rule adopted by the court in their construction of the act of 7 & 8 *G.* 4, (which then regulated arrests and was in most respects worded like the prior acts), was, that, where the cause of action arose from a *debt* or money demand, or where it sounded in damages, but the damages were capable of being ascertained with certainty by mere calculation, the defendant might have been holden to bail as of course. But where the cause of action sounded merely in *damages*, and

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(*d*) *Quin* v. *Reynolds*, 3 M. & Sel. 144: see *White* v. *Gompertz*, 5 B. & Ald. 905; 1 D. & R. 556, *S. C.*, but differently reported.

(*e*) *Howson* v. *Walker*, 2 Bl. Rep. 823: *Spence* v. *Stuart*, 3 East, 89: *Davies* v. *Chippendale*, 2 B. & P. 282: *Hutchins* v. *Kenrick*, 2 Burr. 1048: *Barclay* v. *Faber*, 2 B. & Ald. 743; 1 Chit. Rep. 579, *S. C.*: *Arundel* v. *Chitty*, 1 Dowl. 499.

(*f*) *Barratt* v. *Price*, 1 Dowl. 725; 2 M. & Scott, 339; 9 Bing. 566, *S. C.*: see *Pearson* v. *Yewens*, 5 Bing. N. C. 489: *Robinson* v. *Yewens*, 5 M. & W. 149: *ante*, 479.

(*g*) *Jacobs* v. *Jacobs*, 3 Dowl. 675: and see *Goodwin* v. *Lordon*, 1 A. & E. 378.

(*h*) *Goodman* v. *London*, 2 Dowl. 504: *Anon.*, 1 Id. 157.

(*i*) *Chambers* v. *Bernasconi*, 6 Bing. 498, 500; 4 Moo. & P. 218, *S. C.*

(*j*) 1 & 2 V. c. 110, s. 3: see *post*, 498, n. (*n*).

those damages were *unliquidated*, or could not be reduced to certainty without the intervention of a jury, the defendant could not be holden to bail unless a *judge's order* were first obtained for that purpose. As in the following instances:—

Assumpsit.

Assumpsit.] Before the stat. 1 & 2 *V*. *c*. 110, where the action sounded in *debt*, as where it was brought for goods sold, money lent, or on a bill of exchange or promissory note, or the like, the defendant might have been holden to bail as of course; but where it sounded merely in *damages*, and those damages were unliquidated, as for breach of an agreement to receive or deliver goods or the like, special bail might have been required, upon a judge's order (*k*), but not without it. The defendant could not have been holden to bail as of course in an action upon a policy of insurance, where there had been no adjustment, although the plaintiff swore to a total loss, or the defendant had made an unqualified offer to pay a part of it; this being an action for unliquidated damages (*l*).

Where a defendant was arrested in an action on a contract, the legality of which was doubtful, and which might eventually subject the plaintiff himself to a penalty, the Court of Common Pleas discharged him on a common appearance (*m*). That court also discharged a defendant on a common appearance, who had been arrested in an action on the prothonotary's *allocatur* for costs; and they doubted if such an action would lie (*n*). Where the plaintiff, being surety for the defendant, before the latter obtained his discharge under an insolvent act, was afterwards obliged to give a new security by bond and warrant of attorney, &c., the court held clearly that he could not hold the defendant to bail until he had first paid the debt (*o*). Also where a party obtained a judgment in a foreign court, in a suit for a malicious prosecution, the court held that he could not hold the defendant to bail in an action here upon that judgment (*p*).

A defendant cannot be arrested on an affidavit merely for goods *bargained* and sold (*q*), or for goods *sold* only (*r*), without averring that they are delivered or some special circumstances to warrant the judge in making the order for arrest; because the plaintiff ought not to have the security of the person under the arrest, as well as the security of the goods. He may be arrested on a written guarantee or undertaking to be answerable to a certain amount for goods sold to a third person, in the event of his failing to pay for them (*s*). So, it should seem, he might be arrested for *stipulated damages*, if clearly such; but not for a *penalty* (*t*).

(*k*) See *Waters* v. *Joyce*, 1 D. & R. 150.

(*l*) *Lear* v. *Heath*, 5 Taunt. 201.

(*m*) *Sumner* v. *Green*, 1 H. Bl. 301.

(*n*) *Fry* v. *Malcolm*, 4 Taunt 705: and see *Emerson* v. *Lashley*, 2 H. Bl. 251: *Field* v. *Bezant*, 5 B. & Ad. 357; from which it will be seen that the action would not lie before 1 & 2 V. c. 110; but it seems that such an action would be sustainable since the 18th section of that act where the *allocatur* is made in pursuance of a rule of court.

(*o*) *Taylor* v. *Higgins*, 3 East, 169.

(*p*) *De Balf* v. *Mackenzie*, 2 Str. 1243.

(*q*) *Hopkins* v. *Vaughan*, 12 East, 398.

(*r*) *Loisada* v. *Moryoseph*, 8 Moore, 366; 1 Bing. 357, *S. C.*

(*s*) *Cope* v. *Joseph*, 9 Price, 155: *Clinos* v. *Wallis*, 11 Moore, 248: see *Morley* v. *Inglis*, 4 Bing. N. C. 58, which seems to throw a doubt upon this point. See a form of affidavit, Chit. Forms, 220.

(*t*) See *Wildey* v. *Thornton*, 2 East, 409: *Stinton* v. *Hughes*, 6 T. Rep. 13. As to the difference between *stipulated damages* and *penalties*, see *Kemble* v. *Farren*, 6 Bing. 141: *Daries* v. *Penton*, 6 B. & C. 216: *Leighton* v. *Wales*, 3 M. & W. 545: *Boys* v. *Ancell*, 5 Bing. N. C. 390.

Interest.

Generally speaking, a party cannot, in the absence of an express contract to pay it, and which must appear on the affidavit, arrest for ***interest*** (*u*).

If there have been mutual dealings between the parties, the defendant should be holden to bail for the balance only (*x*). But yet where the defendant, in such a case, had refused to furnish any account of the work done by him for the plaintiff, the Court of Common Pleas held that the plaintiff was justified in holding him to bail for the full amount of the goods sold to him (*y*).

Debt.

Debt.] In debt on simple contract, the defendant may be holden to bail.

On Bonds.

In debt on bond, the defendant may be holden to bail, unless it be a replevin bond or bail-bond (*z*). If it be a bond conditioned for the payment of money, the defendant should be holden to bail merely for the principal and interest due on it, and not for the penalty (*a*). So, on bonds conditioned for the performance of covenants, or to indemnify, or the like, bail should be required to the amount only of the real damages sustained, and not to the amount of the penalty (*b*). But in all cases where the penalty is in the nature of *liquidated* damages, as where a bond is conditioned for the performance of a promise to marry (*c*), or the like, the defendant may be holden to bail for the penalty; the penalty in such a case being the debt in law.

On Recognisance of Bail.

In debt on a recognisance of bail, the defendant cannot be holden to bail, as we have already seen (*ante*, 469); and though an arrest is not, as we have just seen (*supra*), permitted in an action of debt upon bail or replevin bond, yet, after judgment is obtained against the bail in such action, he may be arrested in an action on the judgment (*d*).

On Judgment.

In debt on judgment, special bail cannot in general be required, if the defendant have been holden to bail in the original action (*f*); although the bail in the original action have absconded or become insolvent (*g*); or although the defendant were superseded in the first action (*h*); unless the *supersedeas* have been gained by surprise, and not by the laches of the plaintiff (*i*); or even although the plaintiff had waived the bill in the first action, by declaring for a different cause of action from that mentioned in the writ (*k*), or by taking a warrant of attorney from the defendant in the first action, the second

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(*u*) *Callum* v. *Leeson*, 2 Dowl. 381.

(*x*) *Turlington's case*, 4 Burr. 1996: *Bromfield* v. *Archer*, 1 D. & R. 67; 5 B. & Ald. 513, *S. C.*: *Austin* v. *Debnam*, 4 D. & R. 653; 3 B. & C. 139, *S. C.*

(*y*) *Germain* v. *Burrows*, 5 Taunt. 259: see *Sims* v. *Jaquest*, 10 Bing. 510.

(*z*) *Ormond* v. *Brierley*, 1 Salk. 99: *Brandon* v. *Robson*, 6 T. R. 336: *Mellish* v. *Petherick*, 8 Id. 450: *ante*, 469.

(*a*) See *Talbot* v. *Hodson*, 7 Taunt. 251. A mortgagee, who has a bond collateral to his mortgage, may hold the mortgagor to bail on the bond, though there be suit pending for a foreclosure (*Burnell* v. *Martin*, 2 Doug. 417).

(*b*) 1 Sid. 63: *Stapleton* v. *Baron de Stark*, Barnes, 109: *Anon.*, 1 Salk. 100; Say. 109: *Hatfield* v. *Linguard*, 6 T. R. 217: *Kirk* v. *Strickland*, Doug. 449: *Anderson* v. *Bell*, 2 C. & J. 630: *Edwards* v. *Williams*, 5 Taunt. 247. It may be doubtful whether the court would discharge the defendant if arrested for the penalty. (See 1 Sel. Pr. 35).

(*c*) *Kirk* v. *Strickland*, Doug. 449: and see *Kettleby* v. *Woodcock*, Barnes, 86.

(*d*) *Butt* v. *Moore*, Tidd, 9th ed. 173: *Prendergast* v *Davis*, 8 T. R. 85.

(*f*) *Kendal* v. *Cary*, 2 W. Bl. 768: and see *Collins* v. *Powell*, 2 T. R. 756.

(*g*) *Bowen* v. *Barnett*, Say. 160.

(*h*) *Hall* v. *Howes*, 2 Str. 1039: *Chambers* v. *Robinson*, Id. 782: *Blandford* v. *Foot*, Cowp. 72: *Huggins* v. *Bambridge*, Barnes, 383: but see *De la Cour* v. *Reed*, 2 H. Bl. 278.

(*i*) *Whalley* v. *Martin*, Barnes, 62.

(*k*) *Crutchfield* v. *Seyward*, 2 Wils. 93.

action being upon the judgment entered up on the warrant of attorney (*l*). So, where a defendant was superseded in an action upon a judgment, and again arrested in an action upon the second judgment, the court discharged him on entering an appearance (*m*). What has now been observed relates to actions upon judgments of the *superior* courts only; for if the action be brought on the judgment of an inferior court, the defendant may be holden to bail, although he had been before holden to bail in the original action (*n*). Also, if the defendant were not holden to bail in the original action, he may in general be holden to bail in an action on the judgment (*o*), even although a writ of error be pending on it (*p*); provided the original cause of action were such that the defendant might have been holden to bail for it (*q*). The defendant, in such case, may be held to bail, on the judgment for the balance after a levy of part by a *fi. fa.*, and this before the return of the *fi. fa.* (*r*). Before the 7 *&* 8 *G.* 4, *c.* 71, *s.* 1, by which, to entitle a party to arrest, the cause of action must have originally amounted to 20*l.* or upwards, exclusive of *costs*, &c., where a *defendant* obtained judgment, he might always in the Court of Common Pleas have held the plaintiff to bail in an action of debt upon it (*s*); in the Court of Queen's Bench, it was formerly otherwise (*t*); but it seems that the practice of that court in that respect was afterwards assimilated to that of the Common Pleas (*u*). It would seem that the act of 7 *&* 8 *G.* 4 is directed only against judgments obtained by plaintiffs for costs, and that the defendant may now in such cases hold the plaintiff to bail on a judge's order, under 1 *&* 2 *V. c.* 110, *s.* 3.

On Awards.

In debt on an award, the defendant may be holden to bail; although he had before been holden to bail for the same cause of action which was the subject of the award (*x*).

On penal Statutes.

In debt on penal statutes, the defendant cannot be holden to bail (*y*), unless the statute expressly authorize an arrest (*z*); but in actions on remedial statutes, as on 9 *A. c.* 14, by the loser at play against the winner (*a*), or on 4 *G.* 2, *c.* 28, for double rent for holding over (*b*), or the like, he may. Where a tenant fraudulently removed his goods to prevent a distress, *Taunton*, J., refused an order to hold him to bail in an action for double the value of the goods, saying, there was no instance of an order being granted in such a case (*c*).

Covenant.

Covenant.] In covenant the defendant may be holden to

(*l*) *Salkeld* v. *Lands*, 2 B.& P. 416.

(*m*) *Chambers* v. *Robinson*, 2 Stra. 782.

(*n*) *Davies* v. *Leckie*, Barnes, 94.

(*o*) *Hesse* v. *Stevenson*, 1 New Rep. 133: and see *Combes* v. *Blackall*, 1 Str. 477.

(*p*) *Kendal* v. *Carey*, 2 W. Bl. 768; Comyns, 566: *Weyman* v. *Weyman*, Barnes, 71.

(*q*) See *Gammage* v. *Watkin*, 2 Str. 975; Cowp. 128: *Palmer* v. *Needham*, 3 Burr. 1389: *Belither* v. *Gibbs*, 4 Id. 2117: *Lewis* v. *Pottle*, 4 T. R. 570: *Cressy* v. *Kell*, 1 Wils. 120; and 43 G. 3, c. 46.

(*r*) *Green* v. *Elgie*, 3 B. & Ad. 437.

(*s*) *Nightingale* v. *Nightingale*, 2 W. Bl. 1274.

(*t*) *Bush* v. *Bates*, 5 Burr. 2660.

(*u*) See *Lewis* v. *Pottle*, 4 T. R. 570; 1 Sellon, Pr. 39, 40.

(*x*) *Collins* v. *Powell*, 2 T.R. 756: *Anon.*, 1 Dowl. 5.

(*y*) *St. George's case*, Yelv. 53; 2 Brownl. 293: *Whittingham* v. *Coghlan*, Barnes, 80; Comyns, 75.

(*z*) See *R.* v. *Rebord*, 3 Burr. 1569: *Davis* v. *Mazzinghi*, 1 T. R. 705: *Holland* v. *Bothmar*, 4 T. R. 228: *R.* v. *Horne*, Id. 349: *Goodwin* v. *Parry*, Id. 578.

(*a*) *Turner* v. *Warren*, 2 Str. 1079; Andr. 70, *S. C.*

(*b*) *Wheeler* v. *Copeland*, 5 T. R. 364.

(*c*) *Sutton* v. *Oswald*, 1 Dowl. 348.

bail, if the covenant be for the payment of a sum certain (*d*).

Detinue, Trover.

Detinue, Trover.] In detinue or trover, the defendant could not, even before the 1 & 2 *V. c.* 110, have been holden to bail without a judge's order (*e*).

Trespass.

Trespass.] In trespass, also, the defendant could not, even before the 1 & 2 *V. c.* 110, have been holden to bail without a judge's order (*f*), and this was seldom granted, unless in cases of very violent and cruel assaults (*g*), or where the defendant was about to quit the kingdom (*g*), or in trespass for mesne profits (*h*).

Case.

Case.] So, in case for a tort, the defendant could not, even before the 1 & 2 *V. c.* 110, have been holden to bail without a judge's order. This was sometimes granted in actions for criminal conversation (*i*), and in actions for *scandalum magnatum* (*k*).

CHAPTER III.

THE AFFIDAVIT TO HOLD TO BAIL.

1. *Form of.*
   - *How intitled*, 484.
   - *Deponent's Abode and Addition*, 485.
   - *Names of the Parties*, *id.*
   - *Statement that Defendant is about to quit England*, 486.
   - *Statement that an Action is Pending*, *id.*
   - *Statement of Cause of Action*, *id.*

1. *Form of*—continued.
   - *Negative of Tender*, 495.
   - *Jurat*, *id.*

2. *Mode and Time of Swearing.*
   - *By whom Sworn*, *id.*
   - *Before whom Sworn*, 496.
   - *When to be Sworn, and Duration of*, 497.

1. *Form of.*

1. Form of.

THE following are the rules to be attended to in the framing of this affidavit. *When prepared, engross it on plain paper* (*l*), *and get it sworn as directed, post,* 496.

How Intitled.

How Intitled.] The affidavit should be intitled of the court in which the action is to be brought (*m*). But by rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 4, "an affidavit sworn *before a judge* of any of the Courts of Queen's Bench, Common Pleas, or Exchequer, shall be received in the court to which such judge belongs, though not intitled of that court; but not in any *other* court, unless intitled of the court in which it is to

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(*d*) R. E., 5 G. 2: see *Lambert* v. *Wray*, 3 Dowl. 169.

(*e*) R. H., 48 G. 3: 9 East, 325: 1 Taunt. 203.

(*f*) See R. H., 48 G. 3, K. B. and C. P., and Dax, Exch. Pr. 50.

(*g*) 1 Sellon, Pr. 36.

(*h*) *Hunt* v. *Hudson*, Barnes, 85.

(*i*) *Hadderweek* v. *Catmur*, Barnes, 61.

(*k*) *Chetwin* v. *Venner*, 1 Sid. 183: *Earl Stamford* v. *Gordal*, T. Raym. 74.

(*l*) See the various forms, Chit. Forms, 206 to 227.

(*m*) *Molling* v. *Poland*, 3 M. & Sel. 157: *R.* v. *Hare*, 13 East, 189: and see *Kennett & Avon Canal Company* v. *Jones*, 7 T. R. 451.

be used." So, it seems, an affidavit, sworn before any person having, and appearing on the face of the affidavit to have, authority to administer an oath in the court, will suffice, though not intitled of the court: thus, an affidavit not intitled of the court, but purporting, at the foot, to have been sworn before "J. Y., deputy filazer" (*n*); "or at the Queen's Bench Office, Inner Temple, before me, J. C." (*o*), has been held sufficient. So, if the affidavit be sworn before a commissioner of the court, (though in Scotland or Ireland), it need not be intitled in any court (*p*). Before the 1 & 2 *V. c.* 110, it was a rule that the affidavit should not be intitled in any cause (*q*); and this would, it seems, even since that act, be the case, if the affidavit be sworn before the issuing of the writ of summons, which, according to a late resolution of the judges, it may be (*r*). But, if sworn after the issuing of the writ, then, the affidavit being made in an action, ought, it would seem, to be intitled in the cause.

Deponent's Abode and Addition.

Deponent's Abode and Addition.] The affidavit must state the true place of *abode* of the person making it (*s*), otherwise the court will discharge the defendant on entering a common appearance (*t*). Also, the rule of *H. T.*, 2 *W.* 4, *r.* 5, requires, that "the *addition* of every person making an affidavit shall be inserted therein." The construction to be put on these rules, and the decisions that have been made under them, will be found noticed *post*, *Vol. II. Book IV. Part I. Ch.* 35, title, "Affidavits."

Names of the Parties.

Names of the Parties.] In general, the affidavit must set forth the *christian* and *surname* of the *defendant* in full (*u*); and the adoption of initials or contractions will not suffice (*x*). But, by the act 3 & 4 *W.* 4, *c.* 42, *s.* 12, "in all actions upon *bills of exchange* or *promissory notes*, or other *written instruments*, any of the parties to which are designated by the initial letter or letters, or some contraction of the *christian* or first name or names, it shall be sufficient in every affidavit to hold to bail, and, in the process or declaration, to designate such persons by the same initial letter or letters, or contraction of the *christian* or first name or names, instead of stating the *christian* or first name or names in full." Also, by the rule of *H. T.*, 2 *W.* 4, *r.* 32, in other cases, "where the defendant is described, in the process or affidavit to hold to bail, by *initials*, or by a *wrong* name, or *without a christian* name, the defendant shall not be discharged out of custody, or the bail-bond delivered up to be cancelled, if it shall appear that *due diligence has been used to obtain knowledge of the proper name*" (*y*). An affidavit, that "*Edward Joyce*" is indebted in a sum due to the deponent from "George Page Edward Joyce," is bad (*z*).

Addition of.

It is not necessary to give an *addition* to the defendant, or to the plaintiff, if not the deponent.

(*n*) *Bland* v. *Drake*, 1 Chit. Rep. 165.

(*o*) *Howell* v. *Wilkins*, 7 B. & C. 783.

(*p*) *Urquhart* v. *Dick*, 3 Dowl. 17.

(*q*) R. T., 37 G. 3, Q. B., 7 T. R. 454: see *Hollis* v. *Brandon*, 1 B. & P. 36: *Green* v. *Redshaw*, Id. 227, C. P.

(*r*) *Holborn* v. *Tucker*, 4th Sept. 1839, *cor. Maule*, B., at chambers: *Hollingsworth* v. *Robertson*. 11th Nov. 1839, *cor. Littledale*, J., at chambers. The writ of summons, however, according to the present practice, is issued before applying to the judge. (See *per Alderson*, B., *Turnor* v. *Darnell*, 7 Dowl. 346.)

(*s*) R. M., 15 C. 2.

(*t*) *Jarrett* v. *Dillon*, 1 East, 18.

(*u*) *Waters* v. *Joyce*, 1 D. & R. 150.

(*x*) *Reynolds* v. *Hankin*, 4 B. & Ald. 536: *Lake* v. *Silk*, 3 Bing. 296.

(*y*) As to what is sufficient diligence to satisfy this rule, see *post*, 510. See form of affidavit, Chit. Sum. Prac. 13.

(*z*) *Waters* v. *Joyce*, 1 D. & R. 150.

The name of the plaintiff or defendant, as stated in the affidavit, must be so stated in the declaration; otherwise, the bail will, it seems, be discharged (*post*, *Chap.* 13, *Sect.* 2).

Statement that Defendant is about to quit England.

Statement that Defendant is about to quit England.] We have seen that by the 1 & 2 *V. c.* 110, *s.* 3, the plaintiff must shew to the satisfaction of the judge to whom he applies for an order for arrest, that there is probable cause for believing that the defendant is about to quit England, unless he be forthwith apprehended. The affidavit for this purpose must state the belief of the deponent, that the defendant is about to quit England, unless he be forthwith apprehended, and must also set forth the circumstances on which that belief is founded, in order that the judge may determine on their sufficiency (*a*).

As to the nature of the proposed absence from England, it is sufficient if the absence be of such a nature as would delay the plaintiff, if successful, from obtaining execution by *ca. sa.*, in the ordinary course, *ex. gr.*, where an officer is about to join his regiment in Ireland (*b*).

Statement that an Action is pending.

Statement that an Action is pending.] The affidavit, or another accompanying it, should it seems state that a writ of summons has been issued, or otherwise shew that an action has been commenced for the same cause for which it is sought to arrest the defendant (*c*), or the judge should be satisfied, by the production of the writ or otherwise, that it has been issued.

Statement of Cause of Action.

The Affidavit must be such, that Perjury can be assigned.

Statement of Cause of Action.] The general rule as to the statement of the cause of action is, that the affidavit must be such that perjury may be assigned on it, if false; and whatever is necessary to shew the plaintiff's right of action must be expressly stated (*d*). It would not be safe to deprive a defendant of his liberty without calling on the plaintiff to shew the character in which he sues, or at least that he has authority to sue: for the defendant might be indebted, and to a great amount, and yet the debt might be one on which the plaintiff might have no right to hold him to bail, *ex. gr.*, an equitable debt, and on the allegation of which, therefore, it might be impossible to indict him for perjury (*e*). The allegations in the affidavit are, for the purposes of the arrest, conclusive on the defendant, and are not traversable (*post*, 503): it ought, therefore, to be certain and explicit, and nothing left to intendment (*f*). Therefore, an affidavit that the defendant *in* indebted, instead of *is* indebted, has been holden bad (*g*).

Must be direct and positive.

The affidavit, therefore, must, in the first place, be *direct and positive* as to the existence of the debt or other cause of action, and not merely argumentative (*h*). Consequently, swearing to the debt, "as the deponent believes" (*i*); or, "as appears

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(*a*) *Bateman* v. *Dunn*, 7 Dowl. 105; 5 Bing. N. C. 49, *S. C.*

(*b*) *Larchin* v. *Willan*, 7 Dowl. 11; 4 Moo. & W. 351, *S. C.*

(*c*) See *per Alderson*, B., *Turnor* v. *Darnell*, 7 Dowl. 346.

(*d*) See *per Vaughan*, B., 2 C. & J. 471. But it is not necessary that the affidavit should be confined to express or precise words. (See *per Dallas*, C. J., *Skeen* v. *M'Gregor*, 8 Moore, 108).

(*e*) See *Hughes* v. *Brett*, 2 Bing. 239, *per Jones*, Serjt.

(*f*) *Fricke* v. *Poole*, 9 B. & C. 543; 4 Man. & R. 448.

(*g*) *Reeks* v. *Groneman*, 2 Wils. 224.

(*h*) *Sheldon* v. *Baker*, 1 T. R. 87: *Wheeler* v. *Copeland*, 5 T. R. 364: *Pomp* v. *Ludvigson*, 2 Burr. 655: *Van Morsel* v. *Julian*, 1 Wils. 231: *Long* v. *Lynch*, 3 Wils. 154.

(*i*) *Rios* v. *Belifante*, 2 Str. 1209: *Clap-hamson* v. *Bowman*, Id. 1226.

by the bond;" or, "by the books," or "by the confession of the defendant," or the like (*j*); or, "as appears by the master's *allocatur*" (*k*); or "according to the bill delivered by the plaintiff to the defendant" (*l*); or even swearing that defendant is indebted to the plaintiff in a certain sum, adding "for which he has not accounted" (*m*), is not sufficient. And where the affidavit is not positive as to the debt, but merely states the circumstances of the case, and then adds, "therefore the defendant is indebted," &c. (*n*); or where the affidavit states that the defendant is indebted unto the plaintiff for goods sold and delivered, &c., to defendant, and proceeds to state that the plaintiff has received no other security save some bills of exchange, overdue and unpaid, without stating that the plaintiff is the holder thereof (*o*); in these cases it is insufficient. But an affidavit that the defendant is indebted to the plaintiff in such a sum "as he computes it," is good (*p*). So, in an affidavit to hold to bail, made by the plaintiff's agent, (the plaintiff himself being abroad), a debt on a judgment being first positively sworn to, a subsequent statement that the judgment is still in force, unpaid and unsatisfied, "as deponent verily believes," will not vitiate it (*q*). An affidavit, that the defendant is "indebted," &c., without also using the usual words "justly and truly," is sufficient (*r*).

Except where it is impossible to swear positively.

Where it is *impossible* to swear *positively*, as where the cause of action arose from the non-payment of bills in India, it was holden sufficient for the party to swear, that they were not paid "to his knowledge and belief" in India or elsewhere (*s*). So, where the plaintiff sues *in autre droit*, as executor or administrator, or as assignee of a bankrupt, it is not required that he should swear positively to the debt; and if an executor swear to his belief (*t*), or if an assignee of a bankrupt swear to the debt, "as appears by the bankrupt's books," or "by his last examination," or the like, "*and* as he verily believes" (*u*), it will be sufficient. But an affidavit by an executor of the defendant's having been indebted to the testator "as appears from a statement made from the testator's books by an accountant employed to investigate the same, as deponent verily believes," has been held insufficient (*x*). So, where an assignee of a bankrupt swore to a debt, as appeared from the letters of A. and B., "as this deponent believes," the affidavit was considered insufficient (*y*). So it was considered insufficient where it was made by a bankrupt, who swore that the defendant was indebted to the deponent before the commission, and, "as he believes," was still indebted to his assignees, on a bill accepted by the defendant, indorsed by the drawer

By Executors or Assignees.

(*j*) *Kelly* v. *Devereux*, 1 Wils. 339: *Rollin* v. *Mills*, Id. 279: *Anon.*, Id. 121: *Heathcote* v. *Gosling*, 2 Str. 1157: *Walrond* v. *Fransham*, Id. 1219, 1209: *Jennings* v. *Martin*, 3 Burr. 1447: *Swarbreck* v. *Wheeler*, Barnes, 100: *Kelly* v. *Devereux*, Say. 59.

(*k*) *Powell* v. *Portherch*, 2 T. R. 55.

(*l*) *Williams* v. *Jackson*, 3 T. R. 575.

(*m*) *Champion* v. *Gilbert*, 4 Burr. 2126: *Mackenzie* v. *Mackenzie*, 1 T. R. 716.

(*n*) *Mackenzie* v. *Mackenzie*, 1 T. R. 716: *Fowler* v. *Morton*, 2 B. & P. 48.

(*o*) *Bostock* v. *White*, *cor.* *Tenterden*, C. J., at chambers, 5th Sept. 1830.

(*p*) *Moultby* v. *Richardson*, 2 Burr. 1032.

(*q*) *Bland* v. *Drake*, 1 Chit. Rep. 165.

(*r*) *Lee* v. *Bidwell*, 4th July, 1834, *cor.* *Alderson*, B., at chambers: *Polleri* v. *De Souza*, 4 Taunt. 154.

(*s*) *Hobson* v. *Campbell*, 1 H. Bl. 245.

(*t*) *Sheldon* v. *Baker*, 1 T. R. 87: *Roche* v. *Carey*, 2 W. Bl. 850: and see *Garnham* v. *Hammond*, 2 B. & P. 298: *Rowney* v. *Dean*, 1 Price, 402.

(*u*) *Swayne* v. *Crammond*, 4 T. R. 176: *Tonna* v. *Edwards*, 4 Burr. 2283: *Barclay* v. *Hunt*, Id. 1992: *Lowe* v. *Farley*, 1 Chit. Rep. 92.

(*x*) *Rowney* v. *Dean*, 1 Price, 402.

(*y*) *Molling* v. *Buckholtz*, 2 M. & Sel. 563.

to deponent, and, "as he believes," still unpaid (*z*). In the case of an assignee of a bond, or the like, he will be allowed to swear "to the best of his knowledge and belief," to all facts not within his own knowledge (*a*). If, in any of these cases, the executor, assignee, &c., take upon himself to swear positively to the debt, the affidavit will not be rejected on that account, however improbable it may be that he should have a positive knowledge of it (*b*). An affidavit that the defendant is indebted to the plaintiff and his wife as administratrix of J. P., deceased, in 1,455*l*., for principal and interest due on a bond for 2,400*l*. made by the defendant to the said J. P., and conditioned for the payment of 1,200*l*. and interest at a day past, is sufficient, and this without stating expressly that J. P. died intestate, &c. (*c*).

By Partner.

An affidavit of debt by a surviving partner must shew distinctly that the other partner is dead (*d*).

Stating Right to Sue by Law of foreign Country.

An affidavit, stating that the defendant was indebted to B. for goods sold and delivered in Holland, and that the debt was assigned to the plaintiff, according to the laws of that country, and concluding with a statement, that the assignee of a debt may sue the debtor according to the laws of Holland, "as plaintiff is informed and believes," is sufficient to hold the defendant to bail here (*e*). But an affidavit that the defendant was indebted to the plaintiff as liquidator of an estate, duly appointed by the law of France, is bad, unless it shew that by the law of France a liquidator is entitled to sue (*f*).

Affidavit must disclose a sufficient Cause of Action.

The affidavit must not only be direct and positive as to the existence of the debt or other cause of action, but must also shew a *sufficient cause of action* for which the defendant *may be holden to bail* for the amount stated (*g*); and such cause of action must be stated explicitly, and with a sufficient degree of particularity and certainty (*h*). Therefore, an affidavit that the defendant "is indebted to the plaintiff in *trover*" (*i*), or in so much "upon promises" (*k*), or in so much "as a balance of accounts between the plaintiff and defendant" (*l*), is insufficient. So is an affidavit that the defendant is indebted to the plaintiff in 1,000*l*. under an agreement in writing, whereby the defendant undertook to pay the plaintiff the balance of accounts, &c., "which said balance is still due and unpaid," without stating that the balance was 1,000*l*. (*m*). But an affidavit that the defendant is indebted to the plaintiff "on the balance of an account stated" without adding "and settled between them," is sufficient (*n*). And, stating that the defendant is indebted to plaintiff "on an account stated be-

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(*z*) *Tucker* v. *Francis*, 1 Bing. 142; 12 Moo. 347.

(*a*) *Cresswell* v. *Lovell*, 8 T. R. 418: *Loveland* v. *Basset*, 1 Wils. 232: and see *Fairman* v. *Farquharson*, 1 Moo. & P. 179.

(*b*) See *Andrioni* v. *Morgan*, 4 Taunt. 231; *Polleri* v. *De Souza*. Id. 154: and see *Knight* v. *Keyte*, 1 East, 415: *Byland* v *King*. 7 Taunt 275: *Warmsley* v. *Macey*, 2 B. & B. 339· and see the forms, Chit. Forms, 210, 211.

(*c*) *Coppin* v. *Copper*, 10 Bing. 443; 2 Dowl 785: 4 M. & Scott, 272, *S. C.*

(*d*) *Edgar* v. *Watt*, 1 H. & W. 108: see *Morrell* v. *Parker*, 6 Dowl. 123.

(*e*) *Scuerhop* v.. *Schmanuel*, 4 D. & R. 180. The court, however, questioned whether B was not the proper party to be made plaintiff.

(*f*) *Tenons* v. *Mars*, 8 B. & C. 638; 3 M. & R. 38, *S. C.*; see *De la Vega* v. *Vianna*, 1 B. & Ad. 284: *ante*, 467, 478.

(*g*) *Cooke* v. *Dobree*, 1 H. Bl. 10; *Jacks* v. *Pemberton*, 5 T. R. 552.

(*h*) See *Wilks* v. *Adcock*, 8 T. R. 27.

(*i*) *Hubbard* v. *Pacheco*, 1 H. Bl. 218.

(*k*) *Cope* v. *Cook*, 2 Doug. 467: and see *Archer* v. *Ellard*, Say. 109.

(*l*) *Polleri* v. *De Souza*, 4 Taunt. 154: *Jones* v. *Collins*, 6 Dowl. 526: and see *Eicke* v. *Evans*, 1 Chit. Rep. 15.

(*m*) *Hatfield* v. *Linguard*. 6 T. R. 217.

(*n*) *Tyler* v. *Campbell*, 3 Bing. N. C. 675; 4 Scott, 384.

tween them," is sufficient (*o*). An affidavit for so much for "interest money," under and by virtue of an agreement, is insufficient (*p*). So is an affidavit "for money due and payable for interest upon and for the forbearance of divers sums of money due and payable, and by the plaintiff forborne for divers spaces of time now elapsed, at the defendant's request," without stating some express contract or agreement to pay interest (*q*). But an affidavit for money lent to and had and received by defendant, "and for interest thereon agreed to be paid by the defendant," is sufficient (*r*). An affidavit on a guarantee for goods should shew the terms of the guarantee, and that the time for the payment has elapsed (*s*). So, an affidavit to hold to bail for a certain sum for the breach of an agreement, must shew that the sum demanded is stipulated damages, and not merely a penalty (*t*); and if even for stipulated damages, it must state a breach of the agreement (*u*). And the plaintiff's swearing that they are "liquidated damages," will not of itself suffice (*x*). And wherever it appears that there is a condition precedent to be performed before holding the defendant to bail, the performance of it must be averred (*y*). Therefore, an affidavit stating that defendant was indebted to plaintiff by virtue of certain articles of agreement, by which the latter agreed to sell, and the former to purchase, certain lands, and that defendant had been let into possession in pursuance of the agreement, is not sufficient, without stating that a conveyance had been tendered to defendant (*z*). An affidavit on an agreement or promise not under seal must always shew a consideration (*a*); therefore, where an affidavit upon an agreement to marry the plaintiff under a penalty did not state the promises to be mutual, or shew other consideration for the promise to the plaintiff, it was holden insufficient (*b*). An affidavit for money lent by plaintiff to defendant, for the use of another, and which the defendant promised to repay or cause to be secured to the plaintiff, was deemed bad, because it omitted to state that the money had not been *secured* to the plaintiff (*c*).

An affidavit that the defendant is indebted to plaintiff "upon and by virtue of a *charterparty* of affreightment, bearing date, &c., for and on account of the hire of a ship, let to hire by plaintiff to defendant, and by him taken for a certain voyage from ——— to ———," is sufficient (*d*). So is an

On a Deed.

(*o*) *Balmano* v. *May*, 6 Dowl. 306: overruling *Hooper* v. *Vestris*, 5 Dowl. 700.

(*p*) *Brook* v. *Trist*, 10 East, 358: and see *Anon*, 1 Salk. 100: *Executors of Boothby* v. *Buller*, 1 Sid. 63: *Whitfield* v. *Whitfield*, Barnes, 109. *Bosanquet* v. *Fillis*, 4 M. & Sel. 330.

(*q*) *Drake* v. *Harding*, 1 H. & W. 364; 4 Dowl. 34, *S. C.*: *Callum* v. *Leeson*, 2 Id. 381; 3 C. & M. 406, *S, C.*: *sed vide White* v. *Sowerby*, 3 Dowl 584; 1 H. & W. 213, *S. C.*, to the contrary; but that case was decided without reference to the decision in *Callum* v. *Leeson*, and underwent consideration in *Drake* v. *Harding*. See also *Pickman* v. *Collis*, 1 Gale, 47; 3 Dowl. 429, *S. C*; but which seems of questionable authority.

(*r*) *Harrison* v. *Turner*. 4 Dowl. 72: 1 H. & W. 340, *S. C.*: *Hutchinson* v. *Hargrave*, 1 Bing. N. C. 369; 1 Scott, 269, *S. C.*

(*s*) *Angus* v. *Robilliard*, 2 Dowl. 90: and see *Elworthy* v. *Maunder*, 5 Bing. 295. The affidavit usually states that the guarantee is in writing, signed by defendant, &c.

(*t*) *Wildey* v. *Thornton*, 2 East, 409.

(*u*) *Stinton* v. *Hughes*, 6 T. R. 13: see *ante*, 481.

(*x*) *Chambers* v. *Ward*, 1 Dowl. 139.

(*y*) *Elworthy* v. *Maunder*, 5 Bing. 295.

(*z*) *Young* v. *Dowlman*, 2 Y. & J. 31: and see *Sykes* v. *Ross*, Id. 2.

(*a*) *Walker* v. *Gregory*, 1 Dowl. 24.

(*b*) *Macpherson* v. *Lovie*, 1 B. & C. 108; 2 D. & R. 69, *S. C.*

(*c*) *Jacks* v. *Pemberton*, 5 T. R. 552: see *Jenkins* v. *Law*, 1 B. & P. 365: *Elworthy* v. *Maunder*, 2 Moo. & P. 482; 5 Bing. 295, *S. C.*: *Townsend* v. *Burns*, 1 Dowl. 562.

(*d*) *Skeen* v. *M'Gregor*, 8 Moore, 107; 1 Bing. 242, *S. C.*

On a Bond.

affidavit that the defendant is indebted to plaintiff in trust for deponent, under a *deed* by which the defendant had covenanted to pay money, "at certain times and on certain events now past and happened" (*e*). So is an affidavit that the defendant is indebted to the plaintiff in 500*l*. "upon a certain *indenture of mortgage*, by which the defendant covenanted to pay the said sum of money to the plaintiff at a certain day now past" (*f*). So is an affidavit for so much, "for *principal* and *interest* due on a *bond*," without expressly stating the bond to be conditioned for the payment of money (*g*). But where the affidavit merely stated the defendant to be indebted to the plaintiff in 6,000*l*., without adding for principal and interest on a bond in the penal sum of 25,000*l*., the court held it to be insufficient, as it did not appear what was the condition of the bond (*h*). The affidavit should, at all events, state that the bond is due and payable (*i*).

On an Award.

An affidavit of debt on an *award* ought to state the fact of the submission to, and the making of the award, and that the money was due at a day past (*k*). And, if the award direct the money to be paid by the defendant to the plaintiff upon demand, the affidavit must state such demand (*l*). An affidavit that the defendant is indebted for damages awarded, and for costs and expenses taxed and allowed, is sufficiently certain, for it will be inferred that the award and taxation are such as will support the action (*m*).

On an Irish Judgment.

An affidavit of debt on an Irish judgment must, before the assimilation of the currency, have stated the value of the sum recovered (*n*); but this seems no longer requisite in cases of judgments subsequent to the 5th of January, 1826 (*o*). Where an affidavit, made before a British consul in a *foreign* country, stated that the defendant was indebted to the plaintiff in 100,000*l*. sterling, for money had and received, it was holden insufficient, (before 6 *G*. 4, *c*. 79), because it did not appear with certainty whether the defendant was indebted in British or Irish sterling money (*p*).

On Bill of Exchange or Promissory Note.

An affidavit on a *bill of exchange* or *promissory note*, not expressly payable with interest, and described in the affidavit as so payable, should shew that the sum for which the arrest is made is for principal money only, either by an express allegation to that effect (*q*), or else by stating the sum payable by the bill or note (*r*). It must state that it is due and un-

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(*e*) *Barnard* v. *Neville*, 3 Bing. 126; 10 Moore, 475, *S. C.*: and see *Lambert* v. *Wray*, 3 Dowl. 162; 1 C., M. & R. 576, *S. C.*

(*f*) *Masters* v. *Billing*, 3 Dowl. 751.

(*g*) *Byland* v. *King*, 7 Taunt. 275; 1 Moore, 24, *S. C.*

(*h*) *Bosanquet* v. *Fillis*, 4 M. & Sel. 330: *Chambers* v *Ward*, 1 Dowl. 139.

(*i*) *Smith* v. *Kendal*, 7 D. & R. 232.

(*k*) *Anon.*, 1 Dowl. 5. See the forms, Chit. Forms, 221.

(*l*) *Driver* v. *Hood*, 7 B. & C. 494; 1 M. & R. 324, *S. C.*

(*m*) *Jenkins* v. *Law*, 1 B. & P. 365: and see *Masel* v. *Angel*, 6 D. & R. 15. *Quære*, if the costs ought to have been included in the amount? (See *post* 498, n. (*n*)).

(*n*) *Storie* v. *Ball*, 2 Chit. Rep. 16: *Kearney* v. *King*, 2 B. & Ald. 301; 1 Chit. Rep. 28, 273, *S. C.*

(*o*) See 6 G. 4, c. 79, which assimilated the currency.

(*p*) *Pickardo* v. *Machado*, 4 B. & C. 886; 7 D. & R. 478, *S. C.*, *Abbott*, C. J., *diss.*: see now 6 G. 4. c. 79.

(*q*) According to *Fowell* v. *Petrie*, 1 Nev. & P. 227, an affidavit that the defendant was indebted to plaintiff in 500*l*. for principal money due on a bill, without stating the sum for which the bill was drawn, is bad, for the court don't understand what is meant by the words *principal money*.

(*r*) *Brook* v. *Colman*, 2 Dowl. 7; 6 Leg. Obs. 444; 1 C. & M. 621, *S. C.*: *Westmacott* v. *Cook*, 2 Dowl. 519: *Latraile* v. *Hoepfner*, 10 Bing. 334; 3 M. & Scott, 801; 2 Dowl. 758, *S. C.*: overruling the cases of *Hanley* v. *Morgan*, 2 C. & J. 331; 1 Dowl. 322, *S. C.*: *Lewis* v. *Gompertz*, 2 C. & J. 352; 1 Dowl. 319, *S. C.* Stating the de-paid (*s*), or some other circumstance from which that fact may be presumed, as the date or time of acceptance, and at what period the note was payable, or that it was payable on demand, or on a day past, or the like (*t*); but it is not otherwise necessary to state the date (*u*). Where a note is payable by instalments, the affidavit should shew what instalments are due, and it will not suffice to state that the sum for which the note was given has not been paid (*x*). An affidavit stating that the defendant was indebted to the plaintiff in a certain sum upon the balance of a bill drawn by plaintiff and accepted by defendant, and due at a day past, is sufficient (*y*). It must also shew how the defendant is indebted, and the character in which he is sued, whether as acceptor, drawer, or indorser (*z*). It is a matter of doubt whether it is necessary for the affidavit to shew the character in which the plaintiff sues, whether as indorsee or payee; it is submitted that it is (*a*). In an action by an indorsee, it must be stated by whom the bill was indorsed; it is not enough to state that it was "duly indorsed" (*b*). But an affidavit that the defendant was indebted to the plaintiff "on a bill of exchange drawn by M. D. on and accepted by defendant, and indorsed by M. D. to plaintiff," without saying that the bill was payable to order, has been deemed sufficient (*c*); and intermediate indorsements need not be stated (*d*). In an action against the drawer or indorser, the affidavit must allege the presentment and default of the acceptor, or else something to dispense with it; but it need not allege notice of dishonour (*e*). It has been considered that the default of the acceptor was sufficiently stated in the affidavit by this averment, "and which having become due is wholly unpaid," without stating any presentment to the acceptor (*f*); but the correctness of this seems questionable; and in a subsequent case, a statement, that the amount "is now due and unpaid," was held not to be a sufficient statement of the acceptor's default (*g*). An affidavit, stating that several per-

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fendant to be indebted in 304*l*. 4*s*. 7*d*. for principal and interest by virtue of an indenture covenanting to pay 300*l*., sufficiently distinguishes the principal and interest. (*Jones* v. *Collins*, 6 Dowl. 526. See the forms, Chit. Forms, 218).

(*s*) *Kirk* v. *Almond*, 1 Dowl. 318; 2 C. & J. 354, *S. C.*: *Holcombe* v. *Lambkin*, 2 M. & Sel. 475: *Edwards* v. *Dick*, 3 B. & Ald. 495. *Machu* v. *Fraser*, 7 Taunt. 171.

(*t*) *Kirk* v. *Almond*, 1 Dowl. 318; 2 C. & J. 354, *S. C.*: *Jackson* v. *Yate*, 2 M. & Sel. 148: *Elstone* v. *Mortlake*, 1 Chit. Rep. 648: and see *Mann* v. *Sheriff*, 2 B. & P. 355: *Shirley* v. *Jacobs*, 3 Dowl. 101: *Phillips* v. *Turner*, 3 Id. 163; 1 C., M & R. 597, *S. C.*: see *Davison* v. *Marsh*, 1 New Rep. 157: *semble* overruled.

(*u*) See *Irving* v. *Heaton*, 4 Dowl. 638.

(*x*) *Hart* v. *M'Gerris*, 3 Tyr. 238: and see *Roberts* v. *Pilkington*, 7 Leg. Obs. 388.

(*y*) *Walmsley* v. *Dibdin*, 4 Moo. & P. 10.

(*z*) *Humphreys* v. *Winslow*, 6 Taunt. 531; 2 Marsh. 231, *S. C.*: *M'Taggart*, v. *Ellis*, 4 Bing. 114; 12 Moore, 326, *S. C.*; 4 M. & Scott, 357 (*c*). An affidavit stating defendant to be indebted, &c., on a bill *drawn and accepted* by him has been held sufficient. (*Harrison* v. *Rigby*, 6 Dowl. 93).

(*a*) See *Balbi* v. *Batley*, 6 Taunt. 25; 1 Marsh. 424, *S. C.*: *Mannatt* v. *Mathew*, 4 M. & Scott, 356; 10 Bing 506, *S. C.*: *Walmsley* v. *Macey*, 5 Moore, 52, 168; 2 B. & B. 338, *S. C.*: but see Tidd. New Pract. 121: *Bradshaw* v. *Sadaington*, 7 East, 94; 3 Smith, 117, *S. C.*: *Elstone* v. *Mortlake*, 1 Chit. 648: *Brooks* v. *Clark*, 2 D. & R. 148: *Walmsley* v. *Dibdin*, 4 Moo. & P. 10. The practice, at all events, is to state the character in which plaintiff sues.

(*b*) *Lewis* v. *Gompertz*, 2 C. & J. 352; 1 Dowl. 319, *S. C.*: *M'Taggart* v. *Ellis*, 4 Bing. 114.

(*c*) *Hughes* v. *Brett*, 6 Bing, 239; 3 Moo. & P. 566: and see *Bradshaw* v. *Saddington*, 7 East, 94: *Bennett* v. *Dawson*, 4 Bing. 609; 1 Moo. & P. 594, *S. C.*: *sed quære*.

(*d*) Chit., jun., on Bills, 74 t; Tidd, New Pract. 122: *Luce* v. *Irvin*, 6 Dowl. 92.

(*e*) *Simpson* v. *Dick*, 3 Dowl. 731: *Witham* v. *Gompertz*, 4 Dowl. 382: *Banting* v. *Jadis*, 1 Id. 445: *Cross* v. *Morgan*, Id. 122: *Buckworth* v. *Levy*, 7 Bing. 251; 5 Moo. & P. 23; 1 Dowl. 211, *S. C.*: *Crosby* v. *Clark*, 1 M. & W. 296; 1 T. & G. 660; 5 Dowl. 62, *S. C.* In an action against the acceptor the allegation is not necessary. (1 Chit., jun., Bills. 73).

(*f*) *Weedon* v. *Medley*, 2 Dowl. 689: but the case in 7 Bing. 251, 5 Moo. & P. 23, *S. C.*, was not there cited.

(*g*) *Jones* v. *Collins*, 6 Dowl. 526; 2 Jurist, 374.

sons are jointly indebted to the plaintiff, on a bill of exchange accepted in the name and firm of A. & Co., "*by them or one of them*," is insufficient (*h*).

For Causes of Action recoverable on the Common Counts.

An affidavit that the defendant is indebted to the plaintiff for *goods sold and delivered*, not stating "by the plaintiff to defendant" (*i*); or for goods sold and delivered to the defendant, without saying "by the plaintiff" (*j*); or for goods sold and delivered *for* the defendant, instead of *to* the defendant (*k*); or for goods bargained and sold, without alleging that they were "delivered" (*l*); or for meat, lodging, &c., found and provided by plaintiff for defendant, and at his request, and for money paid, laid out and expended, and lent and advanced by plaintiff "to" the defendant, and at his request, omitting the words "for the defendant" (*m*); or in "1,000*l.* on *balance of account* for money paid, laid out, and expended by plaintiff, *to and for defendant*, and at his request," &c. (*n*); or "for money had and received by the defendant for and on account of the plaintiff, and at his request," instead of "to and for the use of the plaintiff" (*o*), is bad. But where an affidavit stated that the defendant was indebted to the plaintiff for materials found and provided, goods sold and delivered, and work and labour done and performed by the plaintiff, to and for the use of the defendant, the court held that the latter allegation had reference to the whole of the items, and that the affidavit was sufficient (*p*). And an affidavit for money had and received on account of the plaintiff, without adding "by the defendant" (*q*), has been held sufficient. So, an affidavit that the defendant was indebted to plaintiff in 20*l.* lent and advanced on a bill of exchange for 37*l.*, drawn by J. S. on, and accepted by defendant, and now overdue and unpaid, is sufficient, without saying to whom the money was lent (*r*). So is an affidavit that the defendant is indebted to the plaintiff "for the use and occupation of a certain dwelling-house, &c., of the plaintiff, held and enjoyed by the defendant as tenant thereof:" without saying, as tenant to the plaintiff, or that defendant held at his request (*s*). So, an affidavit, which states that defendant is indebted to plaintiff for the hire of divers carriages, &c., of plaintiff, hired to and for the use of defendant, is sufficient, without stating that they were hired of plaintiff, or by whom they were hired (*t*). So is an affidavit, stating the debt to be "for money paid, laid out, and expended, and wages due to the plaintiff for his services on board the defendant's ship," without expressly stating that the wages were due from the defendant (*u*). And an affidavit,

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(*h*) *Harmer* v. *Ashby*, 10 Moore, 323.

(*i*) *Perks* v. *Severn*, 7 East, 194: *Taylor* v. *Forbes*, 11 Id. 315: *Young* v. *Gatien*, 2 M. & Sel 603.

(*j*) *Cathrow* v. *Haggar*, 8 East, 106: *Fenton* v. *Ellis*, 6 Taunt. 192; 1 Marsh. 535, *S. C.*

(*k*) *Bell* v. *Thrupp*, 2 B. & Ald. 596; 1 Chit. Rep. 331, *S. C.*

(*l*) *Hopkins* v. *Vaughan*, 12 East, 398: *Loisada* v. *Moryoseph*, 8 Moore, 366; 1 Bing. 357, *S. C.*: *ante*, 481.

(*m*) *Fricke* v. *Poole*, 9 B. & C., 543; 4 Man. & R. 448.

(*n*) *Visger* v. *Delegal*, 2 B. & Ad. 571; 1 Dowl. 333, *S. C.*

(*o*) *Kelly* v. *Curzon*, 4 Adol. & E. 622; 1 H. & W. 678.

(*p*) *Lucas* v. *Goodwin*, 4 Scott, 502; 3 Hodges, 32.

(*q*) *Coppinger* v. *Beaton*, 8 T. R. 338: but see *Kelly* v. *Curzon*, *ubi supra*.

(*r*) *Bennett* v. *Dawson*, 1 Moo. & P. 594; 4 Bing 609, *S C*

(*s*) *Lee* v. *Sellwood*, 9 Price, 332: and *Bostock* v. *White*, *cor.* *Tenterden*, C. J., at chambers, 6th Sept. 1830, MS.

(*t*) *Brown* v. *Garnier*, 6 Taunt. 389; 2 Marsh. 83, *S. C.*: *sed quære*.

(*u*) *Symonds* v. *Andrews*, 1 Marsh. 317.

stating that the defendant was indebted to the plaintiff in 130*l.* and upwards, for work and labour done, and for paper found by plaintiffs and their servants, in and about the printing of a certain book of defendant, and at his request, was holden to be sufficient to shew that the work was done, and the materials found for the defendant, and at his instance (*x*). An affidavit, stating the defendant to be indebted to the plaintiff for money had and received to the use of his *wife* (*y*), is bad. An affidavit for *interest* must shew an express contract for it, or otherwise, that it is claimable as a debt (*z*). But it need not state the amount of the principal, nor the time when it began to run (*a*). We have already noticed (*b*) instances as to what will be a sufficient or insufficient affidavit of debt on an *account stated.*

Statement of Defendant's Request.

As regards the statement of defendant's *request*, it has been held that an affidavit for *money lent* and advanced (*c*), or for goods sold and *delivered* (*d*) to the defendant, is sufficient, without stating *expressly* that the money was lent or the goods sold at defendant's *request*. But by *R. H.*, 2 *W.* 4, *r.* 8, "affidavits to hold to bail for *money paid* to the use of the defendant, or for *work and labour done*, shall not be deemed sufficient, unless they state the money to have been paid, or the work and labour to have been done, at the *request* of the defendant" (*e*). In an affidavit for the agistment of cattle, it must be stated that the agistment was at defendant's request (*f*).

In Trover.

An affidavit to hold to bail in *trover* should state that the plaintiff was possessed of the goods, their value, and a conversion by defendant, either express or implied (*g*). Where it did not appear from the affidavit that the goods ever were in the possession of the defendant, though it stated that he refused to deliver them up, the court discharged him on entering a common appearance (*h*). But an affidavit that the defendants possessed themselves of divers goods belonging to the plaintiff, of the value of 20*l.*, and refused to deliver them up, and that they or some of them had converted and disposed of them to their own use, has been deemed sufficient (*i*). So has an affidavit that defendant was indebted to plaintiff in 103*l.* for goods, which the defendant converted to his own use (*k*). In trover for a bill of exchange, the affidavit must, it seems, allege that the bill remains unpaid (*l*). Where a defendant was holden to bail under a judge's order, upon an affidavit shewing that the plaintiff was damnified to such

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(*x*) *Gale* v. *Leckie*, 6 M. & Sel. 228.

(*y*) *Wade* v. *Wade*, 4 Bing. 50: and see *Morgan* v. *Baylis & Wife*, 3 Dowl. 117: and see *Coppin* v. *Potter*, 2 Dowl. 785.

(*z*) See *Drake* v. *Harding*, 4 Dowl. 34; 1 H. & W 364, *S. C.*: *Hutchinson* v. *Hargreave*, 1 Bing. N. S. 369; 1 Scott, 269, *S. C.*: *Harrison* v. *Turner*, 4 Dowl. 72; 1 H. & W. 346, *S. C.*: *Callum* v. *Leeson*, 2 Dowl. 381; 2 C. & M. 406, *S. C.*: and *ante*, 490.

(*a*) *White* v. *Sowerby*, 3 Dowl. 581; 1 H. & W. 364, *S. C.*

(*b*) *Ante*, 488.

(*c*) *Bostock* v. *White*, *cor. Tenterden*, C. J., at chambers, 6th Sept. 1830, MS.

(*d*) *Rowley* v. *Bayley*, 11 Moore, 383: see *Gray* v. *Shepherd*, 3 Dowl. 442: *semble*, *cont.*

(*e*) See *Durnford* v. *Messiter*, 5 M. & Sel. 446: *Pitt* v. *New*, 8 B. & C. 654; 3 M. & R. 129, *S. C.*

(*f*) *Smith* v. *Heap*, 5 Dowl. 11.

(*g*) See *Molling* v. *Buckholtz*, 2 M. & Sel. 563: *Anon.*, 1 Chit. 168: *Imlay* v. *Ellefsen*, 2 East, 453. See the form, Chit. Forms, 225.

(*h*) *Woolley* v. *Thomas*, 7 T. R. 550.

(*i*) *Charter* v. *Jaques*, Cowp. 529.

(*k*) *Emerson* v. *Hawkins*, 1 Wils. 335.

(*l*) *Clarke* v. *Cawthorne*, 7 T. R. 321.

an amount, the affidavit was holden sufficient, although it improperly stated the defendant to be "*indebted*" in that amount (*n*).

On a Penal Statute.

An affidavit on a *penal statute* should specify the nature of the offence, and aver that the defendant has incurred the forfeiture (*o*); but the offence need not be described circumstantially (*p*); nor is it necessary to swear that the defendant is indebted to the plaintiff in the amount of the penalty (*q*). But in an action for double rent under the statute, the affidavit stated a notice to quit, and a holding over by the defendant, "by reason of which and by force of the statute an action accrued," &c.; and it was deemed bad, because it did not state positively that the defendant was indebted, &c. (*r*). If such an affidavit state a statute, under which a penalty was incurred, to have been made in the 27th *G.* 3, which in fact was made in the 22nd *G.* 3, it is a fatal objection, even although the title of the statute be correctly set forth (*s*).

May be good in Part and bad in Part.

Where there are two or more causes of action described in the same affidavit,—as, for instance, where the action is brought for money had and received, and also for money lent, or the like,—it is not necessary to distinguish how much the defendant is indebted on each account: it suffices to state him to be indebted in one entire sum on both accounts (*t*). Whether thus distinguished or not, if such an affidavit be bad as to any part, it would, according to some cases, be bad for the whole (*u*): but this seems questionable (*x*); and it may now be considered as settled, that if the affidavit state one cause of action perfectly and another imperfectly, the defendant may be held to bail for the former, if separate and independent of the latter (*y*).

Must be Single.

An affidavit to hold to bail must be *single;* and must not, therefore, comprise two distinct causes of action at the suit of different plaintiffs (*z*), or two causes of action which cannot be joined in one action (*a*). But an affidavit to hold to bail on a penal statute may include several offences committed by the same defendant (*b*). So, an affidavit to hold to bail must not include several defendants who cannot be joined in one action (*c*). Therefore, upon an affidavit that the maker and indorser of a promissory note are indebted to the plaintiff, neither can be holden to bail (*d*). Even in a penal action, where several persons had separately incurred penalties, it was ruled that they could not be holden to bail on one affidavit (*e*).

(*n*) *Imlay* v. *Ellefsen*, 2 East, 453; see Lofft, 85.

(*o*) *Davies* v. *Mazzinghi*, 1 T. R. 705.

(*p*) Id.: *Watson* v. *Shaw*, 2 T. R. 654.

(*q*) *Davies* v. *Mazzinghi*, 1 T. R. 705.

(*r*) *Wheeler* v. *Copeland*, 5 T. R. 463.

(*s*) *Watson* v. *Shaw*, 2 T. R. 654. See the following cases on the lottery acts: *R.* v. *Horne*, 4 T. R. 349: *King* v. *Pacey*, 2 H. Bl. 601: *Pritchett* v. *Cross*, Id. 17: *Holland* v. *Bothmar*, 4 T. R. 228: *Goodwin* v. *Parry*, Id. 577.

(*t*) *Hague* v. *Levi*, 9 Bing, 595: 1 Dowl. 720, *S. C.*: and see *Rogers* v. *Godbold*, 3 Dowl. 106.

(*u*) *Kirk* v. *Almond*, 1 Dowl. 318; 2 C. & J., 354; 2 Tyr. 316, *S. C.*: *Baker* v. *Wells*, 1 Dowl. 631; 1 C. & M. 238, *S. C.*: *Fricke* v. *Poole*, 9 B. & C. 543: *Rackett* v. *Gye*, 1 H. & W. 198: *Drake* v. *Harding*, 4 Dowl. 34; 1 H. & W. 364, *S. C.*

(*x*) See *Prior* v. *Lucas*, 1 H. & W. 365, n.

(*y*) *Jones* v. *Collins*, 6 Dowl. 526: *Carunce* v. *Rigby*, 3 M. & W. 67.

(*z*) *Dean and Chapter of Exeter* v. *Seagell*, 6 T. R. 688.

(*a*) *Crooke* v. *Davis*, 5 Burr. 2690.

(*b*) *Holland* v. *Bothmar*, 4 T. R. 298.

(*c*) *Gilby* v. *Lockyer*, 1 Doug. 217: *De la Preuve* v. *Duc de Biron*, 4 T. R. 697.

(*d*) *Hussey* v. *Wilson*, 5 T. R. 254.

(*e*) *Goodwin* v. *Parry*, 4 T. R. 577.

Nor will the defect in these cases be waived even by putting in bail (*f*).

Must correspond with the Writ.

The affidavit should correspond with the writ in the nature of the action, otherwise the defendant may be discharged on a common appearance, or the bail-bond, if any, ordered to be delivered up to be cancelled. Thus, if the affidavit be in debt on a judgment and the writ be in *assumpsit*, it would be irregular (*g*).

Must correspond with Declaration.

Care should also be taken that the cause of action stated in the affidavit be that for which the plaintiff has declared (*h*), or intends to declare; for if the declaration varies from the affidavit in the cause of action, the bail will be thereby discharged (*i*). And they would be so, if the declaration varies from the affidavit in the character in which the plaintiff sues, or the defendant is sued (*k*), or in the number of the plaintiffs or defendants (*l*), or in the name of the plaintiff (*m*), or even in the name of the defendant (*n*), unless, indeed, in the latter case, the bail have waived the objection, as by their entering into the bail-piece by the name in which he is declared against. But the fact of the declaration containing other causes of action than that stated in the affidavit, so long as it has a count to meet that statement, would not discharge the bail.

Negative of Tender.

Negative of Tender.] Formerly, it must have been stated in the affidavit that no offer had been made to pay the sum therein sworn to, in notes of the Governor and Company of the Bank of England, expressed to be payable upon demand; fractional parts of the sum of 20*s.* only excepted (*o*). But it is no longer necessary, and consequently not advisable, to negative this tender of the debt, the restrictions on cash payments under the several bank acts, passed in the reign of King George the Third, having, by the 59 *G.* 3, *c.* 49, *s.* 1, ceased on the 1st of May, 1823; and the 3 & 4 *W.* 4, *c.* 98, *s.* 6, having declared bank notes a legal tender for all sums above 5*l.*

Jurat.

Jurat.] As to the form of the *jurat*, see *post*, *Vol. II. Book IV. Part I. Ch.* 35. (See the forms, Chit. Forms, *p.* 207, 208).

If there be any interlineation or erasure in the *jurat*, the affidavit cannot be read or made any use of (*p*). But an erasure *over the jurat* does not vitiate it (*q*). See further as to this, *post*, *Vol. II. Book IV. Part I. Ch.* 35.

2. *Mode and Time of Swearing.*

By whom to be Sworn.

By whom to be Sworn.] The affidavit may be made either by

(*f*) *Hussey* v. *Wilson*, 5 T. R. 254; 4 Id. 557: Tidd, 9th ed. 188: *post*, 501, 502.

(*g*) See *Green* v. *Elgie*, 3 B. & Ad. 437; 1 Dowl. 344, *S. C.*: *Richards* v. *Stuart*, 10 Bing. 319; 2 Dowl. 537, *S. C.*

(*h*) It would seem that the cases decided on this subject previously to 1 & 2 V. c. 110, are still applicable whether the arrest be before or after declaration.

(*i*) *Tetherington* v. *Goulding*, 7 T. R. 80: *Wilks* v. *Adcock*, 8 T. R. 27.

(*k*) See *per* Lord *Tenterden*, C. J., *Marzetti* v. *Jouffroy*, 1 Dowl. 44: *Manesty* v. *Stevens*, 9 Bing. 400: *Ilsley* v. *Ilsley*, 1 Dowl. 310; 2 C. & J. 330., *S C.*: *Anon.*, 1 Dowl. 97.

(*l*) *Spalding* v. *Mare*, 6 T. R. 363: see *Forbes* v. *Phillips*, 2 N. R. 98.

(*m*) *Grindall* v. *Smith*, 1 Moo. & P. 24.

(*n*) See *Clark* v. *Baker*, 13 East, 273: and see *post*, Chap. IV. Sect. V. of this Book.

(*o*) 37 G. 3. c. 91, s. 8: and see the other acts in Tidd's Pract. 9th ed. 187.

(*p*) R. M., 37 G. 3.

(*q*) *Atkinson* v. *Thompson*, 2 Chit. Rep. 19: and see *Houlden* v. *Fassen*, 6 Bing. 236; 4 Moo. & P. 127, *S. C.*

the plaintiff himself, or by one of several plaintiffs (*r*); or by any other person (*s*) who can swear positively to the debt or cause of action; and if made by a third person, it is not necessary to state any connexion between the deponent and the plaintiff (*t*). The person making it, however, it should seem, must not have been convicted of any infamous crime, which would render him incompetent as a witness (*u*).

Before whom to be Sworn.

In England.

Before whom to be Sworn.] The affidavit to hold to bail may be sworn in the court, or before any judge of the court out of which the process shall issue (*x*); or before a commissioner of such court (*x*); and this, before 1 & 2 *V. c.* 110, although such commissioner be concerned as attorney for the plaintiff, or be the attorney's clerk (*y*). Or it may be sworn in Scotland or Ireland before a commissioner empowered to take affidavits under the recent act, 3 & 4 *W.* 4, *c.* 42, *s.* 42 (*post, Vol. II. Book IV. Part I. Ch.* 35). Or it may be sworn before the officer who shall issue the process, or his deputy (*z*), provided such deputy be appointed for issuing process, and not merely for taking affidavits (*a*); and he must not be a deputy of a deputy (*b*).

In a Foreign Country.

If made in England, it cannot be sworn before a magistrate, or any other person but those above specified. But an affidavit to hold to bail in this country may be sworn in any foreign country, either before a judge or magistrate, or other person authorized by the laws of the country to take affidavits; and upon this affidavit, if sufficient in other respects, a judge of one of the superior courts at Westminster will make an order to hold the defendant to bail (*c*). It has been made a question, but not decided, whether a British consul or vice-consul resident in a foreign country has authority by virtue of his office to administer an oath for the purpose of holding a defendant to bail in this country (*d*).

Ireland or Scotland.

The Court of Exchequer in this country have, in several instances, allowed an affidavit sworn before a commissioner of the Court of Exchequer in Ireland or a magistrate in Scotland to be read (*e*). If, however, it be sworn before a judge in Ireland or Scotland, the judge's signature to the *jurat* must be verified by an affidavit to be made in this country; and if sworn before any other person (other perhaps than a commissioner empowered under the act of 3 & 4 *W.* 4, *c.* 42, *s.* 42, *post, Vol. II. Book IV. Part I. Ch.* 35), not only his signature to the *jurat*, but also his authority to administer the oath and take the affidavit, must be verified

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(*r*) *Swayne* v. *Crammond*, 4 T. R. 176.

(*s*) 1 & 2 V. c. 110, s. 3.

(*t*) *Holliday* v. *Lawes*, 3 Bing. N. C. 541: *Short* v. *Campbell*, 3 Dowl. 487; 1 Gale, 60, *S. C*: *Pieters* v. *Luytjest*, 1 B. & P. 1: *Andrioni* v. *Morgan*, 4 Taunt. 231.

(*u*) *Nicholls* v. *Tallyhunty*, Barnes. 79: and see *Walker* v. *Kearney*, 2 Str. 1148; Cowp. 3: but see *Park* v. *Strockley*, 4 D. & R. 144: *Horsley* v. *Somers*. Barnes, 116: *Davis and Carter's case*, 2 Salk. 401: *Bland* v. *Drake*, 1 Chit. Rep. 165

(*x*) 12 G. 1. c. 29.

(*y*) R. E., 15 G. 2, Q. B.: R. E., 13 G. 2, r. 1, C. P.: R. H., 2 W. 4 r. 6: *Goodtitle* d. *Pye* v. *Badtitle*, 8 T. R. 638: *quære* as to this since 1 & 2 V. c. 110? See R. H., 2 W. 4, r. 6: 12 G. 1, c. 29, s. 2.

(*z*) 12 G. 1, c. 29.

(*a*) *Rogers* v. *Jones*, 7 B. & C. 86; 9 Dowl. & R. 878.

(*b*) *Hughes* v. *Jones*, 1 B. & Ad. 388.

(*c*) *Dalmar* v. *Barnard*, 7 T. R. 251: *Omealy* v. *Newell*, 8 East, 364: *Turnbull* v. *Moreton*, 1 Chit. Rep. 721.

(*d*) *Pickardo* v. *Machado*, 4 B. & C. 886; 7 D. & R. 478, *S. C.*: *Ex p. Lady Hutchinson*, 1 Moo. & P. 559; 4 Bing. 606, *S. C.*: see *Re Barber*, 4 Dowl. 640: *Re Eady*, 6 Dowl 615.

(*e*) *Kilby* v. *Stanton*, 2 Y. & J. 75: *Ellis* v. *Sinclair*, 3 Y. & J. 273.

in like manner(*f*). It may be here observed, that an affidavit thus made abroad must contain all the requisites of an affidavit to hold to bail made in this country(*g*); it should also, in general, shew that the amount sworn to is British sterling money (*ante*, 490).

When to be Sworn, and Duration of.

When to be Sworn, and Duration of.] The affidavit may, as we have seen *ante*, 485, be sworn before the issuing of the writ of summons. It should not, as a general rule, be sworn long before the application to the judge for the order to hold to bail. The courts before 1 & 2 *V. c.* 110, considered a year the extent of time during which the affidavit should be considered as effectual, upon the presumption that the debt has been paid during that period(*h*). Consequently, where the process did not issue for three years after the making of the affidavit, the court discharged the defendant on entering a common appearance(*i*). But where the process issued soon after the making of the affidavit, although the defendant was not arrested for upwards of three years afterwards, (several writs founded on the same affidavit having successively issued against him in the meantime), the Court of Common Pleas held the length of time which had elapsed between the swearing of the affidavit and the arrest, no objection, and refused to discharge the defendant(*j*). The same rules would still apply to that part of the affidavit which states the cause of action, but the statement that the defendant is about to quit England, unless forthwith apprehended, must, of course, be sworn to, at, or shortly before, the time of the application for the order to hold to bail.

CHAPTER IV.

JUDGE'S ORDER TO HOLD TO BAIL, UNDER 1 & 2 V. c. 110, s. 3.

A Judge may order a Defendant to be arrested in certain Cases.

THE 3rd section of 1 & 2 *V. c.* 110, enacts, "that if a plaintiff in any action in any of her majesty's superior courts of law at Westminster, in which the defendant is now liable to arrest, whether upon the order of a judge, or without such order, shall by the affidavit of himself or of some other person, shew, to the satisfaction of a judge of one of the said superior courts, that such plaintiff has a cause of action against the defendant or defendants to the amount of 20*l.* or upwards, or has sustained damage to that amount, and that there is probable cause for believing that the defendant or any one or more of the defendants is or are about to quit England unless he or they be forthwith apprehended, it shall be lawful for such judge, by a special order, to direct that such defendant or defendants so about to quit England shall be held to bail for

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(*f*) See *French* v. *Bellew*, 1 M. & Sel. 302: *Omealy* v. *Newell*, 8 East, 364. See the forms, Chit. Forms, 207, 208.

(*g*) *Nesbitt* v. *Pym*, 7 T. R. 376, n.

(*h*) *Collier* v. *Hague*, 2 Str. 1270: *Taylor* v. *Slater*, 2 Scott, 839: *Ramsden* v. *Maugham*, 2 C., M. & R. 634: 4 Dowl. 403; 1 T. & G. 40; 1 Gale, 345, *S. C.*: *Burt* v. *Owen*, 1 Dowl. 691; Tidd's New Pract. 125: *Doe Clark* v. *Stilwell*, 3 Nev. & P. 701. This rule does not apply to other affidavits. (Ib.)

(*i*) *Collier* v. *Hague*, 2 Str. 1270.

(*j*) MS., Trin. 1817: *Hill* v. *Jervis*, 13 Leg. Obs. 30.

such sum as such judge shall think fit, not exceeding the amount of the debt or damages; and thereupon it shall be lawful for such plaintiff, within the time which shall be expressed in such order, but not afterwards, to sue out one or more writ or writs of *capias* into one or more different counties, as the case may require, against any such defendant so directed to be held to bail, which writ of *capias* shall be in the form contained in the schedule to this act annexed, and shall bear date on the day on which the same shall be issued: Provided always, that the said writ of *capias* and all writs of execution to be issued out of the superior courts of law at Westminster into the counties palatine of Lancaster and Durham, shall be directed to the chancellor of the county palatine of Lancaster, or his deputy there, or to the chancellor of the county palatine of Durham, or his deputy there."

Order may be made at any stage of Proceedings before Final Judgment.

And the 5th section of the same act enacts, "that any such special order may be made, and the defendant arrested in pursuance thereof, at any time after the commencement of such action, and before final judgment shall have been obtained therein; and that a defendant in custody upon any such arrest, and not previously served with a copy of the writ of summons, may be lawfully served therewith."

Cases of Absence from England, within s. 3.

This 3rd section applies to every case of absence from England, which would prevent the plaintiff, if successful, from having execution by *ca. sa.* at the proper time; for instance, the case of an officer about to join his regiment in Ireland (*k*). "It is clear that every case of a person about to leave England is not within the meaning of the section: look, for instance, at the case of a captain of a packet plying between Dover and Calais" (*l*). As to the requisites of the affidavit, see *ante*, 484 *to* 496.

Practical Directions as to obtaining the Order.

To obtain a judge's order for arrest *sue out a writ of summons as directed* ante, 112. *This need not be served until after the defendant is arrested. Then prepare an affidavit of the debt, or cause of action, stating that it amounts to* 20*l.* (*m*), *and if in*

(*k*) *Larchin* v. *Willan*, 7 Dowl. 11; 4 Mee. & W. 351; 2 Jurist, 970, *S. C.*

(*l*) *Per Parke*, B., Ib.

(*m*) See form of affidavit, Chit. Forms, 206. The 7th section of the 7 & 8 G. 4, c. 71, after reciting that "the holding to special bail persons inhabiting within the principality of Wales or counties palatine, by process out of the courts of record at Westminster, in debts of small amount, is oppressive and vexatious; and the remedy intended for prevention thereof, by an act passed in the eleventh and twelfth years of the reign of King William the Third, intituled 'an Act for preventing of frivolous and vexatious Suits in the Principality of Wales, and the Counties Palatine,' ought to be amended and extended;" enacted, "that no sheriff or other officer within the said *principality*, or the *counties palatine of Chester*, *Lancaster*, *or Durham*, shall, upon any mesne process issuing out of any of his majesty's courts of record at Westminster, after the said first day of August, arrest or hold any person to special bail, unless such process shall be duly marked and indorsed for bail in a sum not less than 50*l*." So much, however, of this section as relates to Wales and Cheshire is virtually repealed by the 11 G. 4 & 1 W. 4, c. 70. And as to the palatine courts, as the third section of the 1 & 2 V. c. 110, expressly refers to the issuing of writs into Lancaster and Durham, without making any distinction as to amount, and as the present *capias* may be issued during the progress of the suit and the person intended to be arrested may not have been within the jurisdiction of or suable in the palatine courts at the commencement of the suit, and so not within the evil intended to be remedied by the 7 & 8 G. 4, c. 71, it is apprehended (*cessante ratione legis cessat et ipsa lex*) that the 7th section of that act is virtually repealed by the 1 & 2 V. c. 110, s. 3, and that 20*l*. is now the arrestable amount in the counties palatine, as well as in other counties, whether the process issue from a superior or from the palatine court. (See sect. 21). See, however, Atkinson on Sheriff Law, 392, *contra*. With regard to the mode in which the amount of 20*l*. is to be made up, even before the passing of the 7 & 8 G. 4, c. 71, (which expressly requires that the amount should be 20*l*. or upwards over *an action* ex delicto, *stating the material facts of the case*(n), *and also stating that a writ of summons has been issued, and the deponent's belief that the defendant is about to quit England, unless forthwith apprehended, and the facts and circumstances on which that belief is founded* (o). *After having it sworn before a judge, let it be laid before him, and if he approve of it, he will make an order that the defendant (or any one or more of the defendants, as the case may be) shall be held to bail in a sum therein specified* (p). *Then sue out the writ of* capias *as directed* post.

Privileged Persons cannot be Arrested under the Act.

It will be observed, that the act does not do away with any privilege; and, consequently, it would seem that all persons who were privileged from arrest before the act still remain so.

Order may be made even where Special Order was necessary before the Act.

And, further, that the defendant may still be arrested under an order, in pursuance of this section, in cases in which a special order was necessary even before the act; and in this last class of cases it will be necessary to satisfy the judge not only that the cause of action amounts to 20*l*., and that the defendant is about to quit England, but also that such special grounds exist as would have induced a judge to grant an order to hold to bail previously to the act.

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and above and exclusive of any costs, charges, and expenses, that may have been incurred, recovered, or become chargeable in or about the suing for or recovering the same or any part thereof), it was the rule and practice of the courts not to allow an arrest when the original debt was for less than *ten* pounds, (the then arrestable amount), but raised up to that sum by the *costs* of the former action. In a case under the former statutes, where the plaintiff having a debt due to him under an arrestable sum, procured a promissory note to be indorsed to him by another creditor for the purpose of holding the defendant to special bail, the court, considering this as a practice to evade the statute, discharged the defendant out of custody on filing common bail. (*Wigglesworth* v. *Sherwood*, 1 Kenyon, 371).

(n) See *Davis* v. *Chippendale*, 2 B. & P. 282; and see the forms of affidavit, Chit. Forms, 225, 226. The sufficiency of the affidavit for this purpose could not, it seems, before 1 & 2 V. c. 110, in general, have been questioned, so as to obtain the defendant's discharge (see *Imlay* v. *Ellefsen*, 2 East, 453), though indeed, in some instances, in trover, the court discharged defendant on the ground of insufficiency in the affidavit. They will probably do so now in all cases under 1 & 2 V. c. 110, s 6.

(o) See the form of affidavit, Chit. Forms, 206.

(p) See the form of the order, Chit. Forms, 227.

CHAPTER V.

DISCHARGE OF THE DEFENDANT FROM CUSTODY ON MESNE PROCESS, IN CERTAIN CASES.

Sect. 1. *Discharge of Defendant where he ought not to have been Arrested*, 500.
Sect. 2. *Discharge from Custody on mesne process, under* 1 & 2 *V. c.* 110, *s.* 7, 504.

1. *Discharge of Defendant where he ought not to have been Arrested.*

Discharge of Defendant where he ought not to have been Arrested.

BY the 6th section of 1 & 2 *V. c.* 110, "it shall be lawful for any person arrested upon any such writ of *capias* to apply *at any time* after such arrest to a judge of one of the superior courts at Westminster, or to the court in which the action shall have been commenced, for an order or rule on the plaintiff in such action to shew cause why the person arrested should not be discharged out of custody; and that it shall be lawful for such judge or court to make absolute or discharge such order or rule, and to direct the costs of the application to be paid by either party, or to make such other order therein as to such judge or court shall seem fit (*q*); provided that any such order made by a judge may be discharged or varied by the court, on application made thereto by either party dissatisfied with such order."

Costs.

Grounds for Discharging Defendant since 1 & 2 V. c. 110, s. 6.

In addition to the objections to the arrest which might have been urged before 1 & 2 *V. c.* 110, the defendant may object that the affidavit on which the arrest took place does not shew probable cause for believing that the defendant is about to quit England unless forthwith apprehended (*r*); or he may shew, by counter affidavits, that he in fact was not about to quit England, or that the contemplated absence is not of such a character as would prevent the plaintiff, if successful, from obtaining execution against his person in due time (*s*), or he may shew that no action was pending at the time the order for arrest was made (*t*).

Grounds of Discharge even before 1 & 2 V. c. 110.

In the following cases the court or a judge would have discharged the defendant even before 1 & 2 *V. c.* 110, *s.* 6, and of course will continue so to do.

Privilege.

If the defendant be a privileged person at the time of the arrest, or for any other reason not subject to an arrest in the action, the court or a judge will in general discharge him, or, if he have given a bail-bond, will order it to be delivered up to be cancelled, but generally on his entering a common appearance in either case (see *ante*, 463 *to* 480, and *post*, 180 *to* 184). So, if he become a peer or member of parliament at any time pending the suit, the court or a judge will thus give

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(*q*) See *post*, 503.

(*r*) See *Bateman* v. *Dunn*, 7 Dowl. 105; 2 Jurist, 922.

(*s*) See *Larchin* v. *Willan*, 7 Dowl. 11; 4 Mee. & W. 351, *per Parke*, B., and *Alderson*, B.

(*t*) See *per Alderson*, B., *Turnor* v. *Darnell*, 7 Dowl. 346. But in *Holborn* v. *Tucker*, at chambers, 4th Sept., 1839, *Maule*, B., intimated, that an order might be made to hold a defendant to bail without a writ of summons having been previously issued.

him the full effect of his privilege (*u*). But where the question of privilege from arrest in any case is doubtful, the defendant will not in general be thus relieved, but he will, it is said, be left to his writ of privilege (*v*), or plea in abatement.

Debt reduced below 20*l.*, after Arrest.

If the plaintiff after making the affidavit of debt receive part of it, and thereby reduces the debt to an amount not sufficient to warrant an arrest, and the defendant is, notwithstanding, afterwards arrested, the court or a judge will discharge him out of custody, or order the bail-bond to be cancelled, on entering a common appearance, and make the plaintiff pay the costs (*w*).

Cause of Action insufficient.

So, if the action be such that the defendant should not have been holden to bail in it, the court or a judge will discharge him; or, if he have given a bail-bond, will order it to be delivered up to be cancelled, generally on the terms of his entering a common appearance in either case (see *ante*, 481 *to* 484).

Irregular Proceedings.

And the court or a judge would so relieve the defendant, if he have been arrested without an affidavit to hold to bail being previously made, or without a judge's order obtained when necessary; or if the affidavit to hold to bail be not filed with the proper officer (*x*).

Variance between Affidavit and Process, &c.

So, if the affidavit materially differ from the process or declaration, the court or a judge will relieve him in the same way, and discharge the bail above if put in (*ante*, 495; and see *post*, 516). But a variance between the affidavit and the cause of action cannot be taken advantage of before the declaration is delivered or filed (*y*); unless it be quite evident from the affidavit that the form of action stated in the writ must be wrong (*z*).

Defective Affidavit.

It may be necessary to observe, that before 1 & 2 *V. c.* 110, an affidavit upon which a judge made an order to hold to bail, could not, it seems, in general, have been objected to for insufficiency (*a*), though indeed there were several instances in trover in which the affidavits were successfully objected to (*b*). It seems that the court or a judge will now entertain all objections to the affidavit on motion, or application at chambers, under 1 & 2 *V. c.* 110, *s.* 6, except such objections as involve the merits of the case (see *post*, 503) (*c*); and the same rule, presently noticed, as to not receiving a contradictory affidavit to defeat the arrest, will equally apply to such a case (*d*). If, therefore, the affidavit be defective in any material part, the court or a judge will discharge the defendant.

The affidavit, if bad in part, is bad for the whole, and cannot be upheld as to the good part, unless the bad part can be rejected without interfering with the sense or material requisites of the rest (*e*).

In the Exchequer, a defendant is not permitted to object to the affidavit to hold to bail, without referring to the affidavit

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(*u*) *Trinder* v. *Shirley*, 1 Doug. 45: see *Kernott* v. *Norman*: 2 T. R. 390: *Phillips* v. *Wellesley*, 1 Dowl. 9.

(*v*) *Luntley* v. *Battine*, 2 B. & Ald. 234: see *ante*, 463, &c.

(*w*) *Short* v. *Cunningham*, 1 Dowl. 662.

(*x*) *Hussey* v. *Baskerville*, 2 Wils. 225: *sed vide Knowles* v. *Stevens*, 1 C., M. & R. 26.

(*y*) *Naylor* v. *Eagar*, 2 Y. & J. 90.

(*z*) *Green* v. *Elgie*, 3 B. & Ad. 437; 1 Dowl. 344, *S. C.*: see *Richards* v. *Stuart*, 10 Bing. 319; 2 Dowl. 537, *S. C.*: *ante*, 495.

(*a*) See *Imlay* v. *Ellefsen*, 2 East, 453.

(*b*) *Ante*, 493.

(*c*) This is the practice at chambers.

(*d*) *Brackenbury* v. *Needham*, 1 Dowl. 439: *Imlay* v. *Ellefsen*, 2 East, 453.

(*e*) *Ante*, 494.

expressly by the rule *nisi*, so as to apprize the opposite party that he objects to it (*f*).

Counter Affidavit as to Cause of Action.

It should be observed, that it is an almost invariable rule not to receive a counter-affidavit, to contradict or do away the effect of an affidavit to hold to bail as to the debt (*g*); nor, indeed, will the court enter into an examination on the *merits*, but will take the facts of the case, as to the cause of action, to be as sworn to in the original affidavit (*h*). In one case, however, where it appeared that the plaintiff, shortly before he made the affidavit to hold to bail, wrote a letter stating the defendant to be a creditor of his; the court, upon application, interfered, in a summary way, to discharge the defendant out of custody, on an affidavit denying the debt, the plaintiff not having denied the writing of the letter, or alleged that the debt due to him had accrued subsequently to it (*i*). And where the affidavit stated that the defendant was indebted to two persons, for money lent by them and their late co-partner; on an affidavit that the third partner was alive, the court ordered the bail-bond to be delivered up and cancelled (*k*). And in some other instances, under very special circumstances, and in extreme cases, the court have interfered, notwithstanding the affidavit to hold to bail was positive as to the existence of the debt (*l*). And if an affidavit merely state matter which shews that the defendant should not have been arrested at all for the same cause of action, or the like, the court or a judge will receive such counter-affidavit (*m*). In a recent case, the court refused to discharge a defendant out of custody, because the arrest was against good faith (*n*); and, in another case, where the particulars of demand shewed that the debt was barred by the Statute of Limitations (*o*). And the court would not discharge a defendant out of custody in an action on a promissory note, on an affidavit being produced, shewing that the consideration for the note was a gambling debt, and that an injunction had issued in the Court of Chancery to stay proceedings at law (*p*). Nor will they discharge the defendant merely because facts stated in an affidavit, subsequently made by the plaintiff, are inconsistent with the affidavit upon which the arrest has been made (*q*).

Supplementary Affidavit as to.

On the other hand, "no supplemental affidavit shall be allowed to supply any deficiency in the affidavit to hold to bail" (*r*).

(*f*) *Naylor* v. *Eagar*, 2 Y. & J. 99.

(*g*) *Imlay* v. *Ellefsen*, 2 East, 453: *Tucker* v. *Tucker*, 1 Hodges, 15: 1 Scott, 643, *S. C.*: *Mason* v. *Smith*, 5 Dowl. 179: *Brackenbury* v. *Needham*, 1 Dowl. 439; where the arrest was made under a judge's order.

(*h*) *Kirk* v. *Strickland*, 2 Doug. 450: *Anon.*, 1 Salk. 99, 100; 1 L Raym. 383, *S. C.*: *Slater* v. *Shergold*, 3 T. R. 572: and see *Armstrong* v. *Stratton*, 7 Taunt. 405; 1 Moore, 110, *S. C.*: *Burton* v. *Haworth*, 1 N. & M. 318; 4 B. & Ad. 462, *S. C.*: *Smith* v. *Curtis*, 2 Dowl. 223.

(*i*) *Nizetitch* v. *Bonocich*, 5 B. & Ald. 904: and see *Chambers* v. *Bernasconi*, 6 Bing. 498; 1 C. & J. 451, *S. C.*

(*k*) *Morrell* v. *Parker*, 6 Dowl. 123; 3 Mee. & W. 65.

(*l*) See *Wightwick* v. *Banks*, Forrest, 152: *Taylor* v. *Higgins*, 3 East, 169: *Jackson* v. *Tomkins*, 2 Chit. Rep. 20: *M'Clure* v. *Pringle*, 13 Price, 8; M'Clel. 2, *S. C.*; 6 D. & Ry. 24: *Burton* v. *Haworth*, 1 N. & M. 318; 4 B. & Ad. 462, *S. C.*: *Mason* v. *Smith*, 5 Dowl. 179: see *Isaacs* v. *Silver*, 11 Moore, 348, in which the authority of *Wightwick* v. *Banks*, Forrest, 162, is questioned.

(*m*) *Imlay* v. *El'efsen*. 2 East, 453: *Tucker* v. *Tucker*, 1 Scott, 463; 1 Hodges, 15: *Masel* v. *Angel*, 6 D. & R. 19.

(*n*) *Udall* v. *Nelson*, 1 H. & W. 177; 3 A. & E. 215; 6 N. & M. 637, *S. C.*

(*o*) *Pottier* v. *Macdonnell*, 1 H. & W. 189; 3 Dowl. 583, *S. C.*: *Merceron* v. *Merceron*, 5 Dowl. 271.

(*p*) *Curzon* v. *Hodges*, 5 Dowl. 98.

(*q*) *Vaughan* v. *Goadby*, 6 Dowl. 96; 3 Mee. & W. 143.

(*r*) See R. H., 2 W. 4, r. 9: and *Cope* v. *Cook*, 2 Doug. 467: *Jacks* v. *Pemberton*, 5 T. R. 552: *Molling* v. *Buckholtz*, 2 M. & Sel. 563: see *Hollis* v. *Brandon*, 1 B. & P. 36: *Green* v. *Redshaw*, Id. 227: *Mann* v. *Sheriff*, 2 Id. 357: *Machu* v. *Fraser*, 7 Taunt. 174: *Armstrong* v. *Stratton*, Id. 405.

Form of Motion.

Where the objection to the arrest is the insufficiency of the affidavits, the summons or motion should be to set aside the judge's order and not the *capias*(*s*).

Time of making Application.

Before the 1 & 2 *V. c.* 110, *s.* 6, the affidavit could not, it seems, unless an absolute *nullity*(*t*), have been objected to, after the time for putting in bail(*u*), and at all events not after bail had been perfected(*x*), or put in(*y*), or after time obtained(*z*), or an undertaking to put it in(*a*), or after paying money into court in lieu of bail(*b*). And where the defendant had given a bail-bond, without being arrested, the court held that he had thereby waived all objections to the affidavit(*c*); and they so held, where the defendant induced the plaintiff to accept of certain persons as bail, by affecting to acquiesce in the decision of a single judge as to the sufficiency of the affidavit(*d*). It will be observed, that the words of 1 & 2 *V. c,* 110, *s.* 6, are "*at any time after such arrest;*" and it may be made a question whether the above cases as to the time within which the objection must be made are still law. It is submitted that they are, and that the defendant may, by taking any of the above steps, and even, perhaps, by delay(*e*), waive the right of objection conferred on him by 1 & 2 *V.*, in the same way as he might have waived the common law right of objection which he had before that act. *Quisquis potest revocare jus pro se introductum*(*f*).

Costs of Application.

The defendant will not be entitled to the costs of the application as costs in the cause or otherwise, unless so ordered (*g*). But, generally speaking, if the application be successful, the judge either orders the payment of costs by the plaintiff, and restrains defendant from bringing an action on account of the arrest upon an improper affidavit, or else leaves the defendant to bring such action, without making any order as to the costs (see *ante*, 500).

Although the defendant is discharged out of custody, or the bail-bond cancelled on the terms of his entering a common

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(*s*) *Hopkinson* v. *Salembier*, 7 Dowl. 493.

(*t*) It may be a nullity if substantially bad. (See *Morgan* v. *Baylis & Wife*, 3 Dowl. 117: *Hussey* v. *Wilson*, 5 T. R. 254; 4 Id. 577: *ante*, 495). It would be a nullity if sworn before a person having no authority to take it. (*Sharpe* v. *Johnson*, 2 Bing. N. C. 246; 2 Scott, 405; 4 Dowl. 324, *S. C.*)

(*u*) See *Tucker* v. *Colegate*, 1 Dowl. 574; 2 C. & J. 489, *S. C.*: *Firley* v. *Rallett*, 2 Dowl. 708: *Fownes* v. *Stokes*, 4 Id. 125: and see *per Littledale*, J., in *Newnham* v. *Hanny*, 5 Id. 263: *post*, 175.

(*x*) *Jones* v. *Price*, 1 East, 81: *Chapman* v. *Snow*, 1 B. & P. 132: see *Robinson* v. *Nicholls*, 2 Str. 1077

(*y*) *D'Argent* v. *Vivant*, 1 East, 330: *Shawman* v. *Whalley*, 6 Taunt. 185: *Dalton* v. *Barnes*, 1 M. & Sel. 230: *Reeves* v. *Hucker*, 2 C. & J. 44; 2 Tyr. 161, *S. C.*

(*z*) *Moore* v. *Stockwell*, 6 B. & C. 769; 9 D. & R. 124, *S. C.*

(*a*) *Holliday* v. *Lawes*, 3 Bing. N. C. 541.

(*b*) *Green* v. *Glassbrooke*, 1 Bing. N. C. 516: 1 Scott, 402; 1 Hodges, 27, *S. C.* Nor before 1 & 2 V. c. 110, could it be objected to after plea; (*Nesbitt* v. *Pym*, 7 T. R. 376 n.); or after judgment by default and notice of inquiry. (*Desborough* v. *Coppinger*, 8 T. R. 77). These last-mentioned cases are, it is conceived, no longer applicable, since the proceedings by arrest are now quite irrespective of those in the course of the suit. The cases in the text, however, seem still applicable. (See generally, before 1 & 2 V. c. 110, *Hussey* v. *Wilson*, 5 T. R. 254: Tidd, New Pract. 262: and *post*, Vol. II. Book IV. Part I. Ch. 17).

(*c*) *Norton* v. *Danvers*, 7 T. R. 375.

(*d*) *Mammatt* v. *Matthew*, 2 Dowl. 797; 4 M. & Scott, 356, *S. C.*

(*e*) See *Shuggars* v. *Concannon*, 7 Dowl. 391; 5 M. & W. 30, *S. C.*, *nom. Sugars* v. *Concannon.* In this case, however, the attention of the court was not drawn to the words of the act.

(*f*) If, however, the defect be in the *writ*, and not merely in the proceedings before the judge, in the absence of a rule, like that of M., 3 W. 4, r. 10, it would seem that the proceeding would be a nullity, and not capable of being waived; that is, if the defect were a *material* one. (See *post*, 521).

(*g*) *Mummery* v. *Campbell*, 2 Dowl. 798; 4 M. & Scott, 379, *S. C.*

Plaintiff not bound to accept Appearance entered after Discharge.

appearance, plaintiff is not bound to accept such appearance (*h*). Where proceedings had been commenced by *capias* against a defendant who was discharged out of custody, on the ground of a defect in the *affidavit* of debt, without any arrangement being made that he should enter an appearance, the court held, that the plaintiff was not entitled to enter it for him (*i*).

Justification of Arrest where Affidavit Informal.

It may be here observed, that, in an action for false imprisonment on an arrest upon a writ of *capias* issued on an informal affidavit, the defendant may justify under the writ if it has not been set aside (*k*).

2. *Discharge from Custody on Mesne Process, under* 1 & 2 *V. c.* 110, *s.* 7 (*l*).

2. Discharge from Custody on Mesne Process, under 1 & 2 V. c. 110, s. 7.

The 7th section of the statute, 1 & 2 *V. c.* 110, enacts, "that every prisoner who at the time appointed for the commencement of this act (1st October, 1838) shall be in custody upon mesne process for any debt or demand, and shall not have filed a petition to be discharged under the laws now in force for the relief of insolvent debtors, shall be entitled to his discharge upon entering a common appearance to the action: provided nevertheless, that every such prisoner shall be liable to be detained, or after such discharge to be again arrested, by virtue of any such special order as aforesaid, at the suit of the plaintiff at whose suit he was previously arrested, or of any other plaintiff."

Entering Exoneretur, &c., where Bail in a situation to render Defendant.

This section has been held to apply to cases where the defendant had been arrested, and had put in special bail before 1st October, 1838, provided the bail were in a situation to render the defendant, (he being then considered as constructively in the custody of his bail), and the courts and judges at chambers have, in such cases, ordered an *exoneretur* to be entered on the bail-piece in the first instance, in order to save the parties the expense and trouble of a render (*m*), and, for similar reasons, they have, on the application of the defendant, (who had been arrested before 1st October, 1838), ordered proceedings on the bail-bond to be stayed, and the bond to be delivered up and cancelled on a common appearance being entered, without the production of an affidavit of merits (*n*). The entry of an *exoneretur* has, however, been refused where the bail were not in a situation to render the defendant, and where the plaintiff might be prejudiced by the defendant's not being rendered: thus, it has been refused where the defendant was resident in Scotland (*o*), or elsewhere out of the jurisdiction (*p*). And the same, where judgment had been signed, and a *ca. sa.* issued, though not executed; for the defendant, on being rendered, might be immediately charged in execution,

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(*h*) *Perring* v. *Turner*, 3 Dowl. 15.

(*i*) *Wilkins* v. *Parker*, 5 Dowl. 150.

(*k*) *Reddell* v. *Pakeman*, 3 Dowl. 714; 2 C., M. & R. 30; 1 Gale, 104, *S. C.*

(*l*) As to discharge after an improper arrest under 1 & 2 V. c. 110, s. 3, see *ante*, 500.

(*m*) *Bateman* v. *Dunn*, 7 Dowl. 105; 5 Bing. N. C. 49, *S. C.*

(*n*) *Norris* v. *Brighton*, 7 Dowl. 145; 4 Bing. N. C. 114, *S. C.*

(*o*) *Dalton* v. *Gibbs*, 7 Dowl. 143; 5 Bing. N. C. 113, *S. C.*

(*p*) *Lewis* v. *Ford*, 7 Dowl. 85; 4 M. & W. 361, *S. C.*

and thus placed in actual custody on final process (*q*). Also it has been held that a party who before the 1st October, 1838, had paid money into court in lieu of bail, cannot, in any sense, be said to be in custody, so as to be entitled to relief under the 7th section (*r*). Again, it seems that the 7th section only applies where the defendant was either actually or constructively in custody *on* the 1st of October, 1838; after an arrest on mesne process, therefore, where a party arrested on mesne process escaped before, and was retaken on an escape warrant, after the 1st of October, the court refused to discharge him: and *Parke*, B., said, "As he was not in custody on the 1st of October, he cannot come within the 7th section; and the only question is, whether the provisions of the 1st do not prevent him from being retaken. That section, however, means an arrest at the commencement of the suit" (*s*). A defendant who is brought up by *habeas corpus* to be charged in execution is not in custody "on mesne process" within the 7th section (*t*). But a defendant arrested after the act passed, on a *capias utlagatum*, under an outlawry pronounced before the act passed, is entitled to be discharged on entering a common appearance and paying all costs (*u*).

After payment into Court in lieu of Bail.

After Arrest or Escape Warrant.

On Habeas Corpus.

On Capias Utlagatum.

Relief of Sheriff under s. 7.

Where the sheriff being in default, put in bail before the 1st of October, and after that day an attachment issued against him for not bringing in the body, it was held that the court had no power to relieve him under this section (*x*).

Order for Detainer under s. 7.

As to the order of detainer under this section:—such an order cannot impose any other conditions on the defendant's discharge than those authorized by the act. Therefore, an order for the detention of a prisoner in custody, at the time of the passing of the act "until he should give bail, or until further order," has been held bad (*y*). It seems doubtful whether the order should state that it was shewn to the judge's satisfaction that the plaintiff had a cause of action to the amount of 20*l.* (*y*).

(*q*) *Jackson* v. *Cooper*, 7 Dowl. 5; 4 M. & W. 353, *S. C.*

(*r*) *Harrison* v. *Dickinson*, 7 Dowl. 6; 4 M. & W. 355, *S. C.*

(*s*) *Nias* v. *Milton*, 7 Dowl. 91; 4 M. & W. 359, *S. C.*

(*t*) *Reynolds* v. *Simmonds*, 7 Dowl. 85.

(*u*) *Harvey* v. *O'Meara*, B. C., T. T., 1839; 3 Jurist, 629, *Coleridge*, J.

(*x*) *R.* v. *Sheriff of Middlesex*, 7 Dowl. 82; 4 M. & W. 529, *S. C.*

(*y*) *Boddington* v. *Woodley*, 1 P. & D. 159.

CHAPTER VI.

THE WRIT OF CAPIAS AND PROCEEDINGS THEREON BEFORE ARREST.

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Statute permitting the Capias to be Issued.

UPON obtaining the judge's order for arrest, (already noticed, *ante*, 497), the 3rd section of the 1 & 2 *V. c.* 110, enacts that "it shall be lawful for such plaintiff, within the time which shall be expressed in such order, but not afterwards, to sue out one or more writ or writs of *capias* into one or more different counties, as the case may require, against any such defendant so directed to be held to bail, which writ of *capias* shall be in the form contained in the schedule to this act annexed (*vide infra*), and shall bear date on the day on which the same shall be issued: provided always, that the said writ of *capias* and all writs of execution to be issued out of the superior courts of law at Westminster into the counties palatine of Lancaster and Durham shall be directed to the chancellor of the county palatine of Lancaster, or his deputy there, or to the chancellor of the county palatine of Durham, or his deputy there (*a*)."

In what Cases Issued.

In what Cases Issued.] The writ of *capias* under the 1 & 2 *V. c.* 110, cannot be employed as the means of commencing an action; it is merely auxiliary to the main proceedings in the action in cases where the cause of action amounts to 20*l.*, and the defendant is about to quit England, unless forthwith apprehended.

Form of the Writ.

Form of the Writ.] The statute 1 & 2 *V. c.* 110, *s.* 3, prescribes the form of this writ of *capias*, as follows:—

"*Victoria, by the grace of God of the United Kingdom of*

(*a*) The writ of *capias* here treated of is that prescribed by the schedule of 1 & 2 V. c. 110, and not that which, for the purpose of proceeding against insolvents, is continued by the 85th section of that act. (See *Turnor* v. *Darnell*, 5 M. & W. 28; 7 Dowl. 346, S. C.) The latter *capias* is that prescribed by 2 W. 4, c. 39, schedule, and the form of it will be found in Chit. Forms, 4th ed. p. 34. It will also be found fully treated of in the sixth edition of this Work; and the observations in a preceding portion of this edition, as to the form of the writ of summons (*ante*, 103 to 112) are for the most part applicable also to it. For the reasons already mentioned, (*ante*, 134; and see Chit. Forms, page 26), it is not thought proper to encumber this edition with a separate section on the subject. It would now more properly be treated of in a work on Insolvent Practice.

Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of———, [or *To the Constable of Dover Castle*, or *To the Mayor and Bailiffs of Berwick-upon-Tweed*, or as the case may be, post, 508], *Greeting:—We command you, that you omit not by reason of any liberty in your bailiwick, but that you enter the same, and take* C. D. (post, 510 to 513),——— (post, 515), *if he shall be found in your bailiwick, and him safely keep until he shall have given you bail or made deposit with you according to law in an action on promises* [or, *of debt, &c.*] (post, 516), *at the suit of* A. B. (post, 510, 513), ——— *or until the said* C. D. ——, *shall by other lawful means be discharged from your custody. And We do further command you, that on execution hereof you do deliver a copy hereof to the said* C. D. (post, 533). *And we hereby require the said* C. D. *to take notice, that within eight days after execution hereof on him, inclusive of the day of such execution, he should cause special bail to be put in* (*a*) *for him in our Court of*——— (*b*) *to the said action, and that in default of so doing such proceedings may be had and taken as are mentioned in the warning written or indorsed hereon* (*c*). *And We do further command you that immediately after the execution hereof you do return this writ to our said Court of*—— (*b*) *together with the manner in which you shall have executed the same, and the day of the execution thereof; or if the same shall remain unexecuted, then that you do so return the same at the expiration of one calendar month from the date hereof, or sooner if you shall be thereto required by order of the said court or by any judge thereof* (post, 517). *Witness* [name of Chief Justice, or, in the Exchequer of Pleas, of Chief Baron], *at Westminster*, [or as the case may be] *the* ——— *day of* ———" [day of issuing the writ].

"Memorandum to be subscribed to the writ."
["*This writ is to be executed within one calendar month from the date thereof, including the day of such date, and not afterwards.*"

"*A Warning to the Defendant.*

"*If a defendant, having given bail on the arrest, shall omit to put in special bail as required, the plaintiff may proceed against the sheriff, or on the bail-bond.*"

"Indorsements to be made on the writ."
"*Bail for* ——— *pounds by order of*, [naming the judge making the order], *dated this* ——— *day of*———"
"*This writ was issued by* E. F., *of* ———, *attorney for the plaintiff* [or plaintiffs] *within-named.*"
Or,
["*This writ was Issued in person by the plaintiff within-named, who resides at* [mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be"].

The statute *imperatively* requires that the above form should — The Form

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(*a*) This also means giving notice of the bail being put in. (*Grant* v. *Gibbs*, 3 Dowl. 409; 1 Hodges, 56, *S. C.*, a case under 2 W. 4, c. 39).

(*b*) The court must be correctly stated. (See *Mayhew* v. *Hoadley*, 6 Dowl. 629).

(*c*) These words "or indorsed hereon" may be omitted if the memorandum be not *indorsed* on the writ. (*Bridgman* v. *Curgenven*, 3 Dowl. 1, a case under 2 W. 4, c. 39).

prescribed by the Act must be followed.

be adopted (*d*); and any material variation from it would not only render it irregular, but, in most cases, absolutely *void.*

We shall now proceed to notice the particular parts and requisites of this writ, together with the memoranda and indorsements to be made thereon—the mode of suing it out—how it may be continued—and the consequences of any defect therein.

Direction of Writ.

Direction of Writ.] The writ (which is a *non omittas*) may be directed to any sheriff or returning officer in England (*e*). It may also issue into Wales, and be directed to the sheriff of the county (*f*). It may issue into the counties palatine (*g*), and be directed in the manner hereunder mentioned. A writ directed in the alternative "to A. *or* B." would, it seems, in general, be bad (*h*).

To Sheriff.

To Coroner.

To Elizors.

The writ is directed to the sheriff of the county wherein the defendant is to be found, and it cannot be executed in any other county than that to the sheriff of which it is directed (*post*, 531). If the sheriff be a party, the writ should be directed to the other sheriff, if there be two (*i*); or if there be but one, then to the coroners; and if the coroners also be parties, then to persons appointed by the court, or nominated by one of the masters, usually called elizors (*k*). If the sheriff be a party, and the writ be directed to him, the court or a judge will set aside the proceedings for the irregularity (*l*).

In Districts surrounded by another County.

There are in many parts of England districts and places, parcel of some one county, but wholly situate within and surrounded by some other county; which was productive of inconvenience and delay in the service and execution of process; for remedying which, the recent act of 2 *W.* 4, *c.* 39, *s.* 20, enacts, "that every such district and place shall and may, for the purpose of the service and execution of every writ and process, (whether mesne or judicial), issued out of either of the superior courts at Westminster, be deemed and taken to be part *as well* of the county wherein such district or place is so *situate* as aforesaid, *as of* the county whereof the same is *parcel;* and every such writ and process may be *directed* accordingly and *executed* in either of such counties" (*m*). A county of a borough surrounded by another county is not within the meaning of this act (*n*).

To Bailiff of Liberty.

Where a writ is to be executed in a liberty or franchise within a county, it must be directed to the sheriff of the county: but should (unless it contain a *non omittas* clause, as the *capias*, now invariably does) be executed by the bailiff of the liberty to whom the sheriff directed his mandate for that purpose (*o*). Therefore a writ directed to the bailiff of the

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(*d*) See cases on 2 W, 4, c. 39: *Smith* v. *Crump*, 1 Dowl. 51: *Davies* v. *Porter*, 2 Id. 538: *Richards* v. *Stuart*, 10 Bing. 319; 3 M. & Scott, 774, S. C.

(*e*) *Price* v. *Jackson*, 1 M. & Sel. 442: see *Kelly* v. *Shaw*, 6 T. R. 74.

(*f*) 11 G. 4 & 1 W. 4, c. 70, s. 13.

(*g*) See 1 & 2 V. c. 110, s. 3: *Chapman* v. *Maddison*, 2 Str. 1089: *Jackson* v. *Hunter*, 6 T. R. 73.

(*h*) See *R.* v. *Fowler*, 1 Ld. Raym. 586.

(*i*) *Letsom* v. *Bickley*, 5 M & Sel. 144: *Andrews* v. *Sharp*, 2 Bl. Rep. 911.

(*k*) See *Mayor of Norwich* v. *Gill*, 1 Dowl. 246; 1 M. & Scott. 91; 8 Bing. 27, *S. C.* If the writ be directed to the coroner the officer executing it is his officer, and not the sheriff's. (*Serjeant* v. *Cowan*, 1 C. & M. 491).

(*l*) *Weston* v. *Coulson*, 1 W. Bl. 506. This applies to bailable process only. (*Mayor of Kingston* v. *Bubb*, 1 Dowl. 151).

(*m*) See the form, Chit. Forms, 228, 148.

(*n*) *Davis* v. *Skerlock*, 7 Dowl, 530.

(*o*) 5 G. 2, c. 27, s. 3.

Non-omittas clause,

borough of Southwark was holden void, and the defendant was discharged out of custody (*p*). But the sheriff, and not the bailiff, must execute the writ within the liberty, if there be a clause of *non omittas* in the writ (*q*); or if even, without a *non omittas*, he arrest a defendant within the liberty, the arrest will be good, although the sheriff may thereby render himself liable to an action at the suit of the lord of the franchise (*r*). It will be seen that the writ of *capias*, prescribed by the 1 & 2 *V. c.* 110, contains the *non omittas* clause, and the omission of it would render the writ irregular, and perhaps afford a ground for the sheriff refusing to execute it.

In Counties of Cities, and Boroughs.

There are certain cities and towns in England, which are *counties of themselves*, and to the sheriffs of which all writs must be directed which are to be executed within them. Some of these have two sheriffs, *viz.* the cities of Bristol, Chester, Coventry, Gloucester, Lincoln, London, Norwich, and York, and the town of Nottingham; some only one, *viz.* the cities of Canterbury, Exeter, Lichfield, and Worcester, and the towns of Kingston-upon-Hull, Newcastle-upon-Tyne, Poole, and Southampton (*s*). The sheriff of the city of Oxford, appointed in pursuance of the Municipal Corporation Act (*t*), has not the execution in Oxford of writs from the superior courts, but they are still to be executed by the sheriff of the county (*u*). And the same in all other cities and boroughs, which had not sheriffs on whom that duty rested before the passing of the Municipal Corporation Act.

In Counties Palatine.

The writ, as we have just seen, (*ante*, 508), may be issued into the counties palatine of Lancaster or Durham (*v*); but the 3rd section of 1 & 2 *V. c.* 110, provides that the writ of *capias* and all writs of execution to be issued out of the superior courts of law at Westminster into the counties palatine of Lancaster and Durham, shall be directed to the chancellor of the county palatine of Lancaster, or his deputy there, or to the chancellor of the county palatine of Durham, or his deputy there (*x*). The chancellor, in pursuance of the command made by the court, issues his mandate to the sheriff, and the sheriff executes the writ (*y*).

In Chester.

As regards the county palatine of Chester, the 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 13, abolished the authority and jurisdiction of the chamberlain and vice-chamberlain of that county; and since this the writ is directed to the sheriff of that county.

(*p*) *Bowling* v. *Pritchard*, 14 East, 289: *Grant* v. *Bagge*, 3 East, 128: and see *Bradshaw* v. *Davis*, 1 Chit. Rep. 374.

(*q*) *Carrett* v. *Smallpage*, 9 East, 330: see *Atkyns* v. *Clare*, 1 Vent. 413.

(*r*) Gilb. C. B. 27: *Piggott* v. *Wilkes*, 3 B. & Ald. 502: *Bell* v. *Jacobs*, 1 Moo. & P. 309: 4 Bing. 523, *S. C.*: *Sparks* v. *Spinks*, 7 Taunt 311.

(*s*) See, as to Middlesex, Bac. Abr., Shff. K. 162: 2 L. Raym. 1135.

(*t*) 5 & 6 W. 4, c. 76, s 61.

(*u*) *Granger* v. *Taunton*, 3 Bing. N. C. 64; 5 Dowl. 190, *S. C.*

(*v*) An original writ returnable in the Queen's Bench could not issue into such counties, there being no cursitors for them; nor could it be issued without a special application to the Master of the Rolls for that purpose.

(*x*) See the form, Chit. Forms, 229: and see R. M., 3 W. 4, r. 16: and *Bracebridge* v. *Johnston*, 3 Moore, 237; 1 B. & B. 12, *S. C.*

(*y*) This was the daily practice on the now abolished writs of *testatum capias*, or *latitat*, although it seems formerly to have been much doubted. (2 Saund. 193-4, n. 2). It has, however, been held, that if a *capias* were directed in the first instance to the sheriff, he was bound to execute it; and a bail bond taken by him in such a case was holden valid. (*Jackson* v. *Hunter*, 6 T. R. 71: and see *Nedham* v. *Bennett*, T. Raym. 171: *Chapman* v. *Maddison*, 2 Str. 1089: Andr. 191: R. T., 21 C. 1. *Sed quære* since the proviso in 1 & 2 V. c. 110, s. 3?)

In Berwick.

In Berwick-upon-Tweed, the process is directed to "the mayor and bailiffs of Berwick-upon-Tweed" (*a*).

In the Cinque Ports.

In the Cinque Ports, the writ must be directed to "the constable of Dover Castle," or "to the constable of the Castle of Dover" (*b*).

In Ely.

In the franchise of Ely, the writ is directed to "the sheriff of Cambridgeshire" in the first instance (*c*).

In Southwark.

In the borough of Southwark, the writ is directed to the sheriff of the county (*d*).

Writ directed to wrong Person, when Void.

In any of these cases, if, when the writ should be directed to the sheriff, it be directed to any other person, it is *void;* and any arrest, &c., made under it will be considered in the same light as if no writ whatever had issued. But if the writ be directed to the sheriff, when it should have been directed to some other person, the execution of the writ will, it seems, be valid (see *ante*, 509 n. (*y*)); although perhaps the court or a judge would quash it for the irregularity.

Erroneous Direction.

Care should be taken that the direction be correct in substance. A writ directed to the sheriff of "Middesex," instead of "Middlesex," was in one case held to be bad (*e*); though, indeed, in a more recent case this was overruled (*f*). A writ directed to the "sheriff" instead of "sheriffs" of London, is bad (*g*). So is a writ directed to the "sheriffs," instead of "sheriff," of Middlesex (*h*). And a mistake in the writ, or a variance between the writ and copy in any of these respects, will entitle the defendant to be discharged out of custody, or the bail-bond to be delivered up to be cancelled (*i*).

The Parties' Names

The Parties' Names.] Care should be taken that the parties' names be inserted correctly in the writ.

Of Plaintiff.

Of Defendant.

The christian and surname of the plaintiff must be inserted in the writ (*k*).

In general, also, the writ must set forth the christian and surname of the *defendant* in full, and the adoption of initials or contractions will not suffice. But, by the 3 & 4 *W*. 4, *c*. 42, *s*. 12, "in all actions upon *bills of exchange* or *promissory notes*, or other *written instruments*, any of the parties to which are designated by the initial letter or letters or some contraction of the *christian* or first name or names, it shall be sufficient in every affidavit to hold to bail, and in the process or declaration, to designate such persons by the same initial letter or letters, or contraction of the *christian* or first name or names, instead of stating the christian or first name or names in full."

Wrong Name immaterial, where dili-

Also, in other cases, by the rule of *H. T.*, 2 W. 4, *r*. 32, "a description of the defendant in the process or affidavit

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(*a*) There is no filazer for this place. (See *Mayor of Berwick, &c.*, v. *Shanks*, 3 Bing. 461; 11 Moore, 372, *S. C.*)

(*b*) *Frank* v. *James*, 5 Dowl. 723.

(*c*) See *Grant* v. *Bagge*, 3 East, 128: see R. T., 13 G. 2: the sheriff should now execute the writ himself as the writ contains the *non omittas* clause.

(*d*) See *Bowring* v. *Pritchard*, 14 East, 289: and see 1 Chit. R. 374 b.

(*e*) *Hodgkinson* v. *Hodgkinson*, 2 Dowl. 535; see *Colston* v. *Berens*, 3 Id. 253

(*f*) *Colston* v. *Berens*, 3 Dowl. 253; 1 C., M. & R. 833, *S. C.*

(*g*) See *Nicol* v. *Boyne*, 2 Dowl, 761; 3 M. & Scott, 812; 10 Bing. 339, *S. C.*

(*h*) *Jackson* v. *Jackson*, 3 Dowl. 182; 1 C., M. & R. 438, *S. C.*

(*i*) Id.: *Nicol* v. *Boyne*, 10 Bing. 339; 2 Dowl. 761; 3 M. & Scott, 812, *S. C.*: *Parker* v. *Needon*, 2 Dowl. 707; 1 C., M. & R. 396, *S. C.*: *Storr* v. *Mount*, 2 Dowl. 417: see *Clutterbuck* v. *Wiseman*, 10 Law, J., 81; 2 C. & J. 213, *S. C.* But the writ in this last case was a *quo minus* before the 2 W. 4, c. 39. (See *post*, 533).

(*k*) See the form, *ante*, 506.

gence has been used to find the right one.

to hold to bail by *initials*, or by a *wrong name*, or *without* a *christian* name, shall be no ground for discharging the defendant out of custody, or for cancelling the bail-bond, on motion for that purpose, if it shall appear to the court that *due diligence has been used to obtain knowledge of the proper name.*" In one case (*l*), due diligence was held to have been used in inquiring after the name of a defendant under the above rule, although no inquiries had been made of the defendant or his immediate friends, or at his house or place of business, the debt being large, and there being ground to fear he might abscond. In another case, inquiry of a partner of the defendant, who gave the wrong christian name, and at a banker's, where no information was obtained, was held sufficient diligence (*m*).

Discharge of Defendant arrested by Wrong Name

If the case is not within the above statute or rule, and the defendant is arrested by initials, or by a wrong christian or surname, or without a christian name, the court or a judge will, notwithstanding the 3 & 4 *W.* 4, *c.* 42, *s.* 11, order him to be discharged out of custody, or the bail-bond (if any) to be delivered up to be cancelled (*n*); unless the name be *idem sonans* (*o*), or unless the defendant have on several occasions gone by the name in which he is sued (*p*); or unless he waives the objection by executing the bail-bond, or putting in bail above, in the manner presently noticed. The motion for this purpose must before the 1 & 2 *V. c.* 110, have been made or summons taken out before the defendant had put in bail (*q*), or before an undertaking to put in bail (*r*), or, as it seems, before the time for putting it in had elapsed (*s*), and, at all events, before he had obtained time to put it in (*t*), and before the usual time limited for pleading in abatement had expired (*u*); and it would seem that the 1 & 2 *V. c.* 110, *s.* 6, makes no difference in this respect, for though the words of that section are "*at any time* after such arrest," yet it would seem that the defendant may waive the benefit of the statute, just in the same way as in the above-mentioned cases he was holden to have waived the common law right of applying to be discharged (*x*). The court or a judge will, on making the rule or order to discharge the defendant, or to cancel the bail-bond, generally compel him to enter a common appearance if necessary (*y*); and to undertake not to bring any action against the sheriff, &c., to which, as we shall presently see, he might be otherwise liable. The affidavit in support of the application should be intitled in the right name of the party, stating him

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(*l*) *Hicks* v. *Marreco*, 1 C. & M. 84; 3 Tyr. 216, *S. C.*

(*m*) *Ladbrooke* v. *Phillips*, 1 H. & W. 109: and see *Rossett* v. *Hartley*, 5 N. & M. 415; 1 H. & W. 581, *S. C.*

(*n*) *Ladbrooke* v. *Phillips*, 1 H. & W. 109, decided since the 3 & 4 W. 4, c. 42, s. 11: and see *Callum* v. *Leeson*, 2 Dowl. 381; 2 C. & M. 406, *S. C.*: *Smith* v. *Innes*, 4 M. & Sel. 360: *Reynolds* v. *Hankin*, 4 B. & Ald. 536: *Parker* v. *Bent*, 2 D. & R. 73: *M'Beath* v. *Chatterley*, Id. 237: *Wilks* v. *Lorch*, 2 Taunt. 399: see *post*, Vol. II. Book II. Ch. 1.

(*o*) *Ahitbol* v. *Beniditto* instead of *Benedetto*, 2 Taunt. 401: *Homan* v. *Tidmarsh*, 11 Moore, 231: *Dickinson* v. *Bowes*, 16 East, 110: *R.* v. *Shakspeare*, 10 East, 83.

(*p*) *Walker* v. *Willoughby*, 6 Taunt. 530; 2 Marsh, 230, *S. C.*: *Mestaer* v. *Hertz*, 3 M. & Sel. 453: *Newton* v. *Maxwell*, 10 Law Journ. 78; 2 C. & J. 215; 1 Dowl. 315, *S. C.*

(*q*) *Murray* v. *Hubbart*, 1 B. & P. 647: and see *Clark* v. *Baker*, 13 East, 273: *Hole* v. *Finch*, 2 Wils. 393; and *post*, 521.

(*r*) *Holliday* v. *Lawes*, 3 Bing. N. C. 541.

(*s*) See *Tucker* v. *Colegate*, 1 Dowl. 574: 2 C. & J. 489, *S. C.*; *Firley* v. *Rallett*, 2 Dowl. 708: *Fownes* v. *Stokes*, 4 Id. 125: and *per Littledale*, J., in *Newnham* v. *Hanny*, 5 Id. 263.

(*t*) *Moore* v. *Stockwell*, 6 B. & C. 76; 9 D. & R. 124, *S. C.*

(*u*) *Binfield* v. *Maxwell*, 15 East, 159: R. H., 2 W. 4, r. 33: and see *Smith* v. *Patten*, 6 Taunt. 115.

(*x*) See *Sugars* v. *Concanen*, 5 M. & W. 30; 7 Dowl. 391, *S. C.*: *nom. Shugars* v. *Concannon.*

(*y*) *Quære*, since 1 & 2 V. c. 110?

to be sued by the wrong one (*z*). The summons should be taken out in a similar manner, or it would be a waiver of the misnomer (*a*).

Signing Bail Bond by wrong name, a Waiver of Irregularity.

If the defendant sign the bail-bond by the full name in which he is described (though improperly) in the writ, he will in general be precluded from getting his discharge out of custody, or cancelling the bail-bond; but not if he sign it by his real name, describing himself also as sued by the wrong one. The defendant's having signed a regular bail-bond, on a writ merely describing them as "Messrs. Llewellyn & Belchier," were held to have waived the irregularity in their description in the writ (*b*). But if a defendant be arrested by the initials of his christian name, and he execute the bail-bond, even by his full name (*c*), or by the initials (*d*), the court or a judge will, it seems, order it to be cancelled, unless the case be within the above statute or rule of court. If, however, before the 1 & 2 *V. c.* 110, he put in bail above by his right name, the plaintiff might have declared against him by such name, stating him to have been arrested by the other (*e*); or in such a case, where bail is put in in the right name, without at the same time stating the defendant to have been arrested by the name in the process, the plaintiff, it seems, might before that act, and still may, consider the bail as a nullity, and proceed against the sheriff or on the bail-bond, accordingly (*f*). On the other hand, if the defendant put in bail by the name in the writ, he thereby estopped himself from taking any advantage of the error, and the plaintiff might have proceeded to execution against him by such name, however erroneous (*g*); and this, it seems, would still be the case, at least, if the defendant be described by the same name in the writ of summons and other proceedings in the action.

Action against Sheriff for an Arrest in a wrong Name.

If a defendant be arrested on mesne process by a wrong name, he may maintain an action of false imprisonment against the sheriff or his officers, or any one interfering in the arrest (*h*); but not so, if the defendant be as commonly known by the name by which he is sued as his real name (*h*), or if the name be *idem sonans* (see *ante*, 511); and 3 & 4 *W.* 4, *c.* 42, *s.* 11, (*ante*, 511, n. (*n*)), or the rule of *H. T.*, 2 *W.* 4, *r.* 32, (*ante*, 510), makes no alteration of the law in this respect (*i*). Where a person, before process sued out against him, being asked if his name were not John, said that it was, it was holden that he could not afterwards maintain trespass for an arrest in that name, although his name was really William (*k*). The court or a judge, in discharging the defendant out of cus-

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(*z*) *Finch* v. *Cocken*, 2 Dowl. 383; 2 C. & M. 412, *S. C.*: *Shaw* v. *Robinson*, 8 D. & R. 423.

(*a*) *Nathan* v. *Cohen*, 3 Dowl. 370; 1 H. & W. 107, *S. C.*

(*b*) *Kingston* v. *Llewellyn*, 1 B. & B. 529; 4 Moore, 317, *S. C.*

(*c*) *Budd* v. *Graham*, K. B., H. T., 1829: *Taylor* v. *Rutherman*, 6 Moore, 264: *Lake* v. *Silk*, 3 Bing. 296: 11 Moore, 57, *S. C.*: *Grindall* v. *Smith*, 1 Moo. & P. 24.

(*d*) *Turner* v. *Colville*, MS., M. 1820, *S. P.*: *Reynolds* v. *Hankin*, 4 B. & Ald. 536: *Parker* v. *Bent*, 2 D. & R. 73: *M'Beath* v. *Chatterley*, Id. 237: *Ogden* v. *Barker*, 1 Dowl. 125: see *Kingston* v. *Llewellyn*, 4 Moore, 317; 1 B. & B. 529, *S. C.*: but see *Howell* v. *Coleman*, 2 B. & P. 466, *contra.*

(*e*) *Murray* v. *Hubbart*, 1 B. & P. 645: *Symmers* v. *Wason*, Id. 105: *Hole* v. *Finch*, 2 Wils 393.

(*f*) R. v. *Shff. of Suffolk*, 4 Taunt. 618.

(*g*) *Smithson* v. *Smith*, Barnes, 94; Willes, 462, *S. C.*: *Stroud* v. *Gerrard*, 1 Salk. 8: *Meredith* v. *Hodges*, 2 N. R. 453.

(*h*) *Shadgett* v. *Clipson*, 8 East, 328: *Cole* v. *Hindson*, 6 T. R. 234: *Finch* v. *Cocken*, 3 Dowl. 678; 2 C., M. & R. 196; 1 Gale, 130, *S. C.*

(*i*) *Finch* v. *Cocken*, 3 Dowl. 678; 2 C., M. & R. 196; 1 Gale, 130, *S. C.*

(*k*) *Price* v. *Harwood*, 3 Camp. 108: see *Walker* v. *Willoughby*, 6 Taunt. 530.

tody, &c., for a misnomer, usually restrain him from bringing any action.

Sheriff not bound to execute Process where Defendant is described by his wrong Name.

The sheriff or his officer is not bound to execute mesne process wherein the defendant is described by the wrong name (*l*); and if the defendant were to resist the sheriff upon a writ issued against him by a wrong name, and death were to ensue, it would perhaps be only manslaughter (*m*). As to the validity of the bail-bond in such a case, an important case on the subject should be here noticed:—A defendant, whose name was Cocken, was arrested upon a *capias* against him by the name of Cocker: he gave a bail-bond to the sheriff in the name of Cocken sued as Cocker; and the bond being afterwards assigned to the plaintiff, he declared thereon against the defendant as Cocken sued by the name of Cocker; it was held, upon motion in arrest of judgment, that the declaration was bad, because a writ against Cocker did not authorize an arrest of Cocken, unless he was known as well by one name as the other, and there was no averment of that fact in the declaration (*n*).

The Character in which the Parties Sue or are Sued.

The Character in which the Parties Sue or are Sued.] It will be seen, (*ante*, 507), that the form of writ given by the 1 & 2 *V.* *c.* 110, does not expressly require that the parties should describe themselves otherwise than *generally*; and the same was the case in the writ given by 2 *W.* 4, *c.* 39; and it seems to have been unnecessary under the latter statute in the Courts of Queen's Bench and Exchequer, whether or not the plaintiff were suing or the defendant were sued *en autre droit*, (as executor, administrator, assignee, or the like), to describe him in the *writ* as suing or being sued in that character; and upon such a general description the plaintiff might have made the affidavit of debt (*o*), and declared *en autre droit*, without discharging the bail, or otherwise prejudicing himself (*p*). In the Common Pleas, however, there are decisions to the contrary (*q*); and on the whole it would be safest in any of the courts to describe the representative character (if any) in which the plaintiff sues. Notwithstanding, however, the plaintiff should unnecessarily describe himself or the defendant in a particular character, as if he style himself "executor," (provided he do not state himself to sue "*as*" executor, or the like), or give himself or the defendant any other superfluous description in the *writ*, and declare generally or in some other character, this would not before the 1 & 2 *V.* have been, nor, it seems, will it now be irregular or discharge the bail, because the demand is still the same (*r*). But if the writ be to answer the plaintiff *en autre droit*, as, if it describe him as suing "*as*"

(*l*) *Morgans* v. *Bridges*, 1 B. & Ald. 647: *Keisar* v. *Tyrrell*, 2 Bulst. 256.

(*m*) Fost. 312. A warrant is bad unless the name is in it, or such a *designatio personæ* as is not likely to lead to a mistake. (*R.* v. *Hood*, Arch. Cr. Pl. by Jervis, 357; R. & M. 281, *S. C.*)

(*n*) *Finch* v. *Cocken*, 3 Dowl. 678; 2 C., M. & R. 196; 1 Gale, 130, *S. C.*: and see *Cole* v. *Hindson*, 6 T. R. 234.

(*o*) *Ilsley* v. *Ilsley*, 2 C. & J. 330; 1 Dowl. 310, *S. C.*

(*p*) *Ashworth* v. *Ryal*, 1 B. & Ad. 19: *Marzetti* v. *Jouffroy*, 1 Dowl. 44: and see, as to non-bailable process, *Weavers' Comp.* v. *Forrest*, 2 Stra. 1232: *Lloyd* v. *Williams*, 2 Bla. Rep. 722; 3 Wils. 141, *S. C.*: *Canning* v. *Davis*, 4 Bur. 2417: 1 Chit. Pl. 5th ed. 284.

(*q*) *Manesty* v. *Stevens*, 9 Bing. 400; 1 Dowl. 711, *S. C.*: *Ralm*, administrator, v. *Woodward*, 12th June, 1832, C. P.

(*r*) *Lloyd* v. *Williams*, 2 Bla. Rep. 722; 1 B & P. 383, n. (*b*): *Anon*, 1 Dowl. 97: *Watson* v. *Pilling*, 6 Moore, 66; 3 B. & B. 4, *S. C.*: *Knowles* v. *Johnson*, 2 Dowl. 653.

executor(*s*), or "*as*" assignee of a bankrupt(*t*), or if he sue *qui tam*(*u*), and the declaration be by him in a different character, the bail will be discharged.

Number of the Parties.

Number of the Parties.] The names of all the plaintiffs should be inserted in the writ, and no more. The rule of *M. T.*, 3 *W.* 4, requiring that the writ of *capias* should contain the names of all the defendants, does not, it seems, apply to the *capias* given by 1 & 2 *V. c.* 110. The order to hold to bail may, as we have seen, (*ante*, 497), be made against as many of the defendants as the judge thinks fit, and there is nothing in the form of the writ to shew that defendants who are not to be arrested are to be mentioned(*x*). It seems, however, to be safer to mention them, for the purpose of identifying the bailable proceedings with those in the action, and to prevent the discharge of bail by a variance in the description of the action in which they become bound for the defendant.

Discharge of Bail, by declaring against more or less than the Parties stated in the Writ.

Before the 1 & 2 *V. c.* 110, if a bailable writ were at the suit of one plaintiff only, and the declaration at the suit of two(*y*), or against two defendants and the declaration against one only, the court or a judge would have ordered an *exoneretur* to be entered on the bail-piece, or discharged the defendant out of custody, even although the other defendant were out of the jurisdiction of the court(*z*); and would, perhaps, have set aside the proceedings for irregularity(*a*). But this rule as to declaring against only one or more of several defendants named in the writ was not applicable to actions for *torts*, in which, though the plaintiff sued out bailable process jointly against several, he might have declared separately against one or more of them(*b*), provided he dropped his proceedings entirely against the others(*c*). And since that act it would seem that similar consequences will result from any palpable difference between the bailable proceedings and the main proceedings in the action.

Addition and Place of Abode of the Parties, in original Writs.

Addition and Place of Abode of the Parties.] In proceedings by *original* writ in personal and other actions, the *præcipe* must have stated, and, when that process is adopted, (but which it can no longer be in *personal* actions), must still state, the *defendant's* addition of estate or degree, such as baronet,

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(*s*) See, before the 1 & 2 V. c 110, *Murrell* v. *Jowatt*, MS., M. 1823: *Ashworth* v. *Ryal*, 1 B. & Ad. 19: *Delves* v. *Strange*, 6 T. R. 158: *Attwood* v. *Rattenbury*, 5 Moore, 209: *Douglas* v. *Irlam*, 8 T. R. 416: *Hally* v. *Tipping*, 3 Wils. 61.

(*t*) See, before the 1 & 2 V. c. 110, Id.; and 1 Tidd, 9th ed. 450, n. (*e*).

(*u*) See, before 1 & 2 V. c. 110, Id.; and *Canning* v. *Davis*, 4 Burr. 2417.

(*x*) *Quære*, whether they ought to be mentioned for the purpose of identifying the proceedings?

(*y*) *Rogers* v. *Jenkins*, 1 B. & P. 383.

(*z*) *Thompson* v. *Cotter*, 1 M. & Sel. 55: *Woodcock* v. *Kilby*, 1 M. & W. 41; 1 T. & G. 301; 4 Dowl. 730, *S. C.*: *Bellotti* v. *Barella*, 4 Dowl. 719.

(*a*) *Woodcock* v. *Kilby*: *Bellotti* v. *Barella*, *supra*; *Lewin* v. *Smith*, 4 East, 589: *Moss* v. *Birch*, 5 T. R. 722: *Holland* v. *Johnson*, 4 Id. 695: *Holland* v. *Richards*, 4 Id. 697: *Chapman* v. *Eland*, 2 N. R. 82, in which case the defendant had taken the declaration out of the office. (*Yonge* v. *Murray*, 1 Marsh. 274: but see *Forbes* v. *Phillips*, 2 New Rep. 98: *Kerval* v. *Fossett*, 7 Taunt. 458). Where a husband and wife were arrested, and the wife was discharged on entering a common appearance, and the plaintiff declared against the husband alone, the proceedings were held irregular. (*Cattarns* v. *Player*, 3 D. & R. 247). The application should have been made before plea. (*Bartrum* v. *Williams*, 6 Dowl. 397).

(*b*) *Wilson* v. *Edwards*, 3 B. & C. 734; 5 D. & R. 622, *S. C.*

(*c*) *Caldwell* v. *Blake*, 3 Dowl. 656; 1 Gale, 157; 2 C., M. & R. 249; 5 Tyr. 618, *S. C.*: *Evans* v. *Whitehead*, 2 M. & R. 367: *Pepper* v. *Whalley*, 1 Bing. N. S. 71; 2 Dowl. 821, *S. C.*: *Knowles* v. *Johnson*, 2 Dowl. 653: and see the prior rule in K. B. of E. T. 1827.

knight, clerk, esquire, gentleman, yeoman, labourer, spinster, widow, &c.; or of his mystery, as merchant, tailor, carpenter, &c.(*d*). Also, the name of the town, or hamlet, or place, *and* county, where the defendant resides, or lately resided, must be mentioned(*d*). All this, however, was never very essential, unless it was intended to proceed against the defendant to outlawry(*e*); nor was it necessary at any time to give an addition to the name of the *plaintiff*.

Defendant's Residence in the present Writ of Capias.

As regards this statement of the *defendant's* addition and place of abode in the present writ of *capias*, it will be observed, in the form of such writ, as prescribed by the statute, 1 & 2 *V. c.* 110, (*ante*, 506), that there is a space left after the *defendant's* name. This space, in the form given by 2 *W.* 4, *c.* 39, was intended for the residence of the defendant; and the object of refusing it was to identify him so that the right person might be taken. It will be observed, however, that the form given by 1 & 2 *V. c.* 110, differs from that given by 2 *W.* 4, *c.* 39, in not having the word "of" after the defendant's name; and in a case of *Sidney* v. *Bingham*, at chambers, 20th June, 1839, *Coleridge*, J., held that it was unnecessary to state the residence; it not appearing for what purpose the blank was left. It will be safer, however, to state it, in order to avoid raising any question. In the construction of the 2 *W.* 4, *c.* 39, it was considered that the residence, or supposed residence, or even late residence, or such other description of the defendant as could be given, should be inserted(*f*). If it were not given, or were improperly given, the court or a judge would have set it aside, and all subsequent proceedings had thereon, for irregularity(*g*). And the sheriff, perhaps, would not have been bound to execute it(*h*); and, at all events, the court would not allow him to be prejudiced by it(*i*). Where the defendant was described as "T. S., a clerk in the Army Pay Office, Somerset House, in the city of Westminster, and county of Middlesex," this was holden not to be a sufficient description of his residence(*k*). But where he was described as "Captain L., of the Hon. East India Company's ship Kelly Castle, and now most likely to be found at the East India House, London," it was held sufficient(*l*). "Of the city of London" has been held sufficient(*m*). And it was held not necessary that the number of the defendant's house or the parish should be stated; describing him as of "Kent-street, in the county of Surrey," was held sufficient(*n*). And there was no occasion to state expressly the *county* in which his residence is, the omission of the express statement being supplied by the direction of the writ to the sheriff(*o*); but this has not been fully decided(*p*). If the defendant were a prisoner,

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(*d*) See 1 H. 5, c. 5.

(*e*) But see R. M., 15 C. 2, r. 4.

(*f*) See *Hill* v. *Harvey*, 4 Dowl. 163.

(*g*) *Roberts* v. *Wedderburn*, 1 Bing. N. C. 4; 2 Dowl. 816, *S. C.*: *Lindredge* v. *Roe*, 1 Bing. N. C. 5, (where it was given on the back instead of the body of the writ): *Price* v. *Huxley*, 2 C. & M. 211; 2 Dowl. 231, *S. C.*: and see R. M., 3 W. 4, r. 10, *ante*, 118.

(*h*) See *Kenrick* v. *Nanney*, 1 Dowl. 58; 2 Leg. Obs. 270, *S. C.*

(*i*) See *Clarke* v. *Palmer*, 9 B. & C. 153; 4 M. & R. 141, *S. C.*

(*k*) *Rolfe* v. *Swann*, 1 M. & W. 305; 5 Dowl. 106; 1 T. & G. 665, *S. C.*

(*l*) *Welsh* v. *Langford*, 2 Dowl. 498.

(*m*) *Bodfield* v. *Podmore*, 5 B. & Ad. 1095.

(*n*) *Webb* v. *Lawrence*, 6 Leg. Obs. 460; 2 Dowl. 81; 1 C., M. & R. 886; 3 Tyr. 906, *S. C.*: and see *Cooper* v. *Wheale*, 4 Dowl. 281; 1 H. & W. 525, *S. C.*

(*o*) *Perring* v. *Turner*, 3 Dowl. 15: see *Border* v. *Levi*, Id. 150; 1 Bing. N. C. 362, *S. C.*, *nom. Bosler* v. *Levy*.

(*p*) See *Bosler* v *Levy*, 1 Bing. N. C. 362; 1 Scott, 270; 3 Dowl. 150, *S. C.*, *per Vaughan* and *Bosanquet*, Js.

he must be described as of the prison in which he was in custody(*q*). He might be described as of his *late* place of residence(*r*). And, in general, it was sufficient to give the best description that under the circumstances could be given(*s*). An insertion of the defendant's place of residence in the copy of the writ, or in an indorsement thereon, would not cure the omission of it in the body of the writ itself(*t*). A variance between the description of the defendant's residence in the affidavit of debt and the *capias* is not material(*u*).

Defendant's Addition.

No *addition* need be given to the defendant in ordinary cases (*x*); but if a defendant have a name of dignity, it should perhaps be stated in the writ(*y*).

Plaintiff's Residence.

It is not necessary to give in the writ itself any description of the *plaintiff's* residence; such description, however, must (as will be seen *post*, 518) be given by an indorsement on the writ, when sued out by the plaintiff in person.

Form of Action.

Form of Action.] It will be seen that the form of the writ of *capias*, as prescribed *ante*, 507, renders it necessary to describe in it concisely the cause of action, giving, as an example, the actions on promises and debt, and requiring the description to be "an action on promises," or "of debt." In following such example, it would be proper in other actions to describe them accordingly, as an action of "covenant," "detinue," "on the case," or of "trover," or "trespass," or "libel"(*z*), or "slander"(*a*), as the case may be. Describing an action on *promises* as an action of "trespass on the case," would be bad(*b*). (See further, *ante*, 107).

Consequence of Mistake in.

If this statement of the cause of action be wholly omitted, the court or a judge may set aside the bailable proceedings(*c*); and if improperly stated, the court or a judge may discharge the defendant out of custody, or order the bail-bond (if any) to be cancelled. The cause of action thus inserted may be the same as that which is stated or intended to be stated in the declaration; for, before the 1 & 2 *V. c.* 110, if there were any variance between the writ and declaration in this respect, it would have been a ground for setting aside the declaration for irregularity, though it seems it would not have been a ground for discharging the defendant out of custody or discharging the bail(*d*); and since that act, it seems that it would be a ground

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(*q*) *Lovett* v. *Hill*, 4 Dowl. 579.

(*r*) *Hill* v. *Harvey*, 4 Dowl. 163.

(*s*) *Buffle* v. *Jackson*, 2 Dowl. 505: *Welsh* v. *Langford*, Id. 498.

(*t*) *Rice* v. *Huxley*, 2 Dowl. 231; 2 C. & M. 211; 4 Tyr. 68, *S. C*: *Lindredge* v. *Roe*, 1 Bing. N. C. 6.

(*u*) *Buffle* v. *Jackson*, 2 Dowl. 505.

(*x*) *Sidney* v. *Bingham*, at chambers, 20th June, 1839, *Coleridge*, J.

(*y*) See Tidd, Sup. N. P. 66. Before 1 & 2 V. c. 110, he might, perhaps, have pleaded in abatement, if not so stated. This he cannot do now; and *quære* whether any advantage can be taken of the omission? (See *ante*, 106).

(*z*) *Pell* v. *Jackson*, H. T. 1814.

(*a*) *Anon.*, T. T. 1834.

(*b*) *Richards* v. *Stuart*, 2 Dowl. 537; 10 Bing. 319; 3 M. & Scott, 774: *Barker* v. *Weedon*, 1 C., M. & R. 396; 4 Tyr. 860; 2 Dowl. 707, *S. C.*

(*c*) See R. M., 3 W. 4, 10. See the rule of H. T., 2 W. 4, r. 10, as to requiring a bail-bond or recognisance of bail, with a penalty or sum of 40*l.* only in such a case: and see *Munroe* v. *Howe*, 1 Chit. Rep. 171: *Mayfield* v. *Davison*, 10 B. & C. 223: but those rules are not, it seems, applicable to the process prescribed by the 1 & 2 V. c. 110.

(*d*) *Ward* v. *Tummon*, 1 A. & E. 619: *Gurney* v. *Hopkinson*, 1 C., M. & R. 587; 5 Tyr. 211; 3 Dowl. 189, *S. C.*: and see *Edwards* v. *Dignam*, 2 Dowl. 240: *King* v. *Skeffington*, 25th Jan. 1833, 1 Id. 686: *et vide* R. M., 3 W. 4, r. 10, *ante*, 118. According to the following cases, it would seem that the bail would have been discharged for a variance between the writ and *affidavit*, and the declaration. (*De la Cour* v. *Read*, 2 H. Bl. 278: *Turning* v. *Jones*, 5 T. R. 402: *Tetherington* v. *Goulding*, 7 T. R. 80: *Thomson* v. *Macirone*, 4 D. & R. 619: 2 Saund. 73 a). If the writ were in "trespass on the case," and the declaration on promises, or if the writ were in trespass, and the declaration in for discharging the bail; and, at all events so, if the cause of action also differed from that stated in the writ of summons.

If the writ and affidavit vary in the form of action, the bail would be discharged(*e*).

Return of.

Return of.] The writ of *capias* does not specify any particular return day; but the defendant must, *within eight days after the execution thereof on him*, (*i. e.* after the arrest), *inclusive of the day of such execution*, put in special bail on whatever day the last of such eight days may happen to fall, whether in term or vacation. If, however, the last of such eight days falls on a Sunday, Christmas-day, or any day appointed for a public fast or thanksgiving, in either of such cases the following day is to be considered as the last of such eight days; and if the last of such eight days fall on any day between the Thursday before and the Wednesday after Easter-day, then the Wednesday after Easter-day is to be considered as the last of such eight days; and if the writ be executed on any day between the 10th August and the 24th October, the bail may be put in by the defendant at the expiration of such eight days(*f*). It will be seen (*post*, 518) that the writ is in force only, and cannot be executed after *one calendar month* from the day of its date, including such day. By the terms of the writ the sheriff is bound to return it immediately after it is executed, and the day of its execution may now be considered as the return day.

In what Court.

The writ should require the defendant to put in bail "in our Court of Queen's Bench," or "Common Pleas," or "Exchequer of Pleas," according to the court out of which the writ was issued(*g*). If, however, other words, distinctly pointing out what court was meant, were used, it would, perhaps, suffice; *ex. gr.* if issued out of the Queen's Bench, it required him to put it in "in our court before us" (*h*).

How Returned.

The sheriff, as is required by the writ, must immediately after the execution thereof return it, together with the manner in which he executed it, and the day of the execution thereof; or if the same be not executed, then he must return it at the expiration of one calendar month from its date, or sooner if required by an order of the court or a judge. The practice upon this, however, shall be considered hereafter (*post*, 547 *to* 553).

Date and Teste.

Date and Teste.] The writ of *capias* "shall bear *date* on the day on which the same shall be issued"(*i*). See further as to the date, *ante*, 108.

The writ should, it seems, be tested in the name of the lord chief justice, or lord chief baron, of the court from which it issues, or in case of vacancy of such an office, then in the name of the senior puisne judge of such court(*k*).

"trespass on the case," or the like, it would have been a variance. (Id.: and see *Thompson* v. *Dicas*, 2 Dowl. 93; 1 C. & M. 768, *S. C.*) It would be no ground for a demurrer.

(*e*) *Green* v. *Elgie*, 3 B. & Ad. 437: see *Richards* v. *Stuart*, 10 Bing. 319; 2 Dowl. 537, *S. C.*: *Barker* v. *Weedon*, 1 C., M. & R. 396; 4 Tyr. 360; 2 Dowl. 707, *S. C.*

(*f*) See 2 W. 4, c. 39, s. 11, *ante*, 91; and 1 & 2 V. c. 110, s. 4.

(*g*) This must be correctly stated. (See *Mayhew* v. *Hoadley*, 6 Dowl. 629).

(*h*) See Tidd, 9th ed. 150.

(*i*) 1 & 2 V. c. 10, s. 3.

(*k*) See, as to the teste of writs, under 2 W. 4, c. 39, *ante*, 108.

Day of Signing.

By 5 & 6 *W. & M.* c. 21, s. 4, and 9 & 10 *W.* 3, c. 25, s. 24, the officer who shall sign any writ or process to arrest a person, before judgment, shall at the same time set down upon such writ or process the day and year of his signing the same. But the stat. 2 *W.* 4, c. 39, s. 12, seems to be a virtual repeal of these enactments.

Duration of the Writ.

Duration of the Writ.] The writ remains in force only, and cannot be executed after *one calendar month from the date of it*, including the day of such date; and if it be not executed within that time, it cannot be continued by an *alias* or *pluries* writ, inasmuch as the 1 & 2 *V.* c. 110 (unlike the 2 *W.* 4, c. 39) contains no provisions for this purpose. Though there be not eight days remaining of the one month, when the writ is executed, the eight days to put in bail must be still reckoned as in other cases (*l*).

Memorandum and Warning to be subscribed.

Memorandum and Warning to be subscribed.] The writ of *capias* must have the formal memorandum and warning (noticed *ante*, 507) subscribed to it, or indorsed thereon. An omission of, or material variance from either, would probably be considered as making the writ void, and not merely irregular, inasmuch as there is no rule with regard to the *capias*, prescribed by the 1 & 2 *V.* c. 110, analogous to the rule of Michaelmas term, 3 *W.* 4, noticed *ante*, 118.

Indorsements on.

Indorsements on.] The writ of *capias* must be indorsed with the following memoranda of notices:—

1. The Sum specified in the Judge's Order to hold to Bail.

1. The first indorsement required, according to the form given by the 1 & 2 *V.* c. 110, is the sum specified in the judge's order to hold to bail (*m*). The form of this indorsement should be thus: "*Bail for £—, by order of* [naming the judge making the order], *dated this —— day of ——*" [date of the order]. The words of the act as to the form of the writ being imperative, the omission of, or a material error in, this indorsement would, in the absence of a rule analogous to *R. M.*, 3 *W.* 4, (*ante*, 118), probably be considered as rendering the writ void, and not merely irregular; and it would, at all events, afford a ground for setting aside the writ, or discharging the defendant, or cancelling the bail-bond (*n*). Under the former acts, if the affidavit stated several debts, it was sufficient to indorse the sum total (*o*); and where the indorsement was thus, "Bail for 40*l.* *and upwards*," the court held it sufficient, as the defendant would not be bound to give bail for more than 40*l.* (*p*). Where a defendant was arrested a second time on a fresh writ upon the same affidavit, by a rule of court allowing it, it was held not necessary to indorse on the writ that the bail was by the rule of court (*q*).

2. Name and Place of.

2. The second indorsement required, according to the form

(*l*) See 2 W. 4, c. 39, s. 10: 1 & 2 V. c. 110, s. 4.

(*m*) See the former practice, 12 G. 1, c. 29, s. 2: *Whiskard* v. *Wilder*, 1 Bur. 330: *Evans* v. *Bidgood*, 4 Bing. 63; 12 Moore, 236, *S. C.*, *nom. Martin* v. *Bidgood*: *Wilcoxon* v. *Nightingale*, in error, 4 Bing. 501; 10 B. & C. 202, *S. C.*: *Sharpe* v. *Abbey*, 5 Bing. 193; 2 Moo. & P. 312, *S. C.*

(*n*) See *Cook* v. *Cooper*, 7 Ad. & El. 605; 2 Nev. & P. 607, *S. C.*

(*o*) *Evans* v. *Bidgood*, 4 Bing. 63; 12 Moore, 236, *S. C.*

(*p*) *Webb* v. *Lawrence*, 2 Dowl. 81; 1 C. & M. 806; 3 Tyr. 460, *S. C.*

(*q*) *Richards* v. *Stuart*, 10 Bing. 322; 3 M. & Scott, 774; 2 Dowl. 752, *S. C.*

Abode of Person or Attorney, by whom the Writ was Issued.

given by the 1 & 2 *V. c.* 110, is the name and place of abode of the attorney by whom the writ was issued; or, if no attorney be employed, then a memorandum, expressing that the writ has been sued out by the plaintiff in person, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be. Previously to 1 & 2 *V. c.* 110, by *R. M.*, 3 *W.* 4, *r.* 9, (*ante*, 51, 109), if the writ were sued out by an agent, the name and place of abode of the attorney in the country must also have been indorsed upon the writ (*r*); and although this rule does not appear to be applicable to the new writ of *capias*, yet it would be safer still to make it until it has been decided to be unnecessary. The form of this indorsement is: "*This writ was issued by E. F., of* ——, *attorney for the plaintiff* [or *plaintiffs*] *within-named.*" Or, if sued out by the plaintiff in person: "*This writ was issued in person by the plaintiff within-named, who resides at* ——" [mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be]. An omission of, or a material error in, this indorsement, would be attended with consequences similar to those already noticed, (*ante*, 518), as resulting from an omission of, or error in, the first indorsement (*s*). As to what indorsement is sufficient, see the cases decided on 2 *W.* 4, *c.* 39 (*ante*, 110).

Lastly, the Warning.

Lastly, might be indorsed the warning, (noticed *ante*, 507), but this is usually *subscribed* to, and not indorsed on the writ (*t*).

7 & 8 G. 4, c. 71, inapplicable to present Capias.

The provisions of 7 & 8 *G.* 4, *c.* 71, *ss.* 8 & 9, as to the delivery and indorsement of bailable process sued out in person by parties not attornies, appear to be inapplicable to the present writ of *capias*, which requires the place of residence of the plaintiff, if suing in person, to be indorsed on the writ.

Indorsement of Abode, &c., of Defendant unnecessary.

The indorsement of the place of abode and addition of the defendant, required by *R. H.*, 2 & 3 *G.* 4 (*u*), is not necessary on the present writ of *capias* (*x*).

Indorsement of Debt and Costs unnecessary.

The form of writ given by the statute 1 & 2 *V. c.* 110, does not require any indorsement of the amount of the debt and costs, such as was requisite on process issued under 2 *W.* 4, *c.* 39, (*ante*, 111), and as the rules of *H.*, 2 *W.* 4, & *M.*, 3 *W.* 4, *r.* 5, (*ante*, 111), are inapplicable, it would seem that no such indorsement need be made on the present writ of *capias* (*y*).

Indorsement of Day of Execution.

As to the necessity of indorsing the true day of the execution of the writ, see *post*, 534.

Alias, &c., Writs.

Alias, Pluries, and Concurrent Writs.] The 1 & 2 *V. c.* 110, contains no provisions for continuing the *capias* by *alias* or *pluries;* consequently, on the expiration of the first *capias*

(*r*) R. M., 3 W. 4, r. 9, *ante*, 51, 109: see *Shepherd* v. *Shum*, 2 C. & J. 633: *Miller* v. *Bowden*, 1 C. & J. 563.

(*s*) See *Chapman* v. *Ryall*, Barnes, 415: *Oppenheim* v. *Harrison*, 1 Burr. 20: *Williams* v. *Lewis*, 1 Chit. Rep. 611.

(*t*) See *Bridgman* v. *Congreave*, 3 Dowl. 1.

(*u*) 5 B. & Ald. 560: see *Kenrick* v. *Nanney*, 1 Dowl. 58.

(*x*) See *Bodfield* v. *Podmore*, 5 B. & Ad. 1095. Even before the 2 W. 4, c. 39, it was doubtful whether the omission of the indorsement rendered the writ bad. (See *Clarke* v. *Palmer*, 9 B. & C. 153; 4 M. & R. 141, *S. C.*)

(*y*) So decided by *Coleridge*, J., *Sidney* v. *Bingham*, at chambers, 10th June, 1839.

without being executed, a new order must be obtained before another *capias* can be issued (*z*).

Concurrent Writs.

Concurrent writs may be issued (*a*).

Practical Directions as to Suing out the Writ, &c.

Practical Directions as to suing out the Writ, &c.] In order to sue out this writ of *capias*, *procure a judge's order to hold to bail, as directed* ante, 497, 498, *and a* præcipe (*b*) *for the office; also get a blank writ of* capias, (*which may be had at the stationer's, or elsewhere*), *and fill it up according to the directions pointed out* ante, 506—518. *Take them to one of the masters of the court out of which the writ is to be issued, who will sign the writ. Leave the affidavit and* præcipe *with him. Take the writ to the Seal Office, and get it sealed. Take care that it is correctly indorsed with the indorsements, as directed* ante, 518 *to* 519. *Make a copy of it, including the memoranda and these indorsements, for the purpose of serving it on the defendant* (*c*). *If more than one defendant to be arrested, make such a copy for each of them. Be particularly careful that the copy in every respect is a correct one.* As to what defect in the copy will render the proceedings irregular, see *post*, 533, 534. *Apply at the Sheriff's Office, and get a warrant thereon for the arrest, directed to the sheriff's officer you intend employing for that purpose, and as noticed* post, 523. *Give the copy or copies of the writ and the warrant to the officer, who will thereupon arrest the defendant, and proceed as pointed out in the next Chapter* (post, 523). If the writ is to be executed in the county palatine of Lancaster or Durham, *a mandate must, previously to the delivery of the writ to the sheriff, be obtained from the chancellor or his deputy, commanding the sheriff to execute the writ.*

Concurrent Writs.

The plaintiff may, if he choose, issue concurrent writs into several counties at the same time (*a*); and this is usual where there is a doubt in which of the several counties the defendant is to be found. But the defendant in such case would, it seems, be liable only to the costs of the writ on which he is arrested (*d*).

As to the mode of executing the writ, see the next Chapter.

Defects in, how and when taken Advantage of.

Defects in, how and when taken Advantage of.] We have already seen in the preceding pages, 507 *to* 519, in what respects the writ may be defective. The omission of immaterial particles in the writ or indorsements is not, it would seem, an irregularity of which the court will take notice, if the omissions do not alter the meaning of the writ (*e*). And where the writ under the 2 *W.* 4, *c.* 39, was in this form, "if *se*

(*z*) See the former practice as to *alias* and *pluries capias*, in the 6th edition of this work, 173. See also, *ante*, 117, as to *alias* and *pluries* writs of summons.

(*a*) 1 & 2 V. c. 110, s 3: see *Dunn* v. *Harding*, 10 Bing. 553; 2 Dowl. 803, *S. C.*

(*b*) The *præcipe* or note of instructions states the county, nature of the writ, names of the parties, and cause of action concisely, with the name of the plaintiff's attorney, and date. (See a form, Chit. Forms, 227). The *præcipe* forms no part of the process; and a variance between it and the *capias* will not, in general, be material. (MS. 1814: *sed quære*). The mere fact of a *præcipe* not being to be found is no ground for setting aside the proceedings to outlawry, if it be sworn that a *præcipe* was at one time left in the office. (*Robert* v. *Rogers*, 3 Dowl. 176). It need not disclose that the *capias* was indorsed for bail by affidavit. (*Usborne* v. *Pennell*, 10 Bing. 531; 4 M. & Scott, 431; 2 Dowl. 801, *S. C.*: see *Boys* v. *Durand*, 2 Taunt. 161).

(*c*) See the writ, *ante*, 507.

(*d*) See *Angus* v. *Coppard*, 3 M. & W. 59.

(*e*) *Pocock* v. *Mason*, 1 Bing. 245: *Forbes* v. *Mason*, 3 Dowl. 104: *Yardley* v. *Jones*, 4 Id. 45.

What Defects immaterial.

shall be found in your bailiwick," instead of, "if *she* shall," &c., it was held not to be so defective as to warrant the court in discharging the defendant from custody (*f*): and the same where the words "the" and "by" were omitted in the copy served (*g*); also, where the word Middlesex was by mistake written Middesex (*h*). And these decisions as to *immaterial* defects, seem to be equally applicable to writs of *capias* under the 1 & 2 *V. c.* 110.

How Defects to be taken Advantage of.

As regards the *mode* of taking advantage of a defect or of a variance between the writ and the declaration, the defendant could not even before 1 & 2 *V. c.* 110, have taken such advantage, either by plea in abatement, for the court would not grant oyer of the writ (*i*)—or by writ of error (*k*); much less, can he take advantage of it by such means since that act, for the bailable proceedings are now altogether collateral to the main proceedings in the action. But for a variance, omission, or a mistake in the name of the defendant, or in the number of the parties—in the cause of action—in the teste—in the indorsements, or the like, we have seen in the preceding pages, that the court or a judge will discharge the defendant out of custody, or order the bail-bond (if any) to be delivered up to be cancelled. It should be observed here, that the rule of *M. T.*, 3 *W.* 4, *r.* 10, (*ante*, 118), by which a defect in the body or indorsements of the writ or copy rendered it merely irregular (*l*), and not void, does not, it seems, apply to the *capias* issued under 1 & 2 *V. c.* 110; and, consequently, a material defect might, it seems, now render the present writ of *capias* void.

Application to whom, and how made.

The application to set aside the proceedings must be made to the court, supported by affidavit, or to a judge, who may or may not require such affidavit.

Time of making it.

The application must before the 1 & 2 *V. c.* 110, have been made in a reasonable time, and, at all events, before the defendant applying had taken a fresh step, after knowledge of the irregularity (*m*). It was holden before that act, that when a writ was returnable on the 2nd November, it was too late on the 10th November to take advantage of a misnomer in it (*n*). And as a general rule, for a defect in the writ or indorsements thereon, the application should before that act have been made within the eight days limited for the defendant's putting in bail (*o*). And if the writ were not absolutely *void* (*p*), (which in consequence of *R. M.*, 3 *W.* 4, *r.* 4, was rarely the case), any defect in it would in general have been cured by the defendant or his attorney undertaking to put in

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(*f*) *Sutton* v. *Burgess*, 3 Dowl. 489; 1 Gale, 17, *S. C.*

(*g*) *Pocock* v. *Mason*, 1 Bing. N. C. 245.

(*h*) *Colston* v. *Berens*, 1 C., M. & R. 833: overruling *Hodgkinson* v. *Hodgkinson*, 2 Dowl. 535.

(*i*) *Boats* v. *Edwards*, 1 Doug. 227: *Deshons* v. *Head*, 7 East, 383.

(*k*) See 1 Saund. 318 a: *King* v. *Bishop of Carlisle*, Barnes, 9.

(*l*) See *Gurney* v. *Hopkinson*, 3 Dowl. 189; 1 C., M. & R. 587, *S. C.*; where a *capias* under 2 W. 4, c. 32, described the action as "trespass on the case upon promise," and held merely irregular, and not void.

(*m*) R. H., 2 W. 4. r. 33.

(*n*) *Per Patteson*, J., 2 Dowl. 47, n.

(*o*) Tidd's New Pract. 262: see *per Littledale*, J., *Newnham* v. *Hanny*, 5 Dowl. 263: *Firley* v. *Rallett*, 2 Id. 708: *Fownes* v. *Stokes*, 4 Id. 125: and see *post*, Vol. II. Book IV. Part I. Ch. 17.

(*p*) See *Ballantyne* v. *Wilson*, Forrest, 31; 2 Price, Exch. Cases, 9: *Taylor* v. *Phillips*, 3 East, 155: *Roberts* v. *Monkhouse*, 8 Id. 547: *Osborne* v. *Taylor*, 1 Chit. Rep. 400. If dated on a Sunday, it would be void. (*Hanson* v. *Shackleton*, 4 Dowl. 48; 1 H. & W. 342, *S. C.*)

bail (*q*), or by his putting in bail, or paying money into court in lieu of it (*r*), or obtaining time to put in bail (*s*), or by his taking the declaration out of the office (*t*). And these rules, as to the time of the application, applied to prisoners, as well as other persons (*u*). And these rules and cases (except as to taking the declaration out of the office) would still, it seems, be applicable where the writ is merely irregular (*v*), but, as already observed, (*ante*, 521), an omission of any of the indorsements required by the 1 & 2 *V. c.* 110, (*Sched.*), or any material defect in the writ, may now render the writ *void*, and not merely irregular, so that such defect could not be waived, and advantage might be taken of it at any stage of the bailable proceedings (*x*).

Effect of the Terms that Defendant shall enter a common Appearance.

Before the 1 & 2 *V. c.* 110, it seems that, although the defendant were discharged out of custody, or the bail-bond cancelled on the terms of defendant's entering a common appearance, the plaintiff was not bound to accept such appearance (*y*). And where proceedings had been commenced by *capias* under the 2 *W.* 4, *c.* 39, against a defendant who was discharged out of custody on the ground of a defect in the affidavit of debt, without any arrangement being made that he should enter an appearance, the court held that the plaintiff was not entitled to enter it for him (*z*). And, *à fortiori*, such would now be the case.

Defendant may justify under the Writ, if not set aside.

It may be as well here to observe, that in an action for false imprisonment for an arrest upon a writ of *capias* issued on an informal affidavit, the defendant may justify under the writ, if it has not been set aside (*a*).

Amendment of.

Amendment of.] Before the 1 & 2 *V. c.* 110, the courts and judges had resolved (on the ground of having no authority to do so) not to allow any amendment in the writ itself, or in any form of the memorandum or indorsement prescribed by the statute, 2 *W.* 4, *c.* 39, unless in cases where the Statute of Limitations would be a bar, and perhaps not even then, except in mere verbal mistakes (*b*). And as the present writ of *capias*, and the proceedings under it, are merely collateral to the main proceedings in the action, and cannot affect the question as to the Statute of Limitations, it would seem that no amendment of the *capias* can be allowed. At all events, no amendment can be allowed to the prejudice of the bail (*c*).

(*q*) *Holliday* v. *Lawes*, 3 Bing. N. C. 541.

(*r*) *Widdrington* v. *Charlton*, 1 Str. 155: *Wilson* v. *Finch*, Barnes, 163, 167, 415: *Fox* v. *Money*, 1 B. & P. 250: *Davis* v. *Owen*, Id. 344: *Green* v. *Glassbrook*, 1 Bing. N. C. 516; 1 Scott, 402, *S. C.*: *ante*, 511.

(*s*) *Moore* v. *Stockwell*, 6 B. & C. 76; 9 D. & R. 124, *S. C.*

(*t*) *Caswall* v. *Martin*, 2 Str. 1072: *Morgan* v. *Luckup*, C. T. Hardw. 242: *Marquand* v. *Mayor and Burgesses of Boston*, Barnes, 416.

(*u*) *Primrose* v. *Baddeley*, 2 Dowl. 350; 2 C. & M. 468, *S. C.*: *Fife* v. *Bruere*, 4 Dowl. 329; 1 Hodges, 317, *S. C.*: *Fownes* v. *Stokes*, 4 Dowl. 125: but see *Rock* v. *Johnson*, 4 Id. 405: *Taylor* v. *Slater*, 2 Scott, 839.

(*v*) See *Sugars* v. *Concanen*, 5 M. & W. 1; 7 Dowl. 391, *S. C.*, *nom. Shugars* v. *Concannon*.

(*x*) As to the distinction between proceedings which are void and those which are merely irregular, see *post*, Vol. II.

(*y*) *Perring* v. *Turner*, 3 Dowl. 15.

(*z*) *Wilkins* v. *Parker*, 5 Dowl. 150.

(*a*) *Reddell* or *Riddel* v. *Pakeman*, 3 Dowl. 714; 2 C., M. & R. 30, *S. C.* *Semble*, that *the sheriff* may justify under a writ that has been set aside for *irregularity*, though not under a *void* writ. (See *per Parke*, B., *In re Glatton*, Land-tax, 4 M. & W. 574).

(*b*) See the cases collected *ante*, 121.

(*c*) See Tidd, 9th ed. 161.

CHAPTER VII.

THE ARREST.

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Statute permitting the Arrest and regulating the Proceedings thereon.

THE 4th section of the 1 & 2 *V. c.* 110, enacts, "that the sheriff or other officer to whom any such writ of *capias* shall be directed shall, within one calendar month after the date thereof, including the day of such date, but not afterwards, proceed to arrest the defendant thereupon; and such defendant when so arrested shall remain in custody until he shall have given a bail-bond to the sheriff, or shall have made deposit of the sum indorsed on such writ of *capias*, together with 10*l.* for costs, according to the present practice of the said superior courts; and all subsequent proceedings as to the putting in and perfecting special bail, or of making deposit and payment of money into court instead of putting in and perfecting special bail, shall be according to the like practice of the said superior courts, or as near thereto as the circumstances of the case will admit."

Writ, how lodged with the Sheriff, to be executed.

Writ, how lodged with the Sheriff to be executed.] *When you have sued out the writ of capias, as directed* ante, 520, *take it to the sheriff's or deputy sheriff's office, and obtain a warrant*(*d*) *thereon for the arrest, directed to the sheriff's officer you intend employing to make such arrest. Make one copy, or, if more than one defendant to be arrested, as many copies of the writ and indorsements thereon as there are such defendants: and deliver the same, together with the warrant, to the officer to whom the warrant is directed, and he will thereupon arrest the defendant or defendants, if found within the sheriff's bailiwick, and proceed thereon as directed by the* capias. In the county palatine of Lancaster or Durham, *a mandate must, previously to the delivery of the writ to the sheriff, be obtained from the chancellor of the duchy, or his deputy, commanding the sheriff to execute the writ.* The sheriff himself might personally execute the writ, and so might his under-sheriff, without warrant(*e*). As to the sheriff's fees, see now the 7 *W.* 4 & 1 *V. c.* 55, and the Appendix at the end of the Second Volume.

(*d*) See a form, Chit Forms, 231.

(*e*) Dalton, 103.

Duty of Sheriff to execute the Writ.

Duty of Sheriff to execute the Writ.] It is the duty of the sheriff to set about executing the writ in a reasonable time after he receives it, and to arrest the defendant at the first opportunity; and if he does not arrest as soon as he can, he is guilty of negligence, and will be answerable for any damage arising from it (*f*). If he arrest the defendant, then he should detain him until he shall have given him bail or made deposit with him according to law, or until the defendant shall, by other lawful means, be discharged from his custody.

The Warrant, &c.

Bound Bailiff.

Special Bailiff.

The Warrant, and Bailiff appointed by.] The warrant is an order from the sheriff to his officer to arrest the defendant, so that the sheriff may obey the order of the court, as contained in the writ of *capias* (*g*). The person to whom this warrant is directed is a bound bailiff, that is, a bailiff usually bound with sureties in an obligation for the due execution of his office (*h*). But it may be directed to a special bailiff appointed by the sheriff for the particular occasion, and usually nominated by the plaintiff or his attorney (*i*). The sheriff is not, however, responsible for these special bailiffs' acts; nor can he be ruled to return a writ which has been executed by them (*k*): though, indeed, after the arrest is made, and the defendant is placed in the sheriff's custody, he is answerable for him (*l*).

Who may act as Bailiff.

An infant cannot, it seems, be appointed a sheriff's bailiff (*m*). It is very questionable whether a sheriff's bailiff can appoint a deputy (*n*). If directed to two or more "jointly and severally," any one of them may make the arrest; but if directed to them jointly and not severally, all must be acting in the arrest, otherwise it will be illegal (*o*). So, if it be directed to A. B., and after it is issued A. B. insert the name of C. D. (*p*), or if the direction or any other part of it be left blank, and filled up after it is issued (*q*), the warrant will be void, and any arrest under it illegal.

Contents of the Warrant.

The warrant states the cause of action, the sum for which the defendant is to be holden to bail, and at whose suit. A variance between the writ and warrant will not, it seems, affect the validity of the arrest (*r*). Where an arrest took place on a warrant which required the defendant to answer "*A. B.* and *two others*," it was held that the warrant was good and the arrest legal, the defendant not having been misled by the warrant (*s*). The warrant must, it seems, state

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(*f*) *Brown* v. *Jarvis*, 5 Dowl. 285; 1 M. & W. 704, *S. C.*: and see further, *post*, 543.

(*g*) See the form, Chit. Forms, 23.

(*h*) 1 Bla. Com. 346: see *Morris* v. *Parkinson*, 1 C., M. & R. 163.

(*i*) *Hamilton* v. *Dalziel*, 2 W. Bl. 952: *Porter* v. *Viner*, 1 Chit. Rep. 613: see *Foster* v. *Obadiah*, 5 B. & C. 331. As to what is a sufficient nomination to make sheriff irresponsible, see *Ford* v. *Lech*, 1 Nev. & P. 737: *Corbet* v. *Brown*, 6 Dowl. 794). A mere request is not sufficient, unless it amount to a direction. (Ib.)

(*k*) *Demoranda* v. *Dunkin*, 4 T. R. 119: *Beckford* v. *Welby*, 2 Esp. 591: *Hamilton* v. *Dalziel*, 1 W. Bl. 952: *Higgins* v. *M'Adam*, 3 Y. & J. 114; Chit. Rep. 614, n.: *post*, 548.

(*l*) *Taylor* v. *Richardson*, 8 T. R. 505.

(*m*) *Cuckson* v. *Winter*, 2 M. & R. 313.

(*n*) Id. 315: *Blatch* v. *Archer*, Cowp. 65.

(*o*) See *Boyd* v. *Durand*, 2 Taunt. 161: and see Co. Lit. 181. b.: *post*, 530.

(*p*) *Housin* v. *Barrow*, 6 T. R. 122: see *Pearson* v. *Yewens*, 5 Bing. N. C. 489; 7 Dowl., 401, *S. C.*: *Robinson* v. *Yewens*, 5 M. & W. 149; 7 Dowl. 337, *S. C.*

(*q*) *Burslem* v. *Fern*, 2 Wils. 47.

(*r*) *Rose* v. *Tomblinson*, 3 Dowl. 49. Sheriff having a good writ makes an ill warrant, yet he may justify under the writ: but, *semble*, the bailiff cannot. (*R.* v. *Fowler*, 1 L. Raym. 586).

(*s*) *Williams* v. *Lewis*, 1 Chit. R. p. 611.

the day and year of the issuing of the process upon which it is founded, as set down on the process itself (*t*), and have indorsed upon it the name of the attorney who sued out the writ (*u*). But an omission of this latter indorsement merely subjects the sheriff to a penalty of 5*l.*, but does not avoid the warrant (*x*). The *R. H.*, 2 *W.* 4, *r.* 2, (*ante*, 111, 519), requiring the indorsement as to the amount of the debt and costs, is not, it seems, applicable to the warrant on the present process. The warrant need not specify the court out of which the writ issued (*y*).

Not to be made before the Sheriff has received the Writ.

The sheriff shall not make out the warrant, until he have the writ in his actual possession, under penalty of 10*l.* (*z*); nor shall the bailiff arrest the defendant until he have received the warrant (*a*), otherwise he will be subject to an action for false imprisonment (*a*), and the court or a judge will discharge the defendant out of custody, or order the bail-bond (if any) to be delivered up to be cancelled (*b*).

It should be delivered to the Officer.

As to the necessity of delivering the warrant to the officer. —Where the plaintiff's attorney obtained from the sheriff's deputy in London a warrant, which he sent to an officer in the country by the post, but did not pay the postage, and the officer having in consequence refused to take in the letter, it was returned to the dead-letter office; the court held, that under these circumstances the sheriff could not be called upon to return the writ (*c*).

Who may be Arrested under the Warrant.

Who may be Arrested under the Warrant.] The officer of the sheriff is authorized by the warrant to arrest the person against whom such warrant is granted. But he must, at his peril, take care that he arrest no other person but such as is described in the warrant; for if he arrest C. D. upon a warrant on mesne process against A. B., and C. D. was not commonly known by the name of A. B., we have seen (*ante*, 512) that C. D. may maintain an action for false imprisonment against the sheriff, even although he be the person actually intended to have been arrested, but by mistake is misdescribed as A. B. in the writ and warrant. Also, if the defendant be privileged from arrest, in some cases it would be extremely dangerous for the sheriff to arrest him. If a bailable writ were to issue against a member of the royal family, or against a peer, peeress, or member of the House of Commons, the sheriff, by executing it, would render himself liable to be committed by the House of Lords or House of Commons respectively for a breach of privilege. So, if the sheriff were to arrest an ambassador or his servant, not only the sheriff and his officer, but also the plaintiff at whose suit the process issued, and his attorney, would be subject to fine, imprisonment, and corporal punishment, by stat. 7 *Ann. c.* 12 (see *ante*, 466). But in all *other* cases of permanent privilege, the sheriff may execute the writ, without any regard to the privilege of the

Arresting privileged Persons.

(*t*) 6 G. 1, c. 21, s. 54.

(*u*) 2 G. 2, c. 23, s. 22: and see 2 W. 4, c. 39, s. 12, *ante*, 51.

(*x*) 12 G. 2, c. 13, s. 4: and see *Grice* v. *Allen*, Barnes, 414, 415: Pr. Reg. 440—442.

(*y*) *Astley* v. *Goodjer*, 2 Dowl. 619; 2 C. & M. 682; 4 Tyr. 414, *S. C.*

(*z*) 6 G. 1, c. 21, s. 53: and see R. M. 1654, s. 2: and *ante*, 15.

(*a*) 4 Bac. Abr., 452: *Green* v. *Jones*, 1 Saund. 295, n. 5: *Astley* v. *Goodjer*, 2 Dowl. 619.

(*b*) *Hall* v. *Roche*, 8 T. R. 187.

(*c*) *Hart* v. *Weatherly*, 4 Dowl. 171.

defendant (*d*); and no action for false imprisonment can be maintained against him for so doing (*e*).

Who permanently or temporarily privileged from Arrest.

Writ of Protection.

Privilege from arrest is either permanent or temporary. The permanent privilege of a party has been already considered (see *ante*, 463 *to* 480). As to the *temporary* privilege from arrest, the Queen may, by her writ of protection, privilege any person in her service from arrest during a year and a day (*f*); but at present this prerogative is seldom, if ever, exercised. If the sheriff, however, were to arrest a person thus protected, he would perhaps be punishable for the contempt. But in the other instances of temporary privilege, which shall now be noticed, the sheriff is not bound in any manner to respect them; but the only remedy the person arrested has, is by application to the court, or to a judge at chambers.

Privilege of Parties, Witnesses, &c., connected with a Cause.

Every person connected with a cause, and attending in the course of it, whether compelled to attend by process or not, such as parties, witnesses, bail, attornies, &c., are privileged from arrest, whilst going to, attending, and returning from court (*g*). If a party be arrested whilst coming to court for the purpose of attending his cause, the judge at *Nisi Prius* will order him to be brought up by *habeas corpus*, and discharge him (*h*), or will order the officer who made the arrest to attend, to shew cause why the party should not be discharged (*i*), and will also put off the trial, if the party require it (*k*). Even where a plaintiff, attending from day to day at the sittings, in expectation of his cause being tried, was, while waiting at a coffee-house in the vicinity of the court for that purpose, but before the actual day of trial, arrested, the court, upon application, ordered him to be discharged (*l*). So, a witness enjoys the same privilege *eundo, morando, et redeundo* (*m*), even although not subpœnaed (*n*). So, where a person attending to justify as bail was arrested, the court ordered him to be discharged (*o*). But this privilege from arrest does not extend to a defendant returning home after being discharged from legal custody (*p*). Barristers, whilst on circuit, or attending, or going to, or returning from, the court on business in which they are engaged, also enjoy the same privilege (*q*). As to the privilege of candidates or voters at an election, see *ante*, 465.

Duration of this Privilege.

As to the duration of this privilege of parties, witnesses, &c.:—It has been already mentioned, that where a party, attending from day to day at the sittings in expectation of his cause coming on, and whilst waiting at a coffee-house in the

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(*d*) *Duncomb* v. *Church*, 1 Salk. 1: Co. Lit. 131: *Tarlton* v. *Fisher*, 2 Doug. 676: *Crossley* v. *Shaw*, 2 W. Bl. 1085.

(*e*) *Tarlton* v. *Fisher*, 2 Doug. 676: and see *Cameron* v. *Lightfoot*, 2 W. Bl. 1194: *Sherwood* v. *Benson*, 4 Taunt. 631.

(*f*) Finch, L. 454: *Barrudale* v. *Cutts*, 3 Lev. 332.

(*g*) *Meekins* v. *Smith*, 1 H. Bl. 636: Peake, Ev. 202: see 2 Salk. 544.

(*h*) *Solomon* v. *Underhill*, 1 Camp. 229: *Ex p. Tillotson*, 1 Stark. 470.

(*i*) MS. sittings after Trin. 1817.

(*k*) *Solomon* v. *Underhill*, 1 Camp. 229.

(*l*) *Childerston* v. *Barrett*, 11 East, 439.

(*m*) *Gillman* v. *Wright*, 1 Vent. 11, n.: *Clerk* v. *Molineux*, T. Raym. 100.

(*n*) See *Meekins* v. *Smith*, 1 H. Bl. 636.

(*o*) *Rimmer* v. *Green*, 1 M. & Sel. 638.

(*p*) MS., H. T., 2 W. 4, 1832: *Rex* v. *Priddle*, 1 Tidd, 196, 9th ed.

(*q*) *Meekins* v. *Smith*, 1 H. Bl. 636: *ante*, 467: *Luntley* v. *Nathaniel*, 2 Dowl. 51. The defendant in that case had gone into a picture shop on his return from court, and was arrested in the shop. (And see *Pitt* v. *Coombs*, 3 N. & M. 212).

vicinity of the court for that purpose, was arrested, the court discharged him, although it was before the actual day of trial (*r*). So, if a party or witness should come to town or from abroad, for the purpose, *bonâ fide*, of attending a trial, the court, it should seem, would afford him protection, although he had come before the time appointed for the trial (*s*), So, a convenient time should be allowed to parties, witnesses, &c., to return home, after the trial or hearing of the cause shall be over; and the privilege should be construed liberally (*t*). Thus, where a cause was tried at the assizes at Winchester on Friday in the afternoon, and one of the witnesses was arrested at seven o'clock on Saturday evening, as she was entering the stage coach which was to convey her to her residence at Portsmouth, the court held that her privilege had not expired, and ordered her to be discharged (*u*). Also, where a defendant, after the rising of the court, went with his attorney and witnesses to dinner at a tavern in New Palace Yard, and was arrested whilst at dinner; the court held that this privilege *redeundo* had not expired, and accordingly discharged him (*x*). And a slight deviation will not deprive the party of this privilege (*y*). But where a plaintiff came from Yorkshire to London, to attend a meeting before an arbitrator, on the 6th of January, it took place on the 7th, when it was objected, that he had obtained the judge's order for the reference surreptitiously, and that the opposite party would apply to the court to set it aside: and thereupon the arbitrator adjourned the meeting until the 15th of February, to allow the motion to be made. The party then went to his inn in the city, and remained until the 16th of January, not having means sooner to return to his home, and waiting to see if any motion were made in the court. No motion having been made within the first four days of term, he was proceeding to take his place on the 16th to return to Yorkshire, when he was arrested: it was held that he was not privileged from arrest (*z*).

To what Courts it extends.

This species of privilege is not confined to an attendance in the superior courts, but has been holden to extend to the court for insolvent debtors (*a*), to the bankruptcy court (*b*), and to all inferior courts of law, such as the sessions, &c., (*c*), and to witnesses attending to the execution of a writ of inquiry before the sheriff (*d*); and by 53 *G.* 3, *c.* 17, *s.* 27, to witnesses attending before the judge advocate. Even when a cause has been referred under an order of *Nisi Prius*, it has been holden that all parties, witnesses, &c., attending before the arbitrator, are privileged in the same manner as if the cause were still before the court (*e*).

Where a party to a cause is arrested upon process out of

To what

(*r*) *Childerston* v. *Barrett*, 11 East, 439.

(*s*) *Ex p. Tillotson*, 1 Stark. 470.

(*t*) See *Selby* v. *Hills*, 8 Bing. 166; 1 M. & Scott, 253; 1 Dowl. 257, *S. C.*

(*u*) *Holiday* v. *Pitt*, Gilb. Rep. 308; 2 Str. 986, *S. C.*

(*x*) *Lightfoot* v. *Cameron*, 2 W. Bl. 1113: but see *Anon.*, 1 Smith, 355.

(*y*) *Pitt* v. *Coombs*, 3 N. & M. 212: *Luntley* v. *Nathaniel*, 2 Dowl. 51.

(*z*) *Spencer* v. *Newton*, 6 Law, J., N. S. 119; 1 Nev. & P. 818; 6 Ad. & El. 623, *S. C.*

(*a*) *Willingham* v. *Matthews*, 2 Marsh, 57; 6 Taunt. 356, *S. C.*

(*b*) *Selby* v. *Hills*, 8 Bing. 166; 1 M. & Scott, 253; 1 Dowl. 257, *S. C.*

(*c*) Com. Dig., Privilege, A.

(*d*) *Walters* v. *Rees*, 4 Moore, 34.

(*e*) *Spence* v. *Stuart*, 3 East, 89: *Arding* v. *Flower*, 8 T. R. 536: *Randall* v. *Gurney*, 3 B. & Ald. 252; 1 Chit. Rep. 679, *S. C.* The arbitrator has no power of discharging the witnesses.

Court the Discharge should in such case be applied for.

another court while attending at *Nisi Prius*, in expectation of its coming on, he must apply for relief to the judge at *Nisi Prius*, or to the court out of which the process issues, and not to the court in which the cause is (*f*). The application for the discharge of a defendant on the ground of his having been arrested while attending a writ of inquiry, must not be made to the sheriff. In one case, where a person was arrested whilst attending before the commissioners of bankrupt to prove a debt, the Court of Queen's Bench refused to discharge him (*g*); and it was decided that he should, in such a case, have applied to the Court of Chancery (*h*). In a later case, however, the Court of Common Pleas discharged a defendant out of custody, when he was arrested whilst returning from the court of commissioners of bankrupts, where he had been acting as petitioning creditor (*i*).

Privilege of Clergymen.

Also, *clergymen* are privileged from arrest whilst performing divine service, and while going to church for that purpose and returning thence (*k*). And by 9 *G.* 4, *c.* 31, *s.* 23, a party knowingly offending herein is declared guilty of misdemeanour. The court discharged a clergyman arrested in his way to the altar, but refused to give him the costs of the application, it not appearing that the arrest was with the concurrence of the plaintiff or his attorney (*l*).

Temporary Privilege of Bankrupt.

The *permanent* privilege of a *bankrupt* from arrest after having obtained his certificate, has been already considered (*ante*, 470). By stat. 6 *G.* 4, *c.* 16, *s.* 117, "the bankrupt shall be free from arrest and imprisonment by any creditor in coming to surrender; and after such surrender during the forty-two days, and such further time as shall be allowed him for finishing his examination, provided he was not in custody at the time of such surrender; and if such bankrupt shall be arrested for debt, or on any escape warrant, in coming to surrender, or shall after his surrender be so arrested within the time aforesaid, he shall, on producing the summons under the hands of the commissioners to the officer who shall arrest him, and giving such officer a copy thereof, be immediately discharged; and if any officer shall detain any such bankrupt after he shall have shewn such summons to him, so signed as aforesaid, such officer shall forfeit to such bankrupt, for his own use, the sum of 5*l.* for every day he shall detain such bankrupt, to be recovered by action of debt in any court of record at Westminster, in the name of such bankrupt, with full costs of suit." This provision, which is the same as the fifth section of the repealed act, (5 *G.* 2, *c.* 30), extends to all arrests by creditors, whether for debts provable under the commission or not (*m*), to arrests under attachments for the nonpayment of money (*n*); and even to arrests under extents at the suit of the crown (*o*). But it does not extend to a taking of the

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(*f*) *Pitt* v. *Evans*, 2 Dowl. 223: see *Jacob* v. *Rule*, 1 Id. 349.

(*g*) *Kinder* v. *Williams*, 4 T. R. 377.

(*h*) See *Ex parte* Kerney, 1 Atk. 54: *List's case*, 2 V. & B. 373.

(*i*) *Selby* v. *Hills*, 8 Bing. 166; 1 M. & Scott, 253; 1 Dowl. 257, *S. C.*

(*k*) 50 Ed. 3, c. 5: 1 R. 2, c. 16.

(*l*) *Goddard* v. *Harris*, 7 Bing. 320; 5 Moo. & P. 122, *S. C.*

(*m*) *Darby* v. *Bougham*, 5 T. R. 209.

(*n*) *Re M'Williams*, 1 Sch. & Lef. 169: *Ex p. Parker*, 3 Ves. 544.

(*o*) *Ex p. Russell*, 1 Rose, 278; 19 Ves. 163: *Ex p. Temple*, 2 Rose, 22; 2 V. & B. 391, *S. C.*

Bankrupts, – Privilege of, during Time limited for Examination

principal by his bail; for the bail are not creditors, and besides, in contemplation of law, he was in their custody from the moment they became bail (*p*). Nor does it extend to a retaking of a prisoner for any escape by the Marshal of the Queen's Bench prison, without an escape warrant, what is said of a taking upon an escape warrant in the statute relating to a retaking by a creditor (*q*). And where a bankrupt is entitled to his discharge upon an arrest, he will be discharged also from all detainers lodged against him after it took place (*r*); but if in custody at the time he surrenders, it is otherwise (*s*). The act gives the bankrupt this privilege from arrest whilst going to surrender; and where a bankrupt, upon receiving the commissioner's summons, delivered up his keys and effects to the messenger, and promised to submit to the directions of the act, but was arrested at his house on the first day appointed for the surrender, the Lord Chancellor, upon petition, discharged him (*t*). So, where, on his way to surrender, he had deviated from the direct road, and was arrested during that deviation, still he was holden entitled to his privilege (*u*). But where the bankrupt came from Holland within the forty-two days, intending to surrender on the forty-second day, but finding the time had been enlarged, he deferred surrendering until the expiration of the enlarged time, and, in the meantime, was arrested, the court refused to discharge him, saying, that the privilege in this case, like that of witnesses attending a court, must be confined to a reasonable time *eundo et redeundo*, and must not be extended beyond it (*x*). The privilege also continues during the whole of the forty-second day, although the bankrupt may have passed his examination at an early hour on that day (*y*); and in the same manner it continues to the end of the day to which the examination is adjourned, if adjourned to a specific day (*z*); but if adjourned *sine die* (*a*), then it continues for such time only, not exceeding three calendar months, as the commissioners by indorsement on their summons shall appoint (*b*), or whilst the party is actually in attendance on the commissioners, or going or returning from the meeting (*c*). So, if after the expiration of the forty-two days the bankrupt obtain an order to enlarge the time for surrendering, he enjoys no privilege from arrest during the enlarged time (*d*), unless whilst in actual attendance at, or in going to or returning from the meeting (*e*). But a commitment of the bankrupt does not operate as an adjournment *sine die*, with a protection; and where the bankrupt, on the day appointed for his last examination, was committed by the commissioners for not answering to their satisfaction, a detainer lodged against him after a day fixed for his being brought up, was held legal (*f*). And the bankrupt derives this privi-

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(*p*) *Ex p. Gibbons*, 1 Atk. 238: and see *Ex p. Leigh*, 1 Glyn & J. 264.

(*q*) *Anderson* v. *Hampton*, 1 B. & Ald. 308: and see *Ex p. Johnson*, 14 Ves. 36.

(*r*) *Ex p. Hawkins*, 4 Ves. 691: *Ex p. Ross*, 1 Rose, 260.

(*s*) *Ex p. Goldie*, 2 Rose, 343; 1 Merivale, 176, *S. C.*

(*t*) *Ex p. De Fries*, Davis, 163.

(*u*) *Ogle's case*, 11 Ves. 566.

(*x*) *Kenyon* v. *Solomon*, Cowp. 156.

(*y*) *Ex p. Donelvey*, 7 Ves. 317.

(*z*) *Simpson's case*, Buck, 424: and see *Davis* v. *Trotter*, 8 T. R. 476.

(*a*) See *Claughton* v. *Leigh*, 2 D. & R. 831; 1 B. & C. 652: *Ex p. Woods*, 1 Glyn & J. 75.

(*b*) 6 G. 4, c. 16, s. 118.

(*c*) *Ex p. Ross*, 1 Rose, 260.

(*d*) *Anon.*, 15 Ves. 1.

(*e*) *Ex p. Hawkins*, 4 Ves. 691.

(*f*) *Ex p. Wright*, 2 Glyn & J. 202.

lege from the statute, and not from the commissioner's certificate indorsed upon his summons (*g*). And, therefore, where the commissioners adjourned the bankrupt's last examination, the bankrupt was holden to be privileged from arrest in the meantime, although the commissioners had neglected to indorse the adjournment upon his summons (*h*).

After Time limited for his Examination.

After the expiration of the time limited for a bankrupt's examination, and before he has obtained his certificate, if he be arrested, the court will not discharge him (*i*), even although arrested at the suit of one of his assignees, who had received several dividends under the commission (*k*), or at the suit of the petitioning creditor (*l*); his only remedy is by application to the Court of Chancery (*m*). The court, however, in such a case, have suspended the rule to bring in the body, in order to give the defendant time to make such an application to the Chancellor for relief (*n*). The order of the Court of Chancery for the bankrupt's discharge is made upon the plaintiff in the first instance (*o*), and if he disobey it, it is then extended to the officer (*p*); and disobedience of it is punishable as a contempt (*q*).

Has also the same Privilege as other Persons.

But besides the privilege given by the statute, the bankrupt also enjoys the same privilege that parties and witnesses do in all other cases; and therefore, where a bankrupt was arrested as he was returning from the hearing of his petition for leave to surrender, he was holden to be privileged, and was discharged (*r*). So, where a bankrupt was attending a meeting of the commissioners to declare a dividend several years after his final examination, being directed verbally by the commissioners to do so, he was holden to be privileged *eundo, morando, et redeundo* (*s*).

Other Cases of Privilege.

We have already seen how far a party can be twice arrested for the same cause, (*ante*, 476), and when a party can be detained in custody on a fresh process after being improperly arrested (*ante*, 479).

By whom made.

By whom made.] The arrest is made either by the sheriff or under-sheriff, or by one or more of his officers, to whom he directs his warrant for that purpose. We have seen, that if it be directed to two or more jointly and severally, any one of them can make the arrest; but when directed to several jointly, and not severally, the arrest must be made by all, otherwise it will be illegal (*t*). It is not necessary, however, that the officer to whom the warrant is directed should be the person who actually makes the arrest, or even be within sight when the arrest is made; but he must be *acting* in the arrest; he cannot go upon another business or stay at home, and send a third person to make it (*u*).

(*g*) *Ex p. Leigh*, 1 Id. 264.

(*h*) *Price's case*, 3 V. & B. 23.

(*i*) *Hill* v. *Reeves*, 1 B. & P. 424: *Percy* v. *Powell*, 3 Id. 6: *Oliver* v. *Ames*, 8 T. R. 364.

(*k*) *Hill* v. *Reeves*, 1 B & P. 424: *Oliver* v. *Ames*, 8 T. R. 364.

(*l*) *M'Master* v. *Kell*, 1 B. & P. 302.

(*m*) *Anon.*, 1 Rose, 230: *Ex p. Boyne*, 1 V. & B. 316.

(*n*) *Oliver* v. *Ames*, 8 T. R. 365.

(*o*) *Anon.*, 15 Ves. 1.

(*p*) *Ex p. Boyne*, 1 V. & B. 316.

(*q*) *Ex p. Kerney*, 1 Atk. 155: *Ex p. King*, 7 Ves. 312: *Ex p. Dixon*, 8 Ves. 104.

(*r*) *Ex p. Jackson*, 15 Ves. 116.

(*s*) *Arding* v. *Flower*, 3 Esp. 117; 8 T. R. 534: and see *Selby* v *Hills*, 8 Bing. 166; 1 M. & Scott, 253; 1 Dowl. 257, S C.

(*t*) *Boyd* v. *Durand*, 2 Taunt. 161: and see 2 M & R. 316 a: *ante*, 524.

(*u*) *Blatch* v. *Archer*, Cowp. 65: and see *Cuckson* v. *Winter*, 2 M. & R. 315, c.: *Barrett* v. *Price*, 1 Dowl. 725; 2 M. &

Special Bailiff.

The sheriff also, instead of directing his warrant to one of his officers, may, as we have seen, (*ante*, 524), direct it to a special bailiff, that is, to a person specially appointed by the plaintiff or his attorney, for the purpose of executing the writ, who executes it accordingly.

In Lancaster or Durham.

When a writ is to be executed in the county palatine of Lancaster or of Durham, the chancellor or his deputy, to whom the writ is directed, issues his mandate to the sheriff, and the arrest is made under the sheriff's warrant, as in ordinary cases. (*See ante*, 509).

In a Liberty or Franchise.

Formerly, when the writ was to be executed within a liberty, and the writ did not contain a *non omittas* clause, the sheriff had to issue his mandate to the bailiff of the liberty, and he had to make the arrest (*x*). If the bailiff returned no answer to the mandate, the sheriff might, upon a *non omittas* writ, have entered the liberty and executed it (*y*); or a *non omittas* writ might be directed to the sheriff in the first instance (*z*), and the sheriff was bound to execute it, without issuing any mandate to the bailiff of the liberty; or, if the sheriff, without a clause of *non omittas* in the writ, arrested the defendant within the liberty, the arrest was good, although perhaps the sheriff thereby rendered himself liable to an action by the lord of the franchise (*a*). The same consequences of a non-insertion of this *non omittas* clause would still prevail; but now, as the form of writ prescribed by the 1 & 2 *V. c.* 110, contains the *non omittas* clause, cases of the non-insertion of it in mesne process, and the consequences attendant thereon, can seldom, if ever, occur.

When.

When.] The arrest may be made at any time within one calendar month from the date of the writ, including such date, and not afterwards (*b*). It may be made at any hour, even of the night (*c*). It must not, however, be made on a Sunday, or it will be illegal (*d*); but bail may take their principal on that day (*e*); or, after a *negligent* escape, the defendant may be retaken on it (*f*). We have seen (*ante*, 525) that if the bailiff make an arrest before the writ comes to the sheriff's hands, or before the warrant is made on it, the former is a trespasser.

Where.

Where.] The arrest may be made at any place within the county, city, &c., to the sheriff of which the writ is directed. If the party be arrested in any other county, &c., than that to the sheriff of which the writ is directed—if, for instance, a defendant be arrested in London, upon a writ of *capias* directed to the sheriff of Middlesex, the court or a judge will discharge him, or order the bail-bond (if any) to be delivered up to be

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Scott, 339; 9 Bing. 566, *S. C.*: *Fownes* v. *Stokes*, 4 Id. 125.

(*x*) 5 G. 2, c. 27, s, 3.

(*y*) See *Semayne's case*, 5 Co. 92: Gilb. C. B. 29.

(*z*) *Carrett* v. *Smallpage*, 9 East, 330.

(*a*) Gilb. C. B. 27: *Piggott* v. *Wilks*, 3 B. & Ald 502: *Bell* v. *Jacobs*, 1 Moo. & P. 309: 4 Bing. 523, *S. C.*: *Sparks* v. *Spink*, 7 Taunt. 311.

(*b*) 1 & 2 V. c. 110, s. 4.

(*c*) *Mackalley's case*, 9 Co. 66: *Anon.*, Chit. 357.

(*d*) 29 C. 2, c. 7, s. 6: and see *Taylor* v. *Phillips*, 3 East, 155: *Loveridge* v. *Plaistow*, 2 H. Bl. 29.

(*e*) *Anon.*, 6 Mod. 231.

(*f*) *Parker* v. *Moore*, 2 Salk. 626; 2 L. Raym. 1028, *S. C.*: and see *Featherstonehaugh* v. *Atkinson*, Barnes, 373: *Atkinson* v. *Jameson*, 5 T. R. 25: *Anon.*, Willes, 459, 460.

In superior Courts.

In verge of Palace.

In Tower.

cancelled, even although the arrest took place on the verge of the county of Middlesex, if there be no dispute as to the boundaries (*g*); and to set aside an arrest in a wrong county, the affidavit must state, or shew sufficiently, that the arrest did not take place on the borders of the county, and that there is no dispute as to the boundaries (*h*). It cannot, however, be made in the Queen's presence, nor in the Queen's courts of justice whilst the Queen's justices are there sitting, nor within the verge of her royal palace (*i*), (that is, as to the palace of Westminster, from Charing Cross to Westminster Hall, 28 *H.* 8, *c.* 12), unless by leave of the Board of Green Cloth (*k*). The Court of Common Pleas, however, refused to discharge a defendant arrested upon a *capias* within the verge without such leave (*l*). It cannot be made in the Tower (*m*), except, perhaps, by leave of the governor.

In Districts partly surrounded by another County.

By the 2 *W.* 4, *c.* 39, *s.* 20, reciting that "there are in divers parts of England certain districts and places, parcel of some one county, but wholly situate within and surrounded by some other county, which is productive of inconvenience and delay in the service and execution of the process of the said courts;" for remedy thereof it is enacted, "that every such district and place shall and may, for the purpose of the service and execution of every writ and process, whether mesne or judicial, issued out of either of the said courts, be deemed and taken to be part as well of the county wherein such district or place is so situate as aforesaid, as of the county whereof the same is parcel; and every such writ and process may be directed accordingly, and executed in either of such counties."

How made.

Seizure of Person.

How made.] The arrest is usually made by actual seizure of the person; but any touching, however slight, of the defendant's person, is sufficient for this purpose; and where the officer laid hold of the defendant's hand, as he held it out of the window, it was deemed sufficient (*n*). But the manner of arrest is not confined to corporal seizure: where the officer entered the room in which the defendant was, and locked the door, telling him at the same time that he arrested him, the court held it to be a good arrest (*o*). Mere words, however, such as telling a man you arrest him, or the like, cannot of themselves amount to an arrest (*p*); and if a sheriff's officer send his servant to a party to inform him that there is a writ out against him, and that he must come and give bail to it, and the party go to the officer's house and pay him for his trouble, and execute a bail-bond, this is not an arrest (*q*).

(*g*) *Hammond* v. *Taylor*, 3 B. & Ald. 408: and see *Chase* v. *Joyce*, 4 M. & Sel. 414.

(*h*) *Webber* v. *Manning*, 1 Dowl. 24: *Storer* v. *Rayson*, 4 D. & R. 739: *Lloyd* v. *Smith*, 1 Dowl. 372.

(*i*) 3 Bl. Com. 289.

(*k*) *R.* v. *Stobbs*, 3 T. R. 735: and see *Winter* v. *Miles*, 1 Camp. 475; 10 East, 578, *S. C.*

(*l*) *Sparks* v. *Spinks*, 7 Taunt. 311.

(*m*) See *Batson* v. *M'Lean*, 2 Chit. R. 51: *Bell* v. *Jacobs*, 1 Moo. & P. 309.

(*n*) *Anon.*, 1 Vent. 306, n.: *Genner* v. *Sparkes*, 1 Salk. 79: and see *Homer* v. *Battyn*, B. N. P. 62: *Lloyd* v. *Sandilands*, 8 Taunt. 250.

(*o*) *Williams* v. *Jones*, Hardw. 301: and see *Arrowsmith* v. *Le Mesurier*, 2 New Rep. 211, 212: *Bridgett* v. *Coyney*, 1 M. & R. 211: *Arrowsmith* v. *Le Mesurier*, Id. 215; 2 N. R. 211, *S. C.*

(*p*) *Genner* v. *Sparkes*, 1 Salk. 79; 6 Mod. 173, *S. C.*

(*q*) *Berry* v. *Adamson*, 2 C. & P. 503; 6 B. & C. 528, *S. C.*: *George* v. *Radford*, 1 M. & M. 244: 3 C. & P. 464, *S. C.*: and see *Small* v. *Gray*, 2 C. & P. 605: *Peters* v. *Stamsay*, 6 C. & P. 737: *Reece* v. *Griffiths*, 5 M. & R. 120: *Nicholl* v. *Darley*, 2

Breaking Doors or Windows to make Arrest.

The officer cannot break open an outer door or window to make an arrest; but after he has obtained peaceable admission at the outer door, he may break open an inner one, even if it be the door of a lodger (*r*). This, however, extends only to the dwelling-house of the defendant; for if he be in the house of a stranger, the sheriff, after demand and refusal of admission, may break open the outer door to arrest him (*s*). Or if, after a party is arrested, he escape into a house, the officer will be justified in breaking even the outer door to retake him (*t*).

Posse Comitatus.

The sheriff may, but it is not compulsory on him, raise the *posse comitatus* in order to execute mesne process (*u*).

Copy of Writ to be delivered to Defendant.

Copy of Writ to be delivered to the Defendant.] The Uniformity of Process Act (2 *W.* 4, *c.* 39, *s.* 4) directed that so many copies of the *capias* as there were persons to be arrested or served should be delivered to the sheriff, and that the sheriff should, upon or forthwith after the execution of such process, cause one such copy to be delivered to every person upon whom such process should be executed by him, and should indorse on such writ the true day of the execution thereof. The 1 & 2 *V. c.* 110, *s.* 4, does not contain such a direction, but the *capias* (given in the schedule to the act) commands "*that on execution hereof you do deliver a copy hereof to the said C. D.*" (the defendant). The object of this is to give the defendant information of the precise demand against him, and enable him immediately to set himself in motion to find bail, and procure his liberty. The copy must be delivered on executing the writ, and under 2 *W.* 4, *c.* 39, the words of which are nearly similar, it was held that where the arrest took place at nine in the morning, a delivery of the copy at seven in the evening was not a compliance with the enactment (*x*). If not complied with, the court or a judge would probably order the defendant to be discharged out of custody; or, if he have given a bail-bond, would order it to be delivered up to be cancelled (*x*). The plaintiff's remedy, in such a case, would, it seems, be against the sheriff for negligence, if, indeed, he sustained any real damage in consequence of it.

Consequence of Non-Delivery.

Consequence of Mistake in Copy.

A mistake in the copy, making a difference in sense from the original *capias*, and calculated in any way to mislead, would, under 2 *W.* 4, *c.* 39, and it would seem also under 1 & 2 *V. c.* 110, render the proceedings defective (*y*). So will any material omission, such as if the day of the date or the addition of the defendant (though unnecessarily introduced in

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Y. & J. 399. *Semble*, to constitute an arrest the warrant must be produced. (*Robins* v. *Hender*, 3 Dowl. 543). See Lord Kenyon's opinion in *Hill* v. *Roche*, 8 T. R. 187, very forcibly expressed as to production of warrants (at least when demanded). See also *Barratt* v. *Price*, 1 Dowl. 725; 2 M. & Scott, 339; 9 Bing. 566, *S. C.*: and *Fownes* v. *Stokes*, 4 Dowl. 125: *Robins* v. *Hender*, 3 Dowl. 543, bear on the point.

(*r*) *Lee* v. *Gansell*, Cowp. 1; *Semayne's case*, 5 Co. 91.

(*s*) Foster, 319: but see *Johnson* v. *Leigh*, 1 Marsh, 565; 6 Taunt. 246, *S. C.*

(*t*) *Anon.*, 6 Mod. 105; Lofft, 390: and see *Lloyd* v. *Sandilands*, 8 Taunt. 250.

(*u*) *Walde* v. *Lambert*, Noy, 40: *Crompton* v. *Ward*, 1 Str. 432.

(*x*) See *Shearman* v. *Knight*, 5 Dowl. 572, a case under 2 W. 4, c. 39.

(*y*) See *Sutton* v. *Burgess*, 1 Gale, 17. 3 Dowl. 489; 1 C., M. & R. 770; 5 Tyr. 320, *S. C.*: *Nicol* v. *Boyne*, 2 Dowl. 761; 3 M. & Scott, 812, *S. C.*: *Smith* v. *Pennell*, 2 Dowl. 654: *Street* v. *Carter*, Id. 67: Cases under 2 W. 4, c. 39. The case of *Hodgkinson* v. *Hodgkinson*, A. & E. 533; 2 Dowl. 535; 3 N. & M. 564, *S. C.*, is overruled.

the writ)(z) be omitted, or the like(a). But an omission or mistake in immaterial articles or particles will not(b). The court will not, it seems, allow an amendment of the copy(c).

Time of Application to set aside Proceedings.

An application to discharge defendant, or to cancel the bail-bond for a defect in the copy served, must be made within a reasonable time and before taking a fresh step. Where the arrest was on the 28th March, an application on the 17th April to cancel the bail-bond was held to be too late(d).

Indorsement on Writ of the Day of Arrest.

Indorsement on Writ of the Day of Arrest.] The Uniformity of Process Act (2 *W*. 4, *c*. 39, *s*. 4) directed that the sheriff, or officer or person to whom the writ is directed, or who has the execution and return thereof, "*shall indorse on such writ the true day of the execution thereof, whether by service or arrest*"(e). And by *R. M.*, 3 *W*. 4, he must have made such indorsement within six days at least after the execution of the writ, or, in default thereof, he would be liable, in a summary way, to make such compensation for any damage which may result from his neglect as the court or a judge might direct(f). And such day of executing the writ must have appeared in his return to it(g). The omission of it, however, would not have subjected him to an attachment(h). The course was to apply to the court or a judge for a rule or order to compel him to amend his return, and to make him pay such compensation to the plaintiff, for damages accruing through his neglect, as they should direct(i). It may be questioned whether this indorsement is necessary in a case of arrest, under the 1 & 2 *V*. *c*. 110, but it will be safer still to make it, until it has been decided to be unnecessary(j). The *capias* under that act expressly commands that the day of its execution be stated in the *return*.

Detainer.

Detainer.] If, whilst the defendant is in custody, any other bailable writ be lodged with the same sheriff, at the suit of the same or of any other plaintiff, the officer in whose custody he is, is bound at his peril to detain him, until regularly discharged also from this second writ. The officer therefore always searches the sheriff's office, to see if there be any detainers lodged there against a person in his custody, before he discharges him. The process of detainer of a defendant in custody of the sheriff is the same as the process where he is at large, and the defendant must forthwith be served with a copy of the writ in the same way as pointed out, *ante*, 533.

Where the first Arrest was illegal.

If the first arrest were made without process, or upon void process, or after the process no longer remained in force, or whilst the defendant was privileged from arrest, or the like, the defendant cannot afterwards be detained by virtue of any other subsequent process, however regular (*k*), unless such subsequent process be at the suit of another plaintiff, and without collusion with the party who caused the first arrest (*l*), nor even then could he be detained if the first arrest were illegal by the wrongful act of the sheriff himself (*m*).

(z) *Cooke* v. *Vaughan*, 4 M. & W. 69: *ante*, 515.

(a) *Perring* v. *Turner*, 3 Dowl. 15: *Cooke* v. *Vaughan*, 4 M. & W. 69, note: *Smart* v. *Johnson*, 6 Dowl. 90: Cases under 2 W. 4, c. 39: see *Sugars* v. *Concannon*, Exch. 27th April, 1839: 17 Law, J., 159.

(b) See *Pocock* v. *Mason*, 1 Bing. N. C. 245; 1 Scott, 51, *S. C.*: *Colston* v. *Berens*, 3 Dowl. 253; 1 C., M. & R. 770, *S. C.*

(c) *Byfield* v. *Street*, 10 Bing. 27; 3 M. & Scott, 406; 2 Dowl. 789, *S. C.*: see *per Taunton*, J., 3 Nev. & M. 564.

(d) *Sugars* v. *Concanen*, Exch. 27th April, 1839: 17 Law, J., 159.

(e) 2 W. 4, c. 39, s. 4, *ante*, 533.

(f) R. M., 3 W. 4, r. 4.

(g) See form of the *capias*, *ante*, 506; and of the return, Chit. Forms, 236.

(h) MS., K. B., H. T., 1833: and see *Ridley* v. *Weston*, 2 M. & Scott, 724.

(i) *Moore* v. *Thomas*, 3 M. & Scott, 810; 2 Dowl. 760, *S. C.*

(j) The form of this indorsement is thus:—"*C. D. was arrested by me, X. Y., by virtue of this writ, on the —— day of ——, 18—. X. Y.*"

What done after the Arrest, &c.

What done after the Arrest, &c.] As soon as the party is arrested, he is usually carried to the house of the officer who arrests him, or of some other office of the sheriff within the county, city, &c., where he may be confined until the eight days limited for the putting in special bail have expired, if not sooner lawfully discharged (*n*). As to what is to be done if the party be too ill to be removed, see *post*, 546. He must not be taken to gaol within twenty-four hours after the arrest, unless he *refuse* to go to a place of safe custody (*post*, 546). He is discharged either upon giving a bail-bond to the sheriff; or upon depositing with the sheriff the sum sworn to, and 10*l.* to answer costs, in pursuance of stat. 43 *G.* 3, *c.* 46; or upon giving security to the plaintiff for his appearance; or without any bail-bond or security; or he escapes, or is rescued, or is lodged in the prison of the county, &c. These several subjects shall be considered in the next Chapter.

Improper Arrest or Detainer.

Improper Arrest or Detainer.] We have seen in the preceding pages, 523—534, in what cases the arrest would be improperly made. In such cases the court or a judge will, on application for that purpose, order the defendant to be discharged out of custody; and if a bail-bond has been given, that it shall be cancelled; and if the arrest is incomplete, as if no copy of the writ has been delivered to the defendant, or an imperfect copy (*o*), the court or a judge will order the defendant to be discharged out of custody, and also order the service of the writ to be set aside. (*See ante*, 511).

(*k*) *Loveridge* v. *Plaistow*, 2 H. Bl. 29: *Barlow* v. *Hall*, 2 Anst. 461: *Birch* v. *Prodger*, 1 N. R. 135: *Davies* v. *Chippendale*, 2 B. & P. 282: *ante*, 479: but see *Howson* v. *Walker*, 2 W. Bl. 823.

(*l*) *Barclay* v. *Faber*, 2 B. & Ald. 743; 1 Chit. Rep. 579, *S. C.*: *Howson* v. *Walker*, 2 Bl. Rep. 823: *Davies* v. *Chippendale*, 2 B. & P. 282: *Robinson* v. *Yewens*, 5 M. & W. 149.

(*m*) *Barratt* v. *Price*, 1 Dowl. 725; 2 M. & Scott, 339; 9 Bing, 566, *S. C.*

(*n*) See *Houlditch* v. *Birch*, 4 Taunt. 608: and see further, *post*, 543, 548.

(*o*) *Byfield* v. *Street*, 10 Bing. 27; 3 M. & Scott, 406; 2 Dowl. 789, *S. C.*: Bagley's Prac. 121.

CHAPTER VIII.

PROCEEDINGS ON THE ARREST.

1. *The Bail-Bond*, 536.
2. *Deposit with the Sheriff*, 539.
3. *Security to the Plaintiff for Defendant's putting in Bail, &c.*, 541.
4. *Discharge of the Defendant without Bail Bond, &c.*, *Id.*
5. *Escape*, 543.
6. *Rescue*, 545.
7. *Lodging the Defendant in Prison*, 546.

Book I. Part II.

1. *The Bail-Bond.*

1. The Bail Bond.

THE defendant, when arrested, "shall remain in custody until he shall have given a bail-bond to the sheriff, or shall have made deposit of the sum indorsed on such writ of *capias*, according to the present practice of the said superior courts," &c. (*p*).

How taken.

How taken.] The officer in whose custody the defendant happens to be, or by whom he was arrested, upon being furnished with the names of two sureties, and having satisfied himself of their sufficiency, will prepare the bond; and as soon as it is executed, and it is found, upon search in the sheriff's office, that there are no other detainers against the defendant, the officer will discharge him out of custody upon being paid his fees, the costs of the bail-bond, &c. The sheriff is to prepare the bond, but it seems that he is entitled to be paid for so doing by the party arrested (*q*).

In what Cases.

In what Cases.] The sheriff is bound to discharge a defendant in his custody upon mesne process in a personal action, upon reasonable sureties of sufficient persons, having sufficient within the county, &c., to keep the defendant's day in such place as the writ requires (*r*); and if he refuses to accept a bail-bond when tendered with sufficient sureties, he is liable to an action on the case for such refusal (*s*). The sureties, at least two of them if more than that number, must, it seems, be respectively worth the penalty of the bond, in order to maintain such action (*t*). They must also have sufficient within the county where the arrest was made (*u*). As to the number of the sureties, see *post*, 538.

May be taken without Arrest.

The sheriff may take a bail-bond from a defendant without

(*p*) 1 & 2 V. c. 110, s. 4.

(*q*) *Milne* v. *Wood*, 5 C. & P. 587.

(*r*) 23 H. 6, c. 9, ss. 5, 7: see *Matson* v. *Booth*, 5 M. & Sel 223.

(*s*) 2 Saund. 61 b. c.

(*t*) *Matson* v. *Booth*, 5 M. & Sel. 223.

(*u*) *Lovell* v. *Plomer*, 15 East, 320.

arresting him; and the bond in such a case will be valid within the statute, if otherwise unobjectionable (*x*).

When to be Executed.

When to be Executed.] The bail-bond must, it seems, be executed and taken on or before the eighth day limited by the process for putting in bail, or it will be void (*y*). And it will be so if it be executed before the condition is filled up (*z*).

For what Sum.

For what Sum.] The sheriff shall take bail for the sum indorsed on the writ, and no more (*a*). As this, however, is merely directory to him, a mistake in the sum for which the bond is taken has been held not to avoid it, where no intention to oppress the defendant appeared (*b*); and in practice it is always taken in double the sum sworn to. Also it is to be observed, that the bail are liable to satisfy the whole debt due to the plaintiff, to the full extent of the penalty of the bond, although it exceed the sum sworn to and costs (*c*). Where a defendant was arrested on a writ indorsed for 179*l.*, and gave a bail-bond for that amount, and the affidavit was for 175*l.* only, the court ordered the bond to be delivered up and cancelled (*d*).

Form of the Bond.

Form of the Bond.] The bond must be to the sheriff himself, by the name of his office, and upon condition written, that the defendant shall appear at the day contained in the writ or warrant, and in such place as the writ or warrant shall require (*e*); otherwise it shall be void (*f*).

Must be by Bond to the Sheriff.

The security to the sheriff must be by *bond;* otherwise it is void (*g*). And this bond must be made to the sheriff himself, by the name of his office, or it will be void (*g*); therefore a bond to, or agreement with, the sheriff's officer (*h*), or a bond to the sheriff, but not by his name of office (*i*), is void, and the court will not relieve the sheriff. It does not require a stamp (*k*).

No Stamp.

The Condition.

The condition of the bond must be for the defendant's appearance at the day and in such place as by the writ is required, or it will be void (*l*). But if the condition state the place of appearance correctly in substance, although not formally so, it will be sufficient (*m*). The condition is now, of course, differently worded to what it was when the action was commenced by original writ, or bill, or *latitat*, &c. (*n*): when those processes were in existence, where the

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(*x*) *Taylor* v. *Clow*, 1 B. & Ad. 223: *Watkins* v. *Barry*, 1 Str. 444: *Healy* v. *Fitzgerald*, 2 Str. 643.

(*y*) *Pullein* v. *Benson*, 1 L. Raym. 352: see *Thompson* v. *Rock*, 4 M. & Sel. 338: *Samuel* v. *Evans*, 2 T. R. 569: *Taylor* v. *Clow*, 1 B. & Ad. 223.

(*z*) *Powell* v. *Duff*, 3 Camp. 181.

(*a*) 12 G. 1, c. 23, s. 2.

(*b*) *Norden* v. *Horsley*, 2 Wils. 69: *Whiskard* v. *Wilder*, 1 Burr. 331: *sed quære*, since 2 W. 4, c. 39, and 1 & 2 V. c. 110. The bond ought not to be prepared in a larger penalty than is requisite. (See *Wingrave* v. *Godmond*, 6 C. & P. 66).

(*c*) 2 Saund. 61 a: *Walker* v. *Carter*, 2 Bl. Rep. 816: *Mitchell* v. *Gibbons*, 1 H. Bl. 76: *Stevenson* v. *Cameron*, 8 T. R. 28: *Heppel* v. *King*, 7 T. R. 370.

(*d*) *Cook* v. *Cooper*, 7 Ad. & El. 605; 2 Nev. & P. 607, *S. C.*

(*e*) 23 H. 6, c. 9, s. 7.

(*f*) Id. s. 8. See *Cotten* v. *Wale*, Cro. El. 862. See the form, Chit. Forms, 233.

(*g*) 23 H. 6, c. 9, ss. 7, 8: *Beaufage's case*, 10 Co. 101: *Lewis* v. *Knight*, 8 Bing. 271; 1 M. & Scott, 353; 1 Dowl. 261, *S. C.*

(*h*) *Rogers* v. *Reeves*, 1 T. R. 418: *Beaufage's case*, 10 Co. 100: *Fuller* v. *Prest*, 7 T. R. 109: *Sedgworth* v. *Spicer*, 4 East, 568: *Lewis* v. *Knight*, 8 Bing. 271; 1 M. & Scott, 353; 1 Dowl. 261 *S. C.:* and see 7 E. 4, 5, pl. 15.

(*i*) *Rogers* v. *Reeves*, 1 T. R. 422: and see *Courtney* v. *Phelps*, 1 Sid. 300: *Cymes* v. *Oakes*, 2 Str. 893.

(*k*) 5 G. 4, c. 41.

(*l*) 23 H. 6, c. 9, s. 78: Dy. 118 b.

(*m*) *Large* v. *Attwood*, 1 D. & R. 557.

(*n*) See the form, Chit. Forms, 233.

condition omitted the words "*wheresoever*," *&c.* (*o*), or, instead thereof, required the defendant's appearance before the king "*at Westminster*" (*p*), or, instead of the words "before our lord the king at Westminster," it had the words, "before the justices at the King's Bench at Westminster" (*q*), the bond was holden sufficient, because the words used were sufficiently descriptive of the court in which the party's appearance was required. But where, upon process out of the Common Pleas, the condition required an appearance before "*his majesty at Westminster*," and it did not otherwise appear that the action was in the Common Pleas, the bond was holden void; for the words used in it were descriptive of the Court of King's Bench and not of the Common Pleas (*r*). The court would have held otherwise, had it appeared from the whole tenor of the bond that it was for the defendant's appearance in the Common Pleas (*s*). A bond conditioned for the defendant to appear in *eight* days after the *date*, the arrest having been on the same day, has been held sufficient (*t*). If the bond be single, and without any condition (*u*), or (which is the same) if the condition be impossible (*x*), or if it be conditioned for anything but the appearance of the defendant (*y*), or if there be a variance between the bond and writ in any material part (*z*), it will be void. Where a bond, in reciting the delivery of the writ, stated that "a copy of the writ was duly delivered to ——," omitting the name of the defendant, and likewise omitting his name in the statement of the condition of the bond, the court, in an action brought against the sheriff for an escape, would not supply the deficiency, and held the bond a nullity (*a*). But it is not required by the statute to insert the nature of the action in the condition of the bond: if it sets forth the parties, and the time and place of appearance, substantially, it is sufficient; and it is laid down by Serjeant *Williams* in his notes to Saunders's Reports, that therefore a mere informality, or variance between the condition and process in the description of the action, or of the time and place of appearance, does not vitiate the bond (*b*).

Number of Sureties.

If the sheriff take a bond with one surety only, such bond will be valid (*c*), although the statute mentions "sureties" in the plural number. The sheriff, however, had better take more than one surety; it is, in fact, strictly his duty so to do: and on this account, where a sheriff took a bail-bond with one surety only, and the plaintiff lost a trial, on an attachment regularly issued against him for not bringing in the body, the Court of Common Pleas ordered the bond, as well

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(*o*) *Shuttleworth* v. *Pilkington*, 2 Str. 1155: *King* v. *Pippett*, 1 T. R. 240.

(*p*) *Jones* v. *Stordy*, 9 East, 55: but see *Marsh* v. *Blachford*, 1 Chit. Rep. 323.

(*q*) 2 Saund. 60 b: and see *Crofts* v. *Stockley*, 5 Bing. 32; 2 Moo. & P. 81; 3 C. & P. 281, *S. C.*

(*r*) *Renalds* v. *Smith*, 6 Taunt. 551.

(*s*) *Crofts* v. *Stockley*, 5 Bing. 32; 2 Moo. & P. 81; 3 C. & P. 281, *S. C.*

(*t*) *Evans* v. *Mosely*, 2 C. & M. 490; 2 Dowl. 364; 4 Tyr. 109, *S. C.*

(*u*) 37 H. 6, 1 a, pl. 7.

(*x*) *Posterne* v. *Hanson*, 2 Saund. 60.

(*y*) *Thrower* v. *Whetstone*, Dy. 118 b: *Beawfage's case*, 10 Co. 101.

(*z*) *Semble*, see *Bennet* v. *Filkins*, 1 Saund. 20: *Bennett* v. *Pilkins*, 1 Lev. 192: *Samuel* v. *Evans*, 2 T. R. 569: but see 2 Saund. 60 a.

(*a*) *Holding* v. *Raphael*, 5 Nev. & M. 655; 1 H. & W. 571, *S. C.*: see *Parker* v. *Bent*, 2 D. & R. 73.

(*b*) 2 Saund. 60 a, n., citing a variety of cases: and see *Owen* v. *Nail*, 6 T. R. 702. It is to be observed, however, that these were all decided upon process issuing before the Uniformity of Process Act. (See *Baker* v. *Newbegin*, R. & M., C. N. P. 93).

(*c*) *Beawfage's case*, 10 Co. 101 a; 2 Saund. 61 c: and see *Peppin* v. *Cooper*, 2 B. & Ald. 440.

as the attachment, to stand as a security (*d*). He may take a bond with three or more sureties if he will (*e*). Also, the sheriff is not answerable to the plaintiff if the sureties be insufficient (*f*); for it is optional with the plaintiff whether he will take an assignment of the bond or not.

For what Amount.

The bond also might formerly, it seems, have been valid, although the sum sworn to had not been indorsed on the writ, or even if there had been no affidavit to hold to bail (*g*), or if the bond were taken for more than double the sum sworn to (*h*); but it would seem that in such cases, the court, on application, will now order it to be delivered up and cancelled (*i*).

By what Name Defendant should execute.

If the defendant have been arrested by a wrong name, he should enter into the bond by his right name, stating himself to have been arrested by the name in the writ, or else sign the bond by his initials, otherwise he might be precluded from getting his discharge, or the bail-bond cancelled, on entering a common appearance (*k*).

If Void, and Bail not put in.

If the bond be void, and bail be not put in and perfected in due time, the sheriff of course may be sued for the escape; and the court in such a case will not, in general, relieve him by allowing him afterwards to put in and perfect bail (*l*).

2. *Deposit with the Sheriff* (*m*).

2. Deposit with the Sheriff.

At common law, the sheriff would not be justified in discharging a defendant arrested by him, even upon receiving from him the amount of the debt sworn to, and costs (*n*).

When may be made.

But now a defendant, when arrested, instead of giving a bail-bond, may deposit with the sheriff, under-sheriff, or sheriff's officer, the amount of the sum indorsed upon the writ, together with 10*l*. to answer the costs which may have accrued to the time limited for the putting in special bail, and thereupon he shall be discharged out of custody (*o*). And it shall be presumed that money paid to the officer, upon an arrest, has been paid under this act, unless the contrary clearly appear (*p*).

Motion by Defendant to take the Deposit out of Court.

The sheriff must, it seems, within the eight days inclusive after the arrest, pay into court the sum so deposited with him; and if the defendant afterwards duly put in and perfect special bail, [or put in bail and render himself] (*q*), he may obtain the money back again upon motion (*r*). *For this*

(*d*) R. v. *Shffs. of London*, in *Lazarus* v. *Tanner*, 9 Moore, 422; 2 Bing. 227, *S. C.*: R. v. *Shff. of Middlesex*, 7 Dowl. 313: see, however, R. v. *Shff. of Middlesex*, 2 Dowl. 140: R. v. *Shff. of Surrey*, 2 C., M. & R. 698.

(*e*) See *Matson* v. *Booth*, 5 M. & Sel. 223.

(*f*) 2 Saund. 61 c.

(*g*) *Whiskard* v. *Wilder*, 1 Burr. 330: *Evans* v. *Bidgood*, 4 Bing. 63: *Wilcoxson* v. *Nightingale*, Id. 501; 10 B. & C. 202, *S. C.*: *Sharp* v. *Abbey*, 2 Moo. & P. 312; 5 Bing. 193, *S. C.*

(*h*) *Norden* v. *Horsley*, 2 Wils. 69: and see *Wingrave* v. *Godmond*, 6 C. & P. 66.

(*i*) See *Cook* v. *Cooper*, 7 Ad. & El. 635; 2 Nev. & P. 607, *S. C.*

(*k*) *Ante*, 511, 512: *sed quære*, if he would in any case be so precluded, if he were in custody?

(*l*) *Fuller* v. *Prest*, 7 T. R. 109: see *post*, 542, 544.

(*m*) As to depositing money in court in lieu of *special* bail, see *post*.

(*n*) See *Slackford* v. *Austen*, 14 East, 468: *Wooden* v. *Moxon*, 6 Taunt. 490.

(*o*) 43 G. 3, c. 46, s. 2.

(*p*) *Wain* v. *Bradbury*, 1 Smith, 127.

(*q*) *Chadwick* v. *Battye*, 3 M. & Sel. 283: *Harford* v. *Harris*, 4 Taunt. 669.

(*r*) 43 G. 3, c. 46, s. 2: see *Young* v. *Maltby*, 3 Dowl. 604; 1 H. & W. 214, *S. C.*: *Steward* v. *Bracebridge*, 1 Chit. Rep. 529; 2 B. & Ald. 770, *S. C.*: *Hill* v. *Ching*, 7 Moore, 432; 1 Bing. 103, *S. C.* A judge at chambers has no power, it would seem, to grant the application. (See *Geach* v. *Coppin*, 3 Dowl. 74).

purpose give a brief to counsel, to move for a rule nisi, *upon an affidavit stating the arrest, deposit, payment of it into court* (*s*), *and that bail has been put in and perfected, or that bail has been put in and the defendant rendered, as the case may be, in due time* (*t*). *Draw up the rule, which is* nisi (*u*), *with one of the masters, and serve a copy of it on plaintiff's attorney or agent: afterwards move to make the rule absolute, upon affidavit of services, and take the money out of court in the usual way.* It is, it seems, absolutely requisite, in order to entitle the defendant to obtain the money out of court, that he should have put in bail according to the exigency of the *capias*, or within the further time, if any, granted for that purpose (*x*). If the affidavit state the bail to have justified, the court will presume that they were so in due time, unless the contrary be shewn by the plaintiff (*y*). The officer is not entitled to poundage on the money thus paid out of court (*z*). If a third person, and not the defendant, have deposited the money with the officer, the court will order it to be paid back to such third person, upon bail being duly put in and perfected, or bail put in and the defendant rendered (*a*), and this though the defendant has become bankrupt (*b*).

The same by Plaintiff.

If bail be not duly put in and perfected in due time, [or the defendant have not put in bail and rendered himself], then by order of the court (*c*), upon motion, the money so deposited and paid into court shall be paid over to the plaintiff (*d*). *For this purpose make an affidavit stating the arrest, deposit, payment of it into court, and that bail has not been put in or not perfected, as the case may be* (*e*), *and proceed in the manner above directed.* The application should not, it seems, be made until the expiration of the day for *perfecting* special bail (*f*). If the defendant does not put in bail in due time, the plaintiff will be allowed, on motion, to take the money out of court, though the defendant has rendered himself since the time for putting in bail, or though he has perfected bail; but the plaintiff in the latter case will be put to his election as to which security he will take, whether the money or the bail (*g*). When the sheriff neglected to pay the money into court until the evening of the day on which the time for putting in bail expired, and the defendant on the next day paid an additional sum of 10*l.* into court for costs, (under *7 & 8 G. 4, c. 71, s. 2, post*), but which the officer had refused to receive before the money was paid in by the sheriff, and the latter sum had been paid to the plaintiff under a rule, against which the defendant might have shewn cause, the

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(*s*) See *South* v. *Jones*, 8 Leg. Obs. 302, in which it was held that the court would not interfere where money has been paid into the hands of the sheriff in lieu of bail, which he has not paid into court: and see *Hall* v. *Jones*, 4 Dowl. 712.

(*t*) See form of the affidavit, Chit. Forms, 233.

(*u*) *Rowe* v. *Softly*, 6 Bing. 635. See the form, Chit. Forms, 234.

(*x*) *Geach* v. *Coppin*, 3 Dowl. 74: *Young* v. *Maltby*, Id. 604; 1 H. & W. 214, *S. C.*: see *Hodgson* v. *Mee*, 5 Nev. & M. 302; 3 A. & E. 765, *S. C.*

(*y*) *Young* v. *Maltby*, 3 Dowl. 604; 1 H. & W. 214, *S. C.*

(*z*) *Hunn* v. *Brine*, 6 Moore, 124: *Haines* v. *Nairn*, 2 Dowl. 43.

(*a*) *Nunn* v. *Powell*, 1 Smith, 13.

(*b*) *Edelsten* v. *Adams*, 2 Moore, 610; 8 Taunt. 557, *S. C.*

(*c*) A judge at chambers has not, it seems, any power. (See *Geach* v. *Coppin*, 3 Dowl. 75).

(*d*) 43 G. 3, c. 46, s. 2.

(*e*) See the form, Chit. Forms, 234.

(*f*) See *Rowe* v. *Softly*, 6 Bing. 634; 4 Moo. & P. 464, *S. C.*

(*g*) *Geach* v. *Coppin*, 3 Dowl. 74: *Newman* v. *Hodgson*, 2 B. & Ad. 422; 1 Dowl. 329, *S. C.*: *Parker* v. *Turner*, 2 Chit. Rep. 71.

court refused to order the plaintiff to refund the money (*h*). The court, however, may grant time to put in and perfect bail, or render the defendant upon an affidavit of merits (*i*). In a case where a defendant being arrested by a wrong name, paid the amount of the sum sworn to, and 10*l*. for costs, to the sheriff, without prejudice, the court would not allow the plaintiff to take it out of court, although the defendant had not perfected bail (*k*). Where a defendant cannot be found, in order to serve him personally with this rule for taking out the money, the court will allow the service to be good by leaving a copy of the rule at the defendant's last place of abode, and sticking it up in the office (*l*). The 10*l*. deposited as costs is to be subject to such deduction, as, upon taxation of plaintiff's costs, as well of the suit as of his application to the court in this behalf, may be found reasonable (*m*). Neither the sheriff nor any other officer's poundage or fees can be deducted on an order for payment of this money out of court (*n*). Such payment being by compulsion of law, the assignees of the defendant, who had previously committed an act of bankruptcy, cannot recover it back from the plaintiff (*o*).

Entering an Appearance after.

When the money has thus been paid out of court to the plaintiff, he may still enter a common appearance for the defendant, *if he think fit*, and so proceed in his action (*p*).

3. *Security to the Plaintiff for Defendant' s putting in Bail, &c.*

3. Security to the Plaintiff for Defendant's putting in Bail.

The statute of Henry 6, already mentioned, relates to such bonds only as are given to the *sheriff;* and therefore bonds to the *plaintiff*, in a different form from that prescribed by the statute, have been holden valid (*q*). So, any other contract or undertaking in writing to the *plaintiff*, for the defendant's appearance, will be valid; and if such an undertaking be given by an attorney, (which is usual in practice), the court will, in general, enforce it by attachment (*r*). The undertaking must, however, be to the plaintiff by name, or to his attorney for him, and not to the sheriff or his officer; otherwise the court would not enforce it (*s*). An undertaking by a third person to sign a bail-bond for the defendant, is not an undertaking within the Statute of Frauds, (29 *Car.* 2, *c.* 3, *s.* 4), to answer for the debt of another, and need not be in writing (*t*).

4. *Discharge of the Defendant without Bail-Bond, &c.*

4. Discharge of Defendant

The sheriff or his officer might, under the process issued before the Uniformity of Process Act, if he would, have dis-

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(*h*) *Hannah* v. *Willis*, 6 Dowl. 417.

(*i*) *Parker* v. *Turner*, 2 Chit. Rep. 71. *Geach* v. *Coppin*, 3 Dowl. 79.

(*k*) *Cadby* v. *Parsons*, 5 Taunt. 623.

(*l*) *Peat* v. *Triscott*, 1 Chit. Rep. 675: *Bellairs* v. *Poultney*, 6 M. & Sel. 230; 1 Chit. Rep. 466, *S. C.*

(*m*) 43 G. 3, c. 46, s. 2.

(*n*) *Stewart* v. *Bracebridge*, 2 B. & Ald. 770; 1 Chit. Rep. 529, *S. C.*

(*o*) *Reynolds* v. *Wedd*, 6 Dowl. 728.

(*p*) 43 G. 3, c. 46, s. 2: see *Clarke* v. *Yeates*, 3 B. & B. 273; 7 Moore, 83, *S. C.*

(*q*) *Hall* v. *Carter*, 2 Mod. 304, 305: *Posterne* v. *Hanson*, 2 Saund. 60.

(*r*) *Posterne* v. *Hanson*, 2 Saund. 60: *Rogers* v. *Reeves*, 1 T. R. 488, 422. These decisions were before the Uniformity of Process Act, but it is apprehended that the principle upon which they were decided is applicable to an arrest or detainer under the present process.

(*s*) *Sedgworth* v. *Spicer*, 4 Fast, 568: *Lewis* v. *Knight*, 8 Bing. 271; 1 M. & Scott, 353; 1 Dowl. 261, *S. C.*

(*t*) 29 C. 2, c. 3, s. 4: *Jarmain* v. *Algar*, 3 C. & P. 249; R. & M., C. N. P. 348, *S. C.*

without Bail-Bond, &c.

charged the defendant, without taking a bail-bond or any other security for his appearance (*u*); and if he afterwards retook him before the time limited for his appearance, or if, after returning *cepi corpus*, and before the expiration of the rule to bring in the body, he put in and perfected bail ,or rendered the defendant (*x*), he was not liable to any action subsequently brought for an escape or false return. But, on the other hand, if the sheriff in such a case had not the defendant at the time limited for his appearance, (that is, if he had him not in actual custody), or did not put in and perfect bail, or render him in due time, he would then be answerable in an action for an escape (*y*) (being an action which might be considered as standing on the same footing as a motion for an attachment, which will be hereafter noticed (*z*)); and the court would not have relieved him, by allowing him after action brought to put in and justify bail (*a*), or to render the defendant (*b*); nor even have stayed the plaintiff's proceedings against him, upon payment of the sum sworn to and costs (*c*), or allowed the defendant to enter a common appearance in the original action upon paying such sum and costs (*d*), if the plaintiff had any claim beyond that sum. The usual course, however, in such a case, was to refer it to the master to see how much was actually due for debt and costs, and, upon payment of the sum reported due, to stay the proceedings against the sheriff. The same practice would perhaps prevail under the process issued since the Uniformity of Process Act, under that act, or under 1 & 2 *V. c.* 110, with this exception, that as the writ requires the sheriff to safely keep the defendant until he shall have given him bail, or made deposit with him according to law, or by other lawful means be discharged, the sheriff would be guilty of a breach of duty if he otherwise discharged him. (*See post*, 543, 544).

Before the Uniformity of Process Act, where the sheriff arrested A. B. on the 13th November, upon a writ returnable on the 15th, and suffered him to go at large without giving a bail-bond, and afterwards returned *cepi corpus*, and bail above were put in on the 17th December, and the same day A. B. was rendered, but no notice of render was given until the 13th January, and an action for an escape was commenced on the 19th December, and no trial had been lost in the original action—the court stayed the proceedings upon payment of costs up to the time when notice of render was given, and the costs of the motion (*e*). And the Court of Exchequer before that act refused to set aside an order for the allowance of bail obtained after action brought against the sheriff for his escape, though no bail-bond had been taken, nor bail above put in in due time, where the defendant had been rendered on the day

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(*u*) See *Atkinson* v. *Matteson*, 2 T. R. 172: *Moses* v. *Norris*, 4 M. & Sel. 397.

(*x*) *Pariente* v. *Plumbtree*, 2 B. & P. 35.

(*y*) 2 Saund. 61 b: *Fuller* v. *Prest*, 7 T. R. 109: *How* v. *Lacy*, 1 Taunt. 119: *Birn* v. *Bond*, 6 Taunt. 554: see *Mendez* v. *Bridges*, 5 Id. 325.

(*z*) See *per Gibbs*, C. J., 2 Marsh. 262.

(*a*) *Fuller* v. *Prest*, 7 T.R. 109: *How* v. *Lacy*, 1 Taunt. 119: *Moses* v. *Norris*, 4 M. & Sel. 397: *Webb* v. *Matthew*, 1 B. & P. 225: see *Allingham* v. *Flower*, 2 Id. 246: *semb.*, *cont.*: see *post*, p. 545.

(*b*) *Burn* v. *Shff. of Middlesex*, 2 Marsh, 261. In *Brookhouse* v. *Shff. of Derbyshire*, 5 B. & C. 244, the notice of render was not served until after action brought for the escape.

(*c*) *R.* v. *Shffs. of London*, 9 East, 316.

(*d*) *Stevenson* v. *Cameron*, 8 T. R. 29.

(*e*) *Brookhouse* v. *Shff. of Derbyshire*, B. & C. 224.

of the expiration of the rule to bring in the body (*f*). But since that act, and the 1 & 2 *V. c.* 110, the court would probably decide differently in such a case (*g*).

Discharge by Plaintiff, or Payment of Debt and Costs by his Consent.

The sheriff is bound to discharge a defendant without a bail-bond, &c., upon receiving a written discharge from the plaintiff or his attorney (*h*). So, if the debt and costs in the action are paid to the plaintiff, no matter by whom, the defendant is entitled to be discharged out of custody (*i*). He may, however, still detain him for a reasonable time, until he have searched the office to see if there be any detainers against him (*k*). And he may detain him for his fees, although the attorney cannot (*l*). But it seems the sheriff has no right to detain a defendant in custody, although he has been compelled to pay the debt and costs under an attachment (*m*).

Detainer for Fees.

No Remedy for Consequence of improper Discharge.

If the sheriff improperly discharge a defendant without a bail-bond, &c., and be obliged to pay the plaintiff the amount of his debt, neither he nor his officer can maintain any action against the defendant for the money so paid (*n*).

5. *Escape.*

5. Escape.

Sheriff's Duty to Arrest, &c.

It is the duty of the sheriff to set about executing the writ in a reasonable time after he receives it for execution, and to arrest the party at the first opportunity; and if he does not arrest as soon as he can he will be guilty of negligence and a breach of duty, and will be answerable for any damage arising therefrom (*o*). If a person against whom the sheriff has a writ does not abscond, but continues in the daily exercise of his usual occupation, appears publicly as usual, and is visible to every person that comes to him on business, and the bailiff neglects to arrest him, and returns *non est inventus*, it is a false return (*p*). It is not, however, sufficient merely to prove that the debtor was within the defendant's bailiwick: the plaintiff must go further, and prove notice to the under-sheriff in the country, or to the bailiff to whom the warrant was directed: a notice to the town agent of the under-sheriff is not sufficient (*q*). It seems, however, that the plaintiff is not bound to give notice to the sheriff, and that the latter is bound to make due inquiries for the purpose of finding the defendant (*r*).

Re-capture.

An *escape* is either negligent or voluntary: negligent, where the party escapes without the consent of the sheriff or his officer; voluntary, where the sheriff or his officer permits him to escape. After a *voluntary* escape, if the party were in custody under a writ of execution, the sheriff can never re-take him, and would be liable to an action for false imprisonment if he did (*s*); and if he were in custody upon mesne process, issued under the Uniformity of Process Act, or under the 1 & 2 *V. c.* 110, the sheriff could not, it seems, retake him, unless on the same

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(*f*) *Morley* v. *Cole*, 1 Price, 103.

(*g*) See *R.* v. *Shff. of Middlesex*, in *Ridgway* v. *Porter*, 3 Dowl. 186.

(*h*) See *Taylor* v. *Brander*, 1 Esp. 45: *Martin* v. *Francis*, 2 B. & Ald. 402: *Hookham* v. *Monkton*, 6 Moore, 497.

(*i*) *Rimmer* v. *Turner*, 3 Dowl. 601.

(*k*) *Taylor* v. *Brander*, 1 Esp. 45: see *ante*, 534, 535.

(*l*) See Wats. Sheriff, 108: *Martin* v. *Francis*, 2 B. & Ald. 402.

(*m*) *Rimmer* v. *Turner*, 3 Dowl. 601.

(*n*) *Pitcher* v. *Bailey*, 8 East, 171.

(*o*) *Brown* v. *Jarvis*, 5 Dowl. 285; 1 M. & W. 704, *S. C.*: and see *Jacobs* v. *Humphrey*, 2 C. & M. 413: *Bales* v. *Wingfield*, 2 Nev. & M. 831.

(*p*) *Beckford* v. *Montague*, 2 Esp. 475.

(*q*) *Gibbon* v. *Coggan*, 2 Camp. 189.

(*r*) *Dyke* v. *Duke*, 4 Bing. N. C., 197.

(*s*) *Jones* v. *Pope*, 1 Saund. 35: *Atkinson* v. *Jameson*, 5 T. R. 25.

day, inasmuch as the return day of the writ is the day of its execution; under the former mesne process he might have retaken him before the return day (*t*), but not after it (*u*). After a *negligent* escape, the sheriff may in all cases retake the party (*v*), even on a Sunday (*x*), or although he have been declared a bankrupt after his escape, and at the time of the retaking had the protection from arrest given him by the commissioners in pursuance of stat. 6 *G.* 4, *c.* 16, *s.* 117 (*y*).

At what Time the Sheriff is liable to an Action for Escape.

In the case of an arrest upon mesne process, issued before the Uniformity of Process Act, all that was required of the sheriff was to bring the body of the defendant into court on the day limited for the defendant's appearance (*z*); consequently, an action for an escape, which we have just noticed, could not have been brought against him before that time. Nor was he liable to an action if he had the defendant at the *return* of the writ, and the defendant was not afterwards at large without bail; or if bail were put in *in time*, and was afterwards perfected before the expiration of the rule to bring in the body (*a*). And even if an action for an escape were brought before bail was put in, putting in and perfecting bail afterwards, and before trial, would have been a bar to the action (*b*); and the only means the plaintiff had of preventing this was by opposing the justification (*c*), or moving to set aside the rule of allowance (*d*). But the duties and liabilities of the sheriff, under the present process, are very different. The exigence of the former process was to take the defendant, *so as to have him at the return of it;* the exigence of the present process is, to take the defendant, "and him *safely keep until* he shall have given you [the sheriff] bail, or made deposit with you, according to law, in an action on promises at the suit of A. B., or *until* the defendant shall *by other lawful means* be discharged from your custody." The eight days appointed by the present process for the defendant's putting in special bail are, it would seem, quite unconnected with that part of it prescribing the sheriff's duties, and the return day of it is the day on which it is executed (*e*). It would seem then, that if the sheriff is guilty of an escape on the present mesne process, he would be at once guilty of a complete breach of duty in not obeying the exigency of the writ, and that an action for it might immediately (without waiting the eight days) be brought against him, provided the plaintiff could prove that he really sustained *damage* by the escape (*f*); or, if not sub-

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(*t*) See *Atkinson* v. *Matteson*, 2 T. R. 172, 176, 177.

(*u*) See *Moses* v. *Norris*, 4 M. & Sel. 397.

(*v*) *Jones* v. *Pope*, 1 Saund. 35.

(*x*) *Anon.*, 6 Mod. 231, 95: and see *ante*, p. 531: *Featherstonehaugh* v. *Atkinson*, Barnes, 373: *Atkinson* v. *Jameson*, 5 T. R. 25.

(*y*) *Anderson* v. *Hampton*, 1 B. & Ald. 308.

(*z*) 1 Saund. 35 a.

(*a*) *Pariente* v. *Plumbtree*, 2 B. & P. 35.

(*b*) *Murray* v. *Durand*, 1 Esp. 87: *Allingham* v. *Flower*, 2 B. & P. 246: and see *Fairlie* v. *Birch*, 3 Camp. 397. When writs of mesne process were returnable only in term time, (as they were before the 2 W. 4, c. 39), this putting in and perfecting bail would not have discharged the sheriff unless the bail were put in of the term in which the writ was returnable. (See *Moses* v. *Norris*, 4 M. & Sel. 397: *Crow* v. *Watson*, 2 Chit. Rep. 93.

(*c*) *Fuller* v. *Prest*, 7 T. R. 109.

(*d*) *Murray* v. *Durand*, 1 Esp. 87.

(*e*) *Hodgson* v. *Mee*, 5 Nev. & M. 302; 3 Ad. & Ell. 765, *S. C.*

(*f*) See *per curiam* in *Brown* v. *Jarvis*, 5 Dowl. 285: *Scott* v. *Henley*, 1 M. & R. 227. In *Neck* v. *Humphrey*, 4 Nev. & M. 738, *Patteson*, J., says: "It does not necessarily follow when the sheriff returns *cepi corpus et paratum habeo*, that he has taken a bail-bond: he may have allowed the defendant to be at large, intending to put in bail when required, *if he can do so*."

ject to an action he might be amerced. It can rarely happen, however, that plaintiff could prove such damage, if a bail-bond is entered into, or money is deposited with the sheriff, or the defendant is in custody again, before the expiration of the eight days; or if bail above are put in in time, and afterwards perfected before the expiration of the rule to bring in the body; consequently it would, in general, be the wisest course to wait the expiration of the eight days before commencing the action. Since the rule of allowance now shews the day on which the bail justified and were allowed, and is not, as formerly, dated of the term generally, and has no relation to the first day of the term, it is conceived that the sheriff could not now bar the action for an escape as he formerly could, by putting in and perfecting bail at any time before the trial, as above noticed, in this way. And, at all events, the court will grant an attachment against the sheriff for not obeying the rule or order to bring in the body, notwithstanding bail have been put in and perfected before the attachment is moved for (*g*). And the court will not, as we have seen, (*ante*, 542), in general, allow the sheriff to render the defendant after action properly brought against the sheriff for an escape; and this, though he has not been ruled to return the writ or bring in the body before action brought.

No Remedy for Consequences of voluntary Escape,

If, after a voluntary escape, the sheriff be obliged to pay the plaintiff the amount of his debt, neither the sheriff nor his officer can maintain any action against the defendant for the money thus paid (*h*).

Punishment for Obstructing Re-capture.

If any person obstruct or prevent the sheriff or his officers from retaking the defendant after his escape, the court, upon application, with an affidavit of the facts, will grant an attachment against them, the same as in all other cases of obstructing the execution of the process of the court (*i*).

6. *Rescue.*

6. Rescue.

When Sheriff not liable for.

If the defendant, after he is arrested, and before he is carried to prison, be rescued from the sheriff or his officer, the sheriff will be excused from having his body in court at the return of the writ, and may make his return to the writ accordingly (*k*). But a rescue after the defendant has been carried to prison, even where the sheriff is bringing him from the prison to the court by *habeas corpus*, will not excuse the sheriff, and he is answerable for it as an escape (*l*). And an escape, owing to the negligence of the officer, will not justify the return of a rescue (*m*).

Punishment of the Rescuers.

If the sheriff return the rescue, the offenders may be punished by attachment (*n*), or by indictment, and by a special action on the case against them by the plaintiff for damages, whether

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Actual damage is necessary to sustain the action. (*Williams* v. *Mostyn*, 4 M. & W. 145).

(*g*) R. H., 3 W. 4, *post*. 553: see *R.* v. *Shff. of Middlesex*, in *Taylor* v. *Odlin*, 8 T. R. 30: *R.* v. *Shff. of Middlesex*, in *Watts* v. *Hamilton*, 2 Dowl. 432.

(*h*) *Pitcher* v. *Bailey*, 8 East, 171.

(*i*) See *Miller* v. *Knox*, Dom. Prac., 4 Bing. N. C. 574.

(*k*) Com. Dig., Rescous: and see *R.* v. *Shff. of Middlesex*, in *Williams* v. *Pennell*, 1 B. & Ald. 190; Holt, C. N. P. 539, n., *S. C.*

(*l*) *O'Neil* v. *Marson*, 5 Burr. 2812.

(*m*) *Hill* v. *Leigh*, Holt, C. N. P. 537: *Fermor* v. *Phillips*, 5 Moore, 184; 3 B. & B. 27 a, *S. C.*

(*n*) *Sheather* v. *Holt*, 1 Str. 531: *R.* v. *Belt*, 2 Salk. 586.

the rescue be returned or not (*o*). And upon the sheriff's returning a rescue, the court, upon application, will grant an attachment against the offenders in the first instance (*p*); for the sheriff's return being in nature of a conviction, and not traversable, and the only remedy for the party in such a case being by action against the sheriff for his false return (*q*), it would be useless to grant a rule *nisi*. For the same reason the court will proceed to punish the offenders without having them examined on interrogatories (*r*). But the court have permitted a defendant to shew, by affidavit, in mitigation of punishment, that in fact there had been no legal arrest (*s*).

Formerly, the punishment on an attachment for a rescue was a fine of four nobles; but latterly the courts have fined the parties according to the circumstances of each case (*t*).

7. *Lodging the Defendant in Prison.*

7. Lodging the Defendant in Prison.

When.

A sheriff's officer, having arrested a defendant upon mesne process, shall not carry him to any tavern or public-house, or to the house of the officer himself, or any tenant or relative of his, without the defendant's free consent, nor carry him to gaol within twenty-four hours from the time of such arrest under penalty of 50*l.*; unless the defendant *refuse* to be carried in the meantime to some safe and convenient dwelling-house in the county, to be named by him, not being his own house (*u*). It is the duty of the officer to request of the defendant to name such house, before he can take him to gaol, within the twenty-four hours (*x*).

In what Prison.

The officer may confine the defendant in custody in a private house (*y*); the defendant, however, is usually confined in the house of the officer who arrests him, or of some other officer within the same bailiwick, until the expiration of the eight days limited for defendant's putting in bail (*z*). But the officer may, if he think fit, lodge him in the gaol of the sheriff, at any time after the expiration of twenty-four hours from the time of arrest; and he should do so before or on the eighth day for defendant's putting in bail, or as soon afterwards as possible; for after that time the sheriff keeps him at his peril, in case the creditor is thereby delayed or prejudiced (*a*). No action can, however, be maintained against the sheriff, even though the prisoner be not forthcoming, unless the plaintiff can prove that he has sustained some damage (*b*).

Where Defendant too ill to be removed.

If the defendant be too ill for removal from his lodging, the sheriff or officer should not remove him, and may suffer him to remain there; but must take care that he do not escape, or else have him in custody at the return of the writ, unless at that time he continue too ill to be removed (*c*).

(*o*) Com. Dig., Rescous: *R.* v. *Osmer*, 5 East, 304.

(*p*) *Anon.*, Say. 121: *R.* v. *Elkins*, 4 Burr. 2129: *Gobby* v. *Dewes*, 10 Bing. 112.

(*q*) *R.* v. *Pember*, Hard. 112.

(*r*) *R.* v. *Elkins*, 4 Burr. 2129: but see *R.* v. *Horsley*, 5 T. R. 362.

(*s*) *R.* v. *Minify*, 1 Str. 642.

(*t*) Ibid.: *R.* v. *Elkins*, 4 Burr. 2429.

(*u*) 32 G. 2, c. 28, ss. 2, 12.

(*x*) *Dewhurst* v. *Pearson*, 1 Dowl. 664: 1 C. & M. 365, *S. C.*: and *Simpson* v. *Renton*, 5 B. & Ad. 35: overruling *Pitt* v. *Shff. of Middlesex*, 1 Dowl. 201; 4 Moo. & P. 726, *S. C.*

(*y*) *Stevens* v. *Jackson*, 6 Taunt. 106; 1 Marsh, 469, *S. C.*: *Baker* v. *Davenport*, 8 D. & R. 606.

(*z*) See *Houlditch* v. *Birch*, 4 Taunt. 608.

(*a*) *Planck* v. *Anderson*, 5 T. R. 37, 41: see also *Brandling* v. *Kent*, 1 T. R. 60: *Williams* v. *Mostyn*, 4 M. & W. 145; 7 Dowl. 38, *S. C.*

(*b*) *Williams* v. *Mostyn*, 4 M. & W. 145; 7 Dowl. 38, *S. C.*

(*c*) See *Perkins* v. *Meacher*, 1 Dowl. 21: *Baker* v. *Davenport*, 8 D. & R. 606: *Cavenaugh* v. *Collett*, 4 B. & Ald. 279.

CHAPTER IX.

PROCEEDINGS AGAINST THE SHERIFF.

1. *Rule or Order to return the Writ.*
   - *In what Cases*, 547.
   - *When and how Obtained*, 549.
   - *Service of*, 550.
   - *Return of Writ*, *Id.*
   - *Motion for Attachment on*, 552.
2. *Rule or Order to bring in the Body*, 553.
   - *When and how obtained*, *Id.*
   - *Service of*, 554.
   - *How complied with*, *Id.*
   - *Motion for Attachment on*, 555.
3. *The Attachment*, 556.

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1. *Rule or Order to Return the Writ.*

1. Rule or Order to Return the Writ.

IT should be premised that the writ of *capias* commands the sheriff to return it *immediately after the execution thereof*, or, if the same remains unexecuted, then, at the expiration of one calendar month from the date thereof, or sooner, if the sheriff shall be thereto required by the order of the court or a judge (*d*). The sheriff may, therefore, immediately after the execution of the writ, be ruled or ordered to return it (*e*).

In what Cases.

In what Cases.] If the defendant do not appear to the writ according to the condition of the bail-bond, (if he have given one), that is, if he do not put in special bail within eight days inclusive after the execution of the writ, or do not perfect special bail, or render himself, in due time, the bail-bond is forfeited; and the plaintiff has the option either of taking an assignment of it, and bringing an action thereon, or of proceeding against the sheriff to compel him to return the writ and bring in the body of the defendant; or, in other words, to put in and perfect special bail, under the penalty of an attachment if he omit so doing. If the bail to the sheriff be good and sufficient persons, it is usual, and in most cases advisable, to take an assignment of the bail-bond, and proceed on it, in preference to proceeding against the sheriff. If the sheriff have discharged the defendant without taking a bail-bond or deposit, the plaintiff has then his option of proceeding against the sheriff, either by action for the escape, (see *ante*, 454), or by attachment after ruling him to return the writ and bring in the body. (*See post*, 549).

Judge's Order to Return the Writ.

The first proceeding against the sheriff, to compel him to put in and justify bail, is in term time by ruling, or in vacation by obtaining a judge's order for him to return the writ; or if bail have been already put in, but not justified, then except to the bail, and serve a notice of exception, (but this

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(*d*) See the form of the writ, *ante*, 506.

(*e*) See *Hodgson* v. *Mee*, 5 Nev. & M. 3 A. & E. 765, *S. C.*

Must be obtained without Delay.

exception is not necessary if the bail were not put in within the eight days limited by the writ), and then rule, or, in vacation, obtain a judge's order for the sheriff to return the writ, in order to compel a justification. This mode of proceeding, however, should be adopted without any unnecessary delay intervening; if the plaintiff lie by, without resorting to his remedy against the sheriff, the court will not, in general, interfere to compel the latter to put in and justify bail, particularly if by such delay he be placed in a worse situation than he would have been if he had been ruled or ordered to return the writ in the first instance; for the rule or order to return the writ is the first intimation the sheriff has that the defendant has made default (*f*). And it may be here mentioned as a general rule, that it is necessary that the proceedings against the sheriff should keep pace with the times allowed for putting in and perfecting bail; otherwise this inconvenience might ensue, that the sheriff might be fixed with the payment of debt and costs, and upon his bringing an action against the defendant or his bail upon the bail-bond, they might plead *comperuit ad diem* (*g*).

In what Cases the Sheriff cannot be compelled to Return.

But there are many cases in which the plaintiff cannot proceed against the sheriff; as, where the plaintiff has already taken an assignment of the bail-bond (*h*), provided it be a valid bond, within the stat. 23 *H.* 6, *c.* 9 (*i*); or where he accepts of a *cognovit* or other security from the defendant, without the privity of the sheriff (*k*); or where the arrest has been made by a special bailiff, nominated by the plaintiff or his agent (*ante*, 524); in which case, if the sheriff be ruled to return the writ, he should move the court to set aside such rule (*l*). And where the plaintiff sent the warrant in a letter by post to the officer, but the letter not being post-paid, the officer refused to take it in; it was held, that the sheriff could not be ruled to return the writ (*m*). The plaintiff may proceed against the sheriff, notwithstanding the defendant may have surrendered within the eight days after the arrest, unless he has also put in special bail (*n*).

Six Months

Also, the sheriff is not liable to be called upon to make a

(*f*) R. v. *Shff. of Surrey*, in *Morris* v. *Duffield*, 9 East, 467: *R.* v. *Perring*, 3 B. & P. 151: *R.* v. *Shffs. of London*, in *Hobhouse* v. *Middleditch*, 2 Chit. Rep. 58.

(*g*) Tidd, 9th ed. 310: *Hutchins* v. *Hird*, 5 T. R. 479.

(*h*) 2 Saund. 60 b: *Etherick* v. *Cowper*, 1 Salk. 99: *Grosvenor* v. *Soame*, 3 Id. 57: *Ladd* v. *Arnaboldi*, 1 Crom. & J. 92, 105.

(*i*) *Brooke* v. *Stone*, 1 Wils. 223; 2 Saund. 61 c: and see as to what is a valid bond, *ante*, 537, 538.

(*k*) R. v. *Shff. of Surrey*, in *Brewer* v. *Clarke*, 1 Taunt. 159: and see *post*, 566.

(*l*) *Pallister* v. *Pallister*, 1 Chit. Rep. 614, n.

(*m*) *Hork* v. *Weatherley*, 4 Dowl. 171.

(*n*) *Hodgson* v. *Mee*, 5 Nev. & M. 302; 3 A. & E. 765, *S. C.* That case decided, that if a defendant, on being arrested, give a bail-bond to the sheriff, he cannot afterwards by surrendering to the sheriff vacate the bond, but after such surrender, and after the expiration of eight days from the arrest, if special bail be not put in, proceedings may be had upon the bail-bond. The following is the judgment of the court in that case, as delivered by *Littledale*, J.:—"Before the Uniformity of Process Act, the sheriff, after taking bail, might receive the defendant into his custody at any time before the return of the writ. But now the writ of *capias* is returnable immediately after execution, and the sheriff may be ruled to return it on the arrest, although such arrest take place in vacation. Had the sheriff been so ruled in this case, he must have returned that the defendant had given bail. He was not justified in receiving the defendant into his custody afterwards, the condition of the bond being, that the defendant shall put in special bail according to the exigency of the writ, that is, within eight days after the arrest. And the third warning appended to the writ is, that if bail be not so put in, the plaintiff shall be at liberty to proceed against the sheriff or on the bail-bond."

after Expiration of Office.

return of any writ or process, unless required, by rule of court (*o*), or judge's order (*p*), to do so within six months after the expiration of his office (*q*), which months are lunar months; and the day upon which the sheriff quits his office is reckoned inclusive (*r*). But if he be ruled or ordered to return the writ before the expiration of the six months, and he neglect to do so, the statute does not prevent an application for the attachment after that time (*s*). Perhaps, under very special circumstances, the sheriff might be ordered to return the writ, though long after the expiration of six months after the expiration of his office (*t*). As to the transfer of writs, &c., to the incoming sheriff, see 3 & 4 *W.* 4, *c.* 99, *s.* 7, *ante*, 14.

When and how obtained.

When and how Obtained.] In cases in which the plaintiff is at liberty to proceed against the sheriff, and elects to do so, his first proceeding is to obtain this rule or order to return the writ. Such rule or order may, as we have seen, (*ante*, 547), be obtained immediately after the arrest (*u*). In *term time* the rule is a side-bar rule, and may be drawn up by one of the masters as a matter of course, on producing a *præcipe* for it; or it may be obtained by motion in court. In *vacation*, instead of the rule, you may obtain a judge's order for the return of the writ, which will have the same effect as the rule for that purpose, although no attachment can issue for disobedience of such order, until it has been made a rule of court. This practice is the result of the enactment of the 2 *W.* 4, *c.* 29, *s.* 15, which enacts, "that it shall be lawful, in *term* time, for the court out of which any writ issued by authority of that act, or any writ of *capias ad satisfaciendum*, *fieri facias*, or *elegit*, shall have issued, to make rules, and also for any judge of either of the said courts, in *vacation*, to make orders, for the return of any such writ; and every such order shall be of the same force and effect as a rule of court made for the like purpose: provided always, that no attachment shall issue for disobedience thereof until the same shall be made a rule of court." And by a general rule of all the courts of *M. T.*, 3 *W.* 4, *r.* 13, "in case a judge shall have made an order in *vacation*, *for the return of any writ* issued by authority of the said act, or any writ of *capias ad satisfaciendum* or *elegit*, on any day in vacation, and such order shall have been duly served, but obedience shall not have been paid thereto, and the same shall have been made a rule of court in the term then next following, it shall not be necessary to serve such rule of court, or make any fresh demand of performance thereon; but an attachment shall issue forthwith, for disobedience of such order, whether the thing required by such order shall or shall not have been done in the meantime."

Practical Directions to obtain.

If in term, *make out a præcipe for the rule, and apply to one of the masters for such rule, who will draw it up. Mention to*

(*o*) *R.* v. *Jones*, 2 T. R. 1: *R.* v. *Adderley*, Doug. 463, n.: *Yaroth* v. *Hopkins*, 3 Dowl. 711; 2 C., M. & R. 250, *S. C.*

(*p*) See the form of the writ, *ante*, 506, *et infra.*

(*q*) 20 G. 2, c. 37, s. 2.

(*r*) *R.* v. *Adderley*, Doug. 463: and see *R.* v. *Sheriff of Middlesex*, 4 East, 604. See the cases collected in 6 Burn, J., 28th ed., title "Time," p. 38: and *ante*, 93.

(*s*) *R.* v. *Adderley*, Doug. 463, n.; 2 Saund. 61 c.

(*t*) See *Wilton* v. *Chambers*, 3 Dowl. 333.

(*u*) See *Hodgson* v. *Mee*, 5 Nev. & M. 303; 3 A. & E. 765, *S. C.*

him the name of the officer who made the arrest, &c. Serve the rule on the under-sheriff. The rule may be obtained on the last as well as any other day in term(*x*). If in vacation, *obtain a judge's order for the return of the writ*(*y*). *Serve the order on the under-sheriff.* Formerly it was usual to lay before the judge an affidavit of the issuing and delivery of the writ to the sheriff, and the deponent's belief that it had been executed, &c. (*z*); but now, by rule of all the courts of *H. T.*, 1 *Vict.*, "it is ordered, that judges' orders to return writs, (whether of mesne or final process), and to bring in the body, be drawn up without any affidavit." It must be observed, as to the county palatine of Lancaster, that the rule or order is not to be made on the chancellor to whom the writ was directed, but on the sheriff of the county (*a*).

Form of Rule.

The rule or order calls upon the sheriff to return the writ within a certain time after notice to be given to his under-sheriff (*b*). This time is four days in London and Middlesex (*c*); and formerly it was *six* days in other counties, &c. (*d*). But now by a general rule of all the courts of *M. T.*, 7 *W.* 4, it is ordered, that "all rules upon sheriffs, other than the sheriffs of London and Middlesex, to return writs, either of *mesne* or *final* process, and rules to bring in the bodies of defendants, be *eight*-day rules instead of *six*-day rules." If the rule be on the late sheriff, it should style him "late sheriff."

Service of.

Service of.] A copy of the rule or order (with the name of the officer by whom the defendant was arrested indorsed on it) must be served *personally* on the sheriff or his under-sheriff (*e*), and the original rule or order at the same time shewn to him (*f*). In London it is served on the deputy secondary, at his office, 28, Coleman-street; in Middlesex, on Mr. Burchell, at the sheriff's office, 9, Red Lion Square; in Surrey, either on the sheriff or under-sheriff, or on his agent in London (*g*); and in all other counties, on the sheriff's deputy or under-sheriff (*h*), or on his agent (*i*). *When you serve the copy of the rule or order, make a memorandum of the name of the person on whom you have served it, that you may insert it afterwards in your affidavit of service.*

Return of Writ.

At what Time.

Return of Writ.] The sheriff must return the writ within the time limited by the rule or order, (or, if the office of the master who now acts as *custos brevium* be closed, as soon as it opens), and this whether in term or vacation (*k*), otherwise he will be in contempt (*l*), and subject to an attachment, as presently mentioned. Formerly, indeed, where the rule expired in *vacation*, the sheriff in the Queen's Bench had until and the

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(*x*) R. H., 2 W. 4, r. 96; by which it is ordered, that "side-bar rules may be obtained on the last as well as on other days in term."

(*y*) See *post*, Vol II. Book IV. Ch. 34.

(*z*) Bagley's Pract. 81: Tidd's New Pract. 170. See the form of the affidavit and order, Chit. Forms, 234, 235.

(*a*) 1 Sellon, 195.

(*b*) See the forms, Chit. Forms, 235.

(*c*) R. T., 6 G. 3.

(*d*) R. T., 5 & 6 G. 2.

(*e*) See *Cave* v. *Price*, Barnes, 30: *Vaughan* v. *Sawyer*, Id. 35.

(*f*) *Barnard* v. *Berger*, 1 New Rep. 121: *R.* v. *Smithies*, 3 T. R. 351.

(*g*) *R.* v. *Coles*, Doug. 420.

(*h*) *Cave* v. *Price*, Barnes, 30.

(*i*) *R.* v. *Shff. of Sussex*, MS., H. 1820: but see *R.* v. *Coles*, Doug. 420, *contra.*

(*k*) Formerly there was an extra charge for opening the Treasury in vacation, and the sheriff had to pay it; (see *R.* v. *Shff. of Surrey*, 3 Dowl. 82); but the charge is abolished by R. T., 7 W. 4, Q. B.

(*l*) R. M., 3 G. 3: R. H., 2 W. 4, r. 11, *post* 551.

whole of the first day of the ensuing term to return the writ and file his return (*m*). But in the Common Pleas (*n*) and Exchequer (*o*), he must, in such case, have filed it in vacation, the Common Pleas and Exchequer Offices being always supposed to be open. But now, by a general rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 11, "when the rule to return the writ expires in vacation, the sheriff shall file the writ at the expiration of the rule, or as soon after as the office shall open." In order to make sheriffs punctual in their return of a writ, it is ordered by a rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 12, that "the officer with whom it is filed shall indorse the day and hour when it was filed." *When the time limited by the rule or order has expired, search with one of the masters or his clerk or messenger at the Treasury Chamber, Westminster Hall, if the writ have been returned.*

Mode of Proceeding on the usual Returns.

If the sheriff have taken a bail-bond, and returned *cepi corpus et paratum habeo* (*p*), and *no bail be yet put in*, you have still the option of taking an assignment of the bail-bond, or of proceeding further against the sheriff by ruling or obtaining a judge's order upon him to bring in the body; or *if bail have been put in*, but not *justified*, then, (if they were put in within the time limited by the writ, *viz.* eight days), except to them, and rule or order the sheriff to bring in the body, in order to compel a justification. If the sheriff have taken the defendant, and let him go at large *without a bail-bond* or deposit as allowed by the writ, he may, it seems, be sued for an escape, though he return *cepi corpus et paratum habeo*, and the defendant be in custody, or bail above be put in and justified (*q*). If the sheriff return *non est inventus*, where he has taken or might have taken the defendant, he is liable to an action for a false return (*r*). But the court will not set aside the return, although a strong case of fraud and collusion be shewn (*s*). Formerly, when the writ did not contain a *non omittas* clause, if the sheriff returned, "*mandari ballivo*, and that he hath not given any answer thereto," you had to sue out a *non omittas* writ directed to the same sheriff; or, if the bailiff had returned *cepi corpus*, you might have ruled such bailiff to bring in the body (*t*): but now the writ of *capias* is a *non omittas* writ in the first instance.

When Defendant is Sick, Rescue, &c.

On a return of *cepi corpus*, the sheriff, instead of returning that he has the defendant ready or in custody, to answer the plaintiff, may return, by way of excuse, if the fact, that he is sick, or has been rescued. If he return that he is sick, the illness of the defendant at the return must appear on the return (*u*).

Where the

Where the writ was lost, and the sheriff gave notice of the

(*m*) *R.* v. *Shff. of Berks*, 5 East, 386; 1 Smith, 427, *S. C.*: *R.* v. *Shff. of Surrey*, 11 East, 591.

(*n*) *R.* v. *Shff. of Middlesex*, in *Thompson* v. *Powell*, 5 Taunt. 647; 1 Marsh, 270, *S. C.*

(*o*) *Smith* v. *Blyth*, 9 Price, 255.

(*p*) This return means that the sheriff has taken the defendant, and that he is *at large* upon bail. The sheriff ought to return that the defendant is in *custody*, if that be the fact. (See *per Littledale*, J., in 4 Nev. & M. 708).

(*q*) See *ante*, 544. Formerly, before the introduction of the new process, he could not be sued for an escape on such a return, if the defendant was in custody, or bail above had been put in and justified. (1 Gilb. C. P. 22: *Ellis* v. *Yarborough*, 2 Mod. 178).

(*r*) *Beckford* v. *Montague*, 2 Esp. 475: see *ante*, 543.

(*s*) *Goubot* v. *De Crouy*, 1 C. & M. 772; 2 Dowl. 86, *S. C.*

(*t*) *Boothman* v. *Earl of Surrey*, 2 T. R. 5, 10.

(*u*) *Perkins* v. *Meacher*, 1 Dowl. 21: *Cavenagh* v. *Collett*, 4 B. & Ald. 279;

loss to the plaintiff, and that the defendant was in custody, it was held, that the plaintiff ought to proceed, as if the sheriff had returned *cepi corpus* (*x*).

Writ is lost, and Defendant in Custody.

Motion for the Attachment.

Motion for the Attachment.] If the sheriff, having been duly served with the rule or order for return of the writ, as above mentioned, does not make his return, or, it seems, if he makes an insufficient return (*y*), within the time limited by such rule or order, he will be in contempt, and subject to an attachment (*z*). *You may ascertain whether he has made it by searching*, as mentioned *ante*, 551. If the sheriff so in contempt has been ruled by the court to return the writ, and the rule expires *in term*, you may move the court for this attachment on the day following (*a*); or, if it expire on the last day of term, then you may move for it on that day, at the rising of the court (*b*): or if it expire in vacation, you may move for it on the first day of next term (*c*). If the sheriff so in contempt has been ordered by a judge *in vacation* to return the writ, then, in the term next following such order, you should make such order a rule of court; for which purpose give a brief to counsel "to move to make the judge's order a rule of court," which requires counsel's signature only. By rule of all the courts of *M. T.*, 3 W. 4, *r.* 13, (*ante*, 549), it will not be necessary to serve such rule of court, or to make any fresh demand of performance thereon, but an attachment may be forthwith obtained for disobedience of such order; and this, whether or not the order has been performed in the meantime (*d*).

Practical Directions for Obtaining.

This attachment is moved for by counsel in term time, upon an affidavit stating a personal service of a copy of the rule or judge's order to return the writ, that such rule or order was at the same time shewn to the person served (*e*), *and that the writ was not filed by the time therein limited*; *and in the case of a judge's order for the return, such affidavit should also state, that the order has been made a rule of court in the term next following such order* (*f*). In the Queen's Bench and Exchequer, it seems that the judge's order may be made a rule of court, and an attachment for not obeying it may be obtained on one motion (*g*); but in the Common Pleas the practice is otherwise, (*h*), and in the Queen's Bench it appears necessary that there should be a separate *rule* for each (*i*). *As to the proceedings upon the attachment, see* post,

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where the return was, that the defendant was insane, and could not be removed without danger of his life, and held bad because it did not allege that he continued so until the return of the writ. (See forms of return, Chit. Forms, 235).

(*x*) *R.* v. *Sheriff of Kent*, 1 Marsh, 289.

(*y*) Roll. Ab., Return, (m) 1: Wats. *Shff.* 76. A return that the defendant "is not *to be* found in my bailiwick," is insufficient. (See *R.* v. *Shff. of Kent*, in *Potter* v. *Simpson*, 5 Dowl. 451; 2 M. & W. 316. *S. C.*)

(*z*) See *Alchin* v. *Wells*, 5 T. R. 470.

(*a*) R. M., 32 G. 3.

(*b*) *Ante*, 97: *R.* v. *Shff. of Surrey*, 11 East, 591: 1 Chit. Rep. 356 a, *S. C.*

(*c*) R. H., 2 W. 4, r. 11, *ante*, 551. Formerly, in such case, in the Q. B., you could not move until the second day of the next term. (*R.* v. *Shff. of Berks*, 5 East, 386). *Aliter* in C. P. and Exch. (*R.* v. *Shff. of Middlesex*, in *Thomson* v. *Powell*, 5 Taunt. 647: *Smith* v. *Bythe*, 9 Price, 255).

(*d*) See *R.* v. *Shff. of Middlesex*, in *Watts* v. *Hamilton*, 2 Dowl. 432.

(*e*) See *R.* v. *Smithies*, 3 T. R. 351: *Barnard* v. *Berger*, 1 New Rep. 121: R. M., 3 W. 4, r. 13, *ante*, 549.

(*f*) R. M., 3 W. 4, r. 13, *ante*, 549. See the forms of affidavits, Chit. Forms, 237, and the attachment and proceedings thereon, Ib.

(*g*) *Hinchcliffe* v. *Jones*, 4 Dowl. 86; 1 H. & W. 337, *S. C.*: *Howell* v. *Bulteel*, 2 C. & M. 339; 3 Dowl. 99; 4 Tyr. 59, *S. C.*: *Forster* v. *Kerkwall*, 4 Dowl. 370: but see *Stainland* v. *Ogle*, 3 Dowl. 99.

(*h*) *Pilcher* v. *Woods*, 4 Dowl. 329.

(*i*) *Hinchcliffe* v. *Jones*, 4 Dowl. 86; 1 H. & W. 337, *S. C.*

p. 256; *and see further, post, Vol. II. Book IV. Part III. tit. "Attachment."*

2. *Rule or Order to bring in the Body.*

2. Rule or Order to bring in the Body.

After the sheriff has returned *cepi corpus*, if the defendant is still at large, and no bail put in, your next step against the sheriff is to rule, or, in vacation, to obtain a judge's order for him to bring in the body; or, if bail have been put in, but not justified, then except to them, and serve a notice of exception(*k*), (but such exception is not necessary if the bail be not put in in time), and then rule, or in vacation obtain a judge's order for, the sheriff to bring in the body, in order to compel a justification(*l*). If special bail be put in and perfected within the time allowed by the rules or orders to return the writ and bring in the body, the cause proceeds in the ordinary way(*m*). Where the plaintiff, having obtained his debt and costs in an action against the sheriff for an escape, but wishing also to proceed in the original action ruled, the sheriff to bring in the body, the court, upon application, discharged the rule with costs(*n*).

Judge's Order for in Vacation.

Formerly, this rule to bring in the body could not be drawn up in vacation: but now, by rule of all the courts of *H.*, 3 *W.* 4, "in case a rule of court or judge's order for returning a bailable writ of *capias* shall expire in vacation, and the sheriff or other officer having the return of such writ shall return *cepi corpus* thereon, a judge's order may thereupon issue, requiring the sheriff or other officer, within the like number of days after the service of such order, as by the practice of the court is prescribed with respect to rules to bring in the body issued in term, to bring the defendant into court, by forthwith putting in and perfecting bail above to the action; and if the sheriff or other officer shall not duly obey such order, and the same shall have been made a rule of court in the term next following, it shall not be necessary to serve such rule of court, or to make any fresh demand thereon, but an attachment shall issue forthwith for disobedience of such order, whether the bail shall or shall not have been put in and perfected in the meantime."

When and how Obtained.

When and how Obtained.] In *term* time, this rule is a side-bar rule, and may be drawn up by one of the masters, as a matter of course, on producing a *præcipe* for it; or it may be obtained by motion in court. In *vacation*, you should obtain a judge's order for the sheriff to bring in the body, which will have the same effect as the rule for that purpose, although no attachment can issue for disobedience of the order until it has been made a rule of court(*o*). *Obtain this rule or order in the mode already directed* (*ante*, 549) *as to obtaining the rule or order for the return of the writ*(*p*). Care should be taken that there be no unnecessary delay in ob-

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(*k*) R. v. *Shff. of Middlesex*, 8 T. R. 258: *Rogers* v. *Mapleback*, 1 H. Bl. 107: *Price* v. *Street*, Barnes, 102.

(*l*) See 2 Saund. 61 d: *Wolfe* v. *Collingwood*, 1 Wils. 262.

(*m*) Tidd, 9th ed. 172.

(*n*) *Borwick* v. *Walton*, 2 B. & Ald. 623; 1 Chit. Rep. 393, *S. C.*

(*o*) R. H., 3 W. 4, *supra*.

(*p*) See form of the rule or order, Chit. Forms, 237, 238.

taining this rule or order, after the eight days have elapsed from the execution of the writ. Where a writ of *latitat* was returned in Hilary term, and the rule to bring in the body not taken out until the Michaelmas term following, the court set aside an attachment for not obeying it (q). It may be obtained even on the day the sheriff returns the writ, provided the time for putting in bail have then expired (r); but it seems not before that time (s).

When Sheriff has gone out of Office.

It was formerly the practice, when the sheriff was out of office, to proceed against him by *distringas*, to compel him to bring in the body; but the practice has been altered in this respect; and the plaintiff may now, within the time limited by law, rule or obtain an order on him to bring in the body, notwithstanding he be out of office before the rule or order is granted (t); or if ruled on the last day of the term to bring in the body, and he go out of office before the next term, he will be liable to an attachment for not obeying the rule (u). In these cases, where the arrest was made by the late sheriff, care must be taken to rule him, and not the present sheriff.

Service of.

Service of.] It must be served in the same manner as the rule or order to return the writ. (*See ante*, 550).

How complied with.

In what Time.

How complied with.] The time limited by this rule or order is four days in London and Middlesex (x), and formerly six days in every other county, &c. (y): but now, by a general rule of all the courts of *M. T.*, 7 *W.* 4, it is ordered, that "all rules upon sheriffs, other than the sheriffs of London and Middlesex, to return writs, either of mesne or final process, and rules to bring in the bodies of defendants, be *eight*-day rules, instead of *six*-day rules."

The Sheriff must, in general, bring in Defendant or perfect Special Bail.

Within the time limited by it, the sheriff must either bring the defendant into court, or put in special bail and perfect it; otherwise the court will grant an attachment against him, as presently mentioned (z). Formerly, if the rule expired on the last day of the term, the sheriff had always the entire of the first day of the next term to justify bail, or otherwise comply with the rule (a); but now the bail must, if the notice of exception require them so to do (b), justify before a judge in vacation. If the time limited have expired, and the rule or order be not complied with, the contempt is not purged by rendering the defendant, or by putting in and perfecting bail on a subsequent day, although before the attachment is moved for (c); and if two days' time to justify be given, and bail are not justified on the last of the two days, an attachment may issue on that day (*d*); and, if the defendant in such a case were to die, after the sheriff is once in contempt by not bringing in the body, the attachment might afterwards issue against him for the previous contempt, although the original cause abated by the defendant's death (*e*). Where the return to the writ stated that the defendant was insane, and could not be removed without great danger, and that he continued so until the return of the writ, the court refused an attachment against the sheriff (*f*). The sheriff is bound to obey the rule, notwithstanding the plaintiff's proceedings are stayed by an injunction obtained by defendant (*g*).

(q) R. v. *Shff. of Surrey*, 7 T. R. 452: and see *R. v. Shffs. of London*, in *Peacock v. Leigh*, 1 Taunt. 111: *Ruston* v. *Hatfield*, 3 B. & Ald. 204: *R.* v. *Shff. of Middlesex*, 1 Dowl. 53.

(r) *R.* v. *Shff. of Middlesex*, in *Pouchee* v. *Levien*, 4 M. & Sel. 427: see *Hutchins* v. *Hird*, 5 T. R. 479: *R.* v. *Shffs. of London*, in 2 East, 241, *contra*.

(s) *R.* v. *Shff. of Middlesex*, in *Potter* v. *Marsden*, 8 East, 525: *Rolfe* v. *Steele*, 2 H. Bl. 276: *Hutchins* v. *Hird*, 5 T. R. 479.

(t) R. T., 31 G. 3, r. 1.

(u) *Meekins* v *Smith*, 1 H. Bl. 629.

(x) R. T., 6 G. 3.

(y) R. T., 5 & 6 G. 2: Tidd, 9th ed. 307.

(z) See *Wolfe* v. *Collingwood*, 1 Wils. 262: and see *Moses* v. *Norris*, 4 M. & Sel. 397: *R.* v. *Shff. of Middlesex*, in *Lister* v. *Goldstein*, 4 D. & R. 225.

(a) *R.* v. *Shff. of Middlesex*, in *Brown* v. *Culver*, 8 T. R. 464: *Vanderhaden* v. *Britten*, 4 D. & R. 155.

(b) R. H., 2 W. 4, r. 17, *post*, 589.

(c) R. H., 3 W. 4, *ante*, 553: *Smith* v. *Andrews*, 2 M. & W. 536: *R.* v. *Shff. of Middlesex*, in *Watts* v. *Hamilton*, 2 Dowl. 432: *R.* v. *Shff. of Middlesex*, in *Ridgway* v. *Porter*, 3 Dowl. 186: *R.* v. *Shff. of Middlesex*, in *Taylor* v. *Odlin*, 8 T. R. 30.

Sheriff not obliged to bring Defendant actually into Court.

The sheriff is not obliged to bring the defendant actually into court; if he shew that he is in his custody (*h*), or that bail has been put in, and that he has rendered in discharge of his bail (*i*), it is sufficient; and for this purpose, if the defendant be not in the sheriff's custody at the return of the writ, the sheriff or his officer may put in bail for him, and these bail may immediately take him, and render him in their discharge (*k*), without justifying (*l*).

Motion for the Attachment.

Motion for the Attachment.] If upon the expiration of the time limited by the rule or order to bring in the body, the sheriff have not complied with it in the manner above mentioned, by having the defendant in custody, or by putting in and perfecting special bail, he will be in contempt, and subject to an attachment. And whether the writ was originally returned with or without an order, is immaterial (*m*). If the sheriff so in contempt has been ruled to bring in the body, and the rule expires *in term*, you may move the court for this attachment on the following day, or any day after (*n*); or if it expire on the last day of term, then you may move for it at the rising of the court on that day (*o*); or if it expire in vacation, you may move for it on the first day of next term. If the sheriff so in contempt has been ordered by a judge, in vacation, to bring in the body, then in the next term following such order you should make it a rule of court; for which purpose, give a brief to counsel to move to make the judge's order a rule of court; which requires counsel's signature only. It will not be necessary to serve such rule of court, or to make any fresh demand of performance thereon; but an attachment may be forthwith obtained for disobedience of such order, and this whether or not it has been performed in the meantime (*p*). It is essential that it should be moved

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(*d*) *Thompson's bail*, 1 Chit. Rep. 310: and see *R. v. Shff. of Middlesex*, in *Lister v. Goldstein*, 2 D. & R. 225.

(*e*) *R. v. Shff. of Middlesex*, 3 T. R. 133.

(*f*) *Cavenagh v. Collett*, 4 B. & Ald. 279: see *Baker v. Davenport*, 8 D. & R. 606: *Perkins v. Meacher*, 1 Dowl. 21: *ante*, 546.

(*g*) *R. v. Shff. of Middlesex*, 1 Dowl. 454.

(*h*) *Macleed v. Marsden*, Barnes, 32.

(*i*) *R. v. Shff. of Middlesex*, in *Brown v. Culver*, 8 T. R. 464: *R. v. Shff. of Middlesex*, 7 Id. 527.

(*k*) *R. v. Butcher*, Peake, 169.

(*l*) *R. v. Shff. of Middlesex*, 7 T. R. 527: *R. v. Shff. of Middlesex*, in *Hammond v. Bean*, 4 Dowl. 673: *vide ante*, 502: *post*, 591, 594, 595.

(*m*) *Bertram v. Davis*, 6 Dowl. 180.

(*n*) 2 Saund. 61 d: see *R. v. Shff. of Middlesex*, in *Brown v. Culver*, 8 T. R. 464; 1 Burr. 651, n.: *ante*, 552.

(*o*) *R v. Shff. of Surrey*, 11 East, 591; 1 Chit. Rep. 356, n.: *R. v. Shff. of Middlesex*, in *Davis v. Allen*, 1 Dowl. 53: see Tidd, 9th ed. 312.

(*p*) R. H., 3 W. 4, *ante*, 553: see *Bertram v. Davis*, 6 Dowl. 180.

for without any unnecessary delay, otherwise the court will not grant it: where the rule to bring in the body was served on the 19th November, and the attachment not sued out until the 9th March, the court set aside the attachment (*q*). So, where the rule was served on the 11th February, and the attachment did not issue till the 3rd May, returnable the 4th, and the defendant had become bankrupt in March, whereby the sheriff had lost his opportunity of proving the debt under the commission, the court set aside the attachment (*r*). If the sheriff be *ruled* to bring in the body, and bail be perfected and rule of allowance served, or defendant rendered, and notice of render given before the attachment issues, it seems that it will be sufficient to prevent the attachment from issuing (*s*); but if the plaintiff have fairly incurred any costs, they must be paid (*t*). If the sheriff, being served with the rule or order to bring in the body, afterwards, and before it expires, go out of office, he is liable to the attachment, in the same manner as if he were still the officer of the court (*u*).

Practical Directions as to.

This attachment is moved for by counsel in term time, on an affidavit of service of a copy of the rule or order, and that the original was shewn at the same time (*x*), *and, also, that no bail has been put in, or that bail has been put in but not justified* (*y*). *And in the case of a judge's order to bring in the body, the affidavit should also state that the order has been made a rule of court in the term next following such order.* The rule for the attachment is absolute in the first instance (*z*). In the Queen's Bench and Exchequer, it seems, the judge's order may be made a rule of court, and an attachment for not obeying it obtained on one motion (*a*). But the practice is, it seems, different in the C. P., where two motions are requisite (*b*); and in the Queen's Bench it appears necessary that there should be a separate *rule* for each (*c*). If the affidavit be not sufficient, the court will allow an additional affidavit to be made (*d*).

3. *The Attachment.*

3. The Attachment. What

The attachment is a criminal process, directed to the coroner when it issues against the present sheriff, or to the present sheriff when it issues against the late sheriff (*e*) commanding him to attach the sheriff, so that he have him in court on a *general* return day (*f*), to answer "for certain trespasses and contempts by him lately done and committed in our court before" &c.

How Sued

The attachment in the Court of Queen's Bench is sued out

(*q*) R. v. *Perring*, 3 B. & P. 151.

(*r*) R. v. *Shff. of Surrey*, in *Morris* v. *Duffield*, 9 East, 467.

(*s*) See *per curiam*, R. v. *Shff. of Middlesex*, 2 D. & R. 225: *Thorold* v. *Fisher*, 1 H. Bl. 3: *Morley* v. *Cole*, 1 Price, 103.

(*t*) See R. v. *Shff. of Middlesex*, 1 Taunt. 56: *Turner* v. *Bristow*, 2 B. & P. 38.

(*u*) *Meekins* v. *Smith*, 1 H. Bl. 629.

(*x*) R. v. *Smithies*, 3 T. R. 351. It is sufficient to swear that the original rule and not a copy was served on the under-sheriff. (*Leaf* v. *Jones*, 3 Dowl. 315).

(*y*) See the form, Chit. Forms, 238.

(*z*) 1 Burr. 651, n.

(*a*) *Howell* v. *Bulteel*, 2 C. & M. 339; 3 Dowl. 99; 3 Tyr. 59, *S. C.*: *Foster* v. *Kirkwall*, 4 Dowl 370: but see *Standard* v. *Ogle*, 3 Dowl. 99, Q. B.

(*b*) *Pilcher* v. *Woods*, 4 Dowl. 329: but in *Bertram* v. *Davis*, 6 Dowl. 180, both were granted on one motion in C. P.

(*c*) *Hinchcliffe* v. *Jones*, 4 Dowl. 86 1 H. & W. 337, *S. C.*

(*d*) R. v. *Smithies*, 3 T. R. 351.

(*e*) 1 Sellon. 201.

(*f*) R. v. *Wilkins*, 1 Str. 624.

and proceeded on thus:—*Go to the master's, and get the rule for the attachment*(g). *Take it to the Crown Office, and one of the clerks will make out the attachment*(h); *get it signed there and sealed.* In the Queen's Bench the rule of *H. T.*, 2 & 3 *G.* 4, requires *the place of abode and addition of the party against whom the attachment is issued, or such other description of him as can be given, to be indorsed on the writ by the plaintiff's attorney or agent* (i). *Then make out your bill of costs (including the coroner's fee and the fee for the warrant), and take it and the attachment to the coroner to whom it is directed, and he will grant a warrant thereon.* (If against the late sheriff, the attachment should be directed to the present sheriff, instead of the coroner). *Upon the return of the attachment call on the coroner, and he will pay you. Or, if he do not, get a side-bar rule at the Crown Office for the coroner to return the writ of attachment*(k); *upon the expiration of that rule, if he have not returned the writ of attachment, move the court for an attachment, upon affidavit of the service of the rule to return the attachment, and that the attachment was not returned, and they will grant an attachment against the coroner, absolute in the first instance*(l), *directed to elizors*(m); *and upon being taken under this attachment, the coroner, of course, will pay you the debt and costs. But if the coroner return that he has taken the sheriff, then obtain a rule for a* habeas corpus, *to bring in the body of the sheriff, which rule is obtained upon counsel's signature merely*(n). *And lastly, if the* habeas corpus *be not obeyed, move for a rule for an attachment against the coroner for not bringing in the body of the sheriff*(o); *and upon being taken under this attachment, the coroner will of course pay you the debt and costs.*

out and prosecuted in Q. B.

The attachment in the Common Pleas and Exchequer is sued out and prosecuted thus:—*Draw up the rule for the attachment (absolute in the first instance) with one of the masters*(p). *Engross the attachment on plain parchment*(q); *get it signed by the master; and get it sealed by the sealer of the writs. Leave it with the coroner, or, if it be against the late sheriff, leave it at the office of the present sheriff to be executed, and leave with him your bill of costs. If, upon applying to the coroner on the day the attachment is returnable, he do not pay you the money, rule the coroner to return the writ*(r). *If, afterwards, on the fifth day after the service of the rule in London or Middlesex, or the seventh day in any other county, you find upon searching at the master's office that the writ has not been returned, make an affidavit of the service of the rule, and that the writ has not been returned*(q), *and thereupon instruct counsel to move for an attachment against the coroner, directed to elizors, which will be absolute in the first instance*(r). *Draw up the rule with the master. Engross the writ of attachment on plain parchment*(r);

How in C. P. and Exch.

(g) See the forms of the rules, Chit. Forms, 237, 239.

(h) See the forms of attachments, Chit. Forms, 239.

(i) See the cases on this rule, *post*, Book I. Part I. Ch. 4, Sect. 4.

(k) See the form, Chit. Forms, 239.

(l) *Andrews* v. *Sharp*, 2 W. Bl. 911: *R.* v. *Peckham*, Id. 1218.

(m) See form of the attachment, Chit. Forms, 239.

(n) *R.* v. *Whaley*, 1 Chit. Rep. 249. See the form of the rule, Chit. Forms, 239; and of the *habeas corpora*, Id.

(o) See form of rule, Chit. Forms, 239.

(p) See the form, Id. 239.

(q) See the form, Id. 238.

(r) See the form, Id. 239.

get it signed by the master; get it sealed by the sealer of the writs; then deliver it to the elizors to be executed. If, however, the coroner return that he has taken the sheriff, then the course is in the Court of Common Pleas, as in the Court of Queen's Bench, to draw up a rule with any of the masters for a habeas corpus *to bring in the body of the sheriff. Sue out the writ and deliver it to the coroner, and if he then fail to bring in the body or pay the money, proceed to attachment against him for his disobedience.*

Amount of Liability. As to the amount for which the sheriff is liable, see *post*, 572.

CHAPTER X.

PROCEEDINGS ON THE BAIL-BOND.

1. *Assignment of.*
  In what Cases, 559.
  When and how, *id.*
  Effect of it, 560.
2. *Action on, by the Plaintiff.*
  When and how to be brought, 560.
  In what Court, 562.
  Venue, *id.*
  Bail, *id.*
3. *Action on, by the Sheriff*, 563.

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1. *Assignment of the Bail-bond.*

Assignment of the Bail-bond.
In what Cases.

In what Cases.] WHERE the defendant is arrested and the sheriff takes a bail-bond, the sheriff shall, at the request and cost of the plaintiff or his attorney, assign to the plaintiff such bail-bond, by indorsing the same, and attesting it under his hand and seal, in the presence of two or more credible witnesses (*s*). If the bail to the sheriff be sufficient, it is usual for the plaintiff to take an assignment of the bail-bond, and bring an action upon it, instead of proceeding against the sheriff. *For this purpose, if in Middlesex, apply at the sheriff's office in Red Lion Square,—if in London, at the Secondary's Office*, 28, *Coleman-street,—or, if in any other county, at the office of the sub-sheriff or his agent in town; and the bond, with an assignment to the plaintiff indorsed on it, will be given to you* (*t*). It may be assigned in any county (*u*). If the sheriff refuse to assign it, the only remedy is by an action on the case against him (*x*).

Where not.

The plaintiff cannot take an assignment of the bail-bond after service of the rule of allowance of bail (*y*), or after suing out an attachment against the sheriff (*z*); for, by doing so, he has made his election to proceed against the sheriff; yet, in such a case, the plaintiff may take an assignment of the bond, if the sheriff chooses to assign it (*a*). Nor can he insist on it even after he has ruled the sheriff to bring in the body (*b*), though this was formerly otherwise (*c*). But he may insist on it, notwithstanding the defendant has rendered, unless he has also put in special bail within eight days from the arrest (*d*).

When and how.

When and how.] The assignment may be taken at any time within a year after the arrest. But it must be taken before

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(*s*) 4 A. c. 16, s. 20.

(*t*) See the form of the assignment, Chit. Forms, 239.

(*u*) *Gregson* v. *Heather*, 2 L. Raym. 1455; 2 Str. 727, *S. C.*

(*x*) *Stamper* v. *Milbourne*, 7 T. R. 122: and see *Mendez* v. *Bridges*, 5 Taunt. 325.

(*y*) *Murray* v. *Durand*, 1 Esp. 87: and see *How* v. *Lacy*, 1 Taunt. 119: *R.* v. *Shff. of Middlesex*, 4 T. R. 493: *post*, 560.

(*z*) *Cunningham* v. *Chambers*, E. T., 45 G. 3, K. B.: Tidd, New Prac. 165: and see 1 Chit. Rep. 394, n.

(*a*) *Pople* v. *Wyatt*, 15 East, 215; 1 Chit. Rep. 394, n.

(*b*) *Wright* v. *Walker*, 3 B. & P. 564: *Blackford* v. *Hawkins*, 7 Moore, 600; 1 Bing. 181, *S. C.*: *Posterne* v. *Hanson*, 2 Saund. 60 b: and see 7 B. & C. 480, n.

(*c*) *Robinson* v. *Owen*, Tidd, 9th ed. 297.

(*d*) *Hodgson* v. *Mee*, 5 Nev & M. 302; 3 A. & E. 765, *S. C.* See the former cases decided upon the process used before the Uniformity of Process Act. (*Jones* v. *Lander*, 6 T. R. 753: *Stamper* v. *Milbourne*, 7 T. R. 122: *Hyde* v. *Whiskard*, 8 T. R. 456: *Brown* v. *Jennings*, 2 B. & Ald. 768; 1 B. & P. 325).

the cause is out of court, by reason of the plaintiff's not declaring; otherwise he cannot sue upon the bond; and, before the 1 & 2 *V.* c. 110, a plaintiff (*e*) was deemed out of court if he had not declared within one year after the arrest; but, since that act it would seem that the time must be calculated with reference to the proceedings on the writ of summons (*f*). However, if he take an assignment before that time, there is no objection to his suing upon it afterwards (*g*). It is said that the bail-bond may be assigned before it is forfeited (*h*); but this is not usual, nor in all cases advisable; and the plaintiff cannot, in any case, proceed upon the bond before forfeiture.

How made.

The assignment must be made by indorsement on the back of the bond, under the hand and seal of the sheriff or other officer, and made in the presence of two or more *credible* witnesses (*i*). By *credible* witnesses is meant disinterested persons, and therefore an assignment is invalid if executed in the presence of and attested by the plaintiff in the action, and another person (*k*). It is not necessary that the witnesses should both subscribe their names at the time of the execution of the assignment (*l*). It need not be stamped (*m*).

By whom.

The assignment may be made by the under-sheriff, in the sheriff's name, or by the sheriff himself; or, it seems, by the under-sheriff's clerk, in his office (*n*). And an authority from the sheriff to the under-sheriff to execute the assignment in his name need not be shewn, as the latter is possessed of all the authorities belonging to the office (*o*).

Effect of it.

Effect of it.] By taking an assignment of the bail-bond, the plaintiff discharges the sheriff, and cannot afterwards call upon him even to return the writ, provided the bond be valid (*ante*, 537—548). So, after the assignment, the plaintiff cannot demand a plea, or otherwise proceed in the original action, without waiving his right of action on the bail-bond. Formerly, if after the assignment the bail to the sheriff became bail above, the plaintiff could not except to them; but, by the rule of *H. T.*, 2 *W.* 4, *r.* 15, this is now otherwise (*post*, 587).

2. *Action on the Bail-Bond by the Plaintiff.*

2. Action on Bail-bond by Plaintiff.
When and how to be brought.

When and how to be brought.] If the bail-bond be forfeited, the plaintiff, after assignment, may bring an action on it in his own name (*p*); and this though he become bankrupt (*q*).

If bail be not put in within eight days after the execution of the *capias* inclusive (*r*), or if they be put in, and the plaintiff except to and the defendant fail to justify them in time,

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(*e*) *Sparrow* v. *Nayler*, 2 W. Bl. 876: and sèe *Collett* v. *Bland*, 4 Taunt. 715: *Wynne* v. *Clarke*, 5 Id. 649: *Merryman* v. *Carpenter*, 2 Str. 1262.

(*f*) R. H., 2 W. 4, r. 35, *ante*, 137. The day of the arrest is the return day. (*Hodgson* v. *Mee*, 5 Nev. & M. 302; 3 A. & E. *S. C.*)

(*g*) *Pigott* v. *Truste*, 3 B. & P. 221.

(*h*) *Paradice* v. *Holiday*, Barnes, 77: see *per Bayley*, J., *Alston* v. *Underhill*, 1 C. & M. 494; 3 Tyr. 427, *S. C.*: but see *Dent* v. *Weston*, 8 T. R 4.

(*i*) 4 A. c. 16, s. 20.

(*k*) *Wright* v. *Barrack*, 1 T. & G. 764; 1 M. & W. 424, *S. C.*

(*l*) *Phillips* v. *Barlow*, 6 C. & P. 781; 1 Scott, 322; 3 Dowl. 381; 1 Bing. N. C. 433, *S. C.*

(*m*) 5 G. 4, c. 41.

(*n*) *Harris* v. *Ashley*, Tidd, New Prac. 164: *Middleton* v. *Sandford*, 4 Camp. 36: and see *Doe* v. *Brown*, 5 B. & Ald. 245: but see *Kitson* v. *Fagg*, 1 Str. 60.

(*o*) *Wright* v. *Barrack*, 1 T. & G. 764.

(*p*) 4 A. c. 16, s. 20.

(*q*) MS., T. T. 1831, K. B.

(*r*) See *Bond* v. *Evans*, 4 B. & C. 864: *Wright* v. *Walker*, 3 B. & P. 564: *Evans* v. *Bates*, 2 C. & M. 143.

the bond is forfeited and an action may be commenced (*s*). It should be observed, however, that although the defendant has made default in the putting in or perfecting bail in due time, nevertheless an action cannot be regularly brought after bail justified and rule for allowance served (*t*), nor after bail put in and render made thereon (*u*). But it may be brought even if after justification, if the rule for allowance be not served in time (*x*). Where persons are put in as bail, who cannot, according to the rules of the court, become bail, the plaintiff cannot treat this proceeding as a nullity, and proceed upon the bail-bond, but must except to the bail, and proceed as if regular bail had been put in (*y*). This, however, does not apply to the case of a practising attorney, or a practising attorney's clerk, being put in as bail, (except for rendering only), in which case the plaintiff may treat the bail as a nullity, and sue on the bail-bond as soon as the time for putting in bail has expired, unless good bail be put in in the meantime (*z*).

Not pending a Rule to bring in the Body.

By a general rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 23, "a plaintiff shall not be at liberty to proceed on the bail-bond pending a rule to bring in the body of the defendant" (*a*). And if bail above be justified before the expiration of the rule to bring in the body, the bail below might, before the abolition of the doctrine of relation to the first day of the term, in an action on the bond, plead *comperuit ad diem*, and that plea was satisfied by the production of the recognisance roll, containing an entry of the defendant's appearance generally; and such roll might be made up at any day before the day given for producing it (*b*); or instead of so pleading, the defendant in the action on the bond might, it would seem, apply to the court or a judge to stay the proceedings on it. But now, perhaps, as the doctrine of relation is abolished, and the recognisance roll does not enter the appearance generally, this plea could not be successfully adopted, though the defendant may still obtain a stay of the proceedings.

Notice to Bail, where necessary.

Where a plaintiff, with the consent of the bail, took a *cognovit* from the principal, with stay of execution for a month, it was holden that he could not commence an action on the bail-bond upon default made, until he had first given notice of the default to the bail (*c*).

(*s*) See *Hillary* v. *Rowles*, 5 B. & Ad. 460; 2 Dowl. 201, *S. C.*: *Robinson* v. *Hawkins*, Bail Court, Q B., M. T. 1837, *S. P.*: and see per *Bayley*, *B.*, *Alston* v. *Underhill*, 1 C. & M. 494; 2 Dowl. 26, *S. C.*

(*t*) *Ellis* v. *Bates*, 2 C. & M. 143. The court in that case made the defendant pay the costs of the assignment of the bond which was properly taken.

(*u*) See *Hodgson* v. *Mee*, 5 Nev. & M. 302; 3 A. & E. 765, *S. C.*: *Ellis* v. *Bates*, 2 New Rep. 85: *Meysey* v. *Carnell*, 5 T. R. 534, 633: and see *Richardson* v. *Hodgson*, 11 Price, 633. From the report of *Lewis* v. *Grimstone*, (5 Dowl. 711), it will appear to be irregular to serve a writ on the bail in an action on the *bail bond*, notwithstanding the writ may have been sued out previous to the notice given to the plaintiff; but the report is inaccurate in stating that the action was on a bail-bond; it was on a recognisance of bail: see the same case reported in 1 Jurist, 514.

(*x*) *Bignold* v. *Lee*, 1 B. & C. 285.

(*y*) *Hawkins* v. *Magnell*, Doug. 466: *R.* v. *Sheriff of Surrey*, 2 East, 181.

(*z*) R. H., 2 W. 4, r. 13, *post*, 575.

(*a*) There is a rule in the Exch. of M. T., 1 W. 4, r. 2, s. 15, that "whenever the plaintiff shall rule a sheriff, on a return of *cepi corpus*, to bring in the body, the defendant shall be at liberty to put in and perfect bail, at any time before the expiration of such rule; and that a plaintiff having so ruled the sheriff, shall not proceed on any assignment of the bail-bond until the time has expired to bring in the body as aforesaid."

(*b*) *Whittle* v. *Oldaker*, 7 B. & C. 478; 1 M. & R. 298, *S. C.*: see *Ladd* v. *Arnaboldi*, 1 C. & J. 97.

(*c*) *Clift* v. *Gye*, 9 B. & C. 422: and see *Woosnam* v. *Price*, 1 C. & M. 352: *Surman* v. *Bruce*, 10 Bing. 444; 4 M. & Scott, 184; 2 Dowl. 777, *S. C.*: *post*, 566.

How commenced.

In order to commence an action on the bail-bond, after having obtained an assignment of it, sue out a writ of summons against the bail and principal, or one of them, and proceed as in ordinary cases in non-bailable actions (*d*): *of course the writ should not be sued out before the forfeiture has taken place* (*e*).

The Action should in general be joint.

You must take care to commence the action against *all* the parties to the bond *jointly*, if they be forthcoming and can be served with the process, or if there be not some other good reason for suing them separately; for by *R. H.*, 2 *W.* 4, *r.* 30, "proceedings on the bail-bond may be stayed on payment of costs in one action, unless sufficient reason be shewn for proceeding in more" (*f*). An application for such a stay of proceedings must be made in a reasonable time, and, at all events, before verdict (*g*). If you cannot, from circumstances, bring your action against all jointly, and each of the parties be resident within the jurisdiction of the court, you must bring actions against them *severally*, or such one of them as you please; you cannot, in such a case, sue two of the three *jointly*, without subjecting yourself to a plea in abatement for nonjoinder: but it would not be irregular (*h*).

In what Court.

In what Court.] The action, when brought by the assignee of the bond, must be brought in the court out of which the process in the original action issued (*i*); otherwise the parties could not have the relief intended for them by the 4 & 5 *Ann.* *c.* 16, *s.* 20. But, by rule of *H. T.*, 2 *W.* 4, *r.* 28, "an action may be brought upon a bail-bond by the sheriff himself in any court" (*k*).

Venue.

Venue.] The venue may be laid in any county (*l*).

Bail.

Bail.] Neither the principal, nor bail, can be holden to bail in an action on the bail-bond; but when judgment has been obtained in an action on the bail-bond, they may be holden to bail in an action on the judgment (*ante*, 470).

Other Proceedings.

Other Proceedings.] If judgment go by default, no writ of inquiry is necessary, but the plaintiff may at once enter final judgment for the penalty (*m*). The execution may be indorsed to levy the debt and costs in the original action to the extent of the penalty, and also the costs of the action on the bond (*n*), and interest, at £4 per cent., on the amount of the judgment from 1st October, 1838, or from the day of entering judgment according as it was entered before or after that day (*o*).

(*d*) See form of the declaration, Chit. Forms, 240.

(*e*) *Alston* v. *Underhill*, 2 Dowl. 26.

(*f*) *Key* v. *Hill*, 2 B. & Ald. 598; 1 Chit. Rep. 337, *S. C.*

(*g*) *Johnson* v. *Macdonald*, 2 Dowl. 44.

(*h*) *Knowles* v. *Johnson*, 2 Dowl. 653.

(*i*) *Morris* v. *Rees*, 3 Wils. 348; 2 W. Bl. 838, *S. C.*: *R.* v. *Hensey*, 1 Burr. 642; 2 Ld. Ken. 366, *S. C.*: *Walton* v. *Bent*, 3 Id. 1923: see *Nelson* v. *Hartley*, 7 Dowl. 461.

(*k*) Formerly this could not have been done in Q. B. (*Donnatty* v. *Barclay*, 8 T. R. 152): *aliter* in C. P. and Exch. (*Newman* v. *Faucitt*, 1 H. Bl. 631: *Yorke* v. *Ogden*, 8 Price, 174).

(*l*) *Gregson* v. *Hether*, 2 Str. 727; 2 L. Raym. 1455, *S. C.*

(*m*) *Moody* v. *Pheasant*, 2 B. & P. 446.

(*n*) *Ante*, 537.

(*o*) 1 & 2 V. c. 110, s. 17.

3. *Action on the Bail-Bond, by the Sheriff.*

Action on Bond, by Sheriff.

The only difference between the proceedings in this case, and when the action is brought by the assignee of the sheriff, is that the action in this case must be brought in the name of the sheriff (*p*), although actually brought by the sheriff's officer who took the bond, (which is usually the case), and for his benefit alone. Also an action may be brought upon a bail-bond by the sheriff himself in any court (*ante*, 562). The declaration also is different, it being usually, as on a common money bond, without setting out the condition.

(*p*) 2 Saund. 61 e.

CHAPTER XI.

SETTING ASIDE OR STAYING PROCEEDINGS AGAINST THE SHERIFF OR UPON THE BAIL-BOND.

Under 1 *&* 2 *V. c.* 110, *s.* 7, 564.
For Irregularity, Id.
For other Causes, 566.
Staying regular Proceedings, on Payment of Costs, 568.

Book I. Part II.

Under 1 & 2 *V. c.* 110, *s.* 7.] THIS has been already noticed (*ante,* 504).

For Irregularity.

In Proceedings relative to Bail.

For Irregularity.] If any of the proceedings against the sheriff be irregular, the court will set them aside, or any attachment founded on them, with costs. So, if any of the previous proceedings of the plaintiff, relative to the bail, be irregular, the sheriff is not liable to an attachment upon such bail not afterwards being perfected. Thus, for instance, if bail be put in in time, but no exception be entered (*p*), or merely a verbal and not a written notice of exception be given (*q*), or the notice of exception be intituled "In the Common Pleas," instead of "In the Queen's Bench" (*r*), or the like; the court, upon application, will set aside the attachment for the irregularity, even although such irregularity have been waived, as respects the defendant, by his subsequent act (*s*). In a manuscript case of Hilary term, 1822, *Abbott,* C. J., in making the rule absolute, said, "In the case of attachments against the sheriff, it is best, as a general rule, to hold the parties to strict regularity in their proceedings." So, where the attachment was obtained pending a summons to stay proceedings in the original action, on payment of debt and costs, the court set it aside for irregularity (*t*). So, where the arrest was made by a special bailiff, in which case we have seen, the plaintiff cannot regularly rule the sheriff, either to return the writ or bring in the body, (*ante,* 524, 547), the court or a judge will set aside the attachment for irregularity, with costs.

In the Assignment of, or Action on the Bail-bond.

So, if there be any irregularity in the assignment of the bail-bond, or in the proceedings in the action on it, the court or a judge will set aside such proceedings for the irregularity, and with costs. Or, if the action on the bail-bond be commenced pending a rule staying the proceedings in the original action, they will set aside the proceedings in the action on such bond, and with costs (*u*). It is to be here observed, that when the defendant obtains a rule which stays the plaintiff's proceedings, he is not entitled, after it is discharged, to the same time for the purpose of taking the next step as he had when he

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(*p*) *Rogers* v. *Mapleback,* 1 H. Bl. 106: *Hodson* v. *Garrett,* 1 Chit. Rep. 174: and it is no waiver that the defendant serve two notices of justification.

(*q*) *Cohn* v. *Davis,* 1 H. Bl. 80.

(*r*) MS., H. 1822.

(*s*) *Rogers* v. *Mapleback,* 1 H. Bl. 106.

(*t*) *R.* v. *Shff. of Middlesex,* in *Woodward* v. *Feltham,* 5 B. & Ald. 746: and cases *post,* Vol. II. Book IV. Part I. Ch. 10.

(*u*) *Swayne* v. *Cramond,* 4 T. R. 176.

obtained the rule; he would be only entitled, in such case, to have a *reasonable* time allowed him, for the purpose of taking his next proceeding; and it has been determined that the whole of the day on which the rule is disposed of is a reasonable time for that purpose (*v*). So, if an action on the bail-bond be commenced too soon (*w*); or after bail put in and justified, and the rule of allowance served; or after bail put in, and during the time the defendant has, by the rules of the court, to justify his bail; or after bail put in and the defendant rendered, and notice thereof duly given (*x*); or the like; or before the expiration of a rule served to bring in the body, (*ante*, 561), the court or a judge will set aside the proceedings in such action for irregularity, with costs. And in a recent case it was held, that after a notice of render it was even irregular to serve a writ in an action on the bail-bond, notwithstanding it was sued out previous to the notice given to the plaintiff (*y*).

After Assignment on the Bail-bond.

So, if the plaintiff proceed against the sheriff after taking an assignment of the bail-bond, the court or a judge will set aside the proceedings for irregularity (*see ante*, 548); but on the other hand, a plaintiff, we have seen, (*ante*, 559), may abandon his proceedings against the sheriff, and proceed upon the bail-bond (*z*), though not pending a rule to bring in the body (*ante*, 561).

Where the Writ is Void.

So, if it appear that the writ, upon which the defendant was arrested, is *void*, perhaps the court or a judge would set aside the proceedings on the bail-bond (*a*); but not if it were merely irregular (*b*). They have refused to interfere summarily where the defect was in the bail-bond itself (*c*), but left the defendant to avail himself of it by plea. It seems, however, they will, where the defendant has been arrested by a wrong name, and where the plaintiff has not used due diligence to obtain knowledge of the defendant's proper name, order the bail-bond to be delivered up to be cancelled (*d*). And it would seem, that in all the cases already noticed, (*ante*, 500), in which the court will discharge the defendant, they will also order the bail-bond (if any) to be delivered up and cancelled.

Application must be made in reasonable Time.

The application to set aside the proceedings for irregularity must always be made in a reasonable time, and, at all events, before the opposite party has taken a fresh step with a knowledge of the irregularity. (*See post, Vol. II. Book IV. Part I. Ch.* 17).

How made.

Make out an affidavit shewing the irregularity, and deliver a written paper to counsel to move thereon for a rule nisi *to set aside the attachment or the proceedings on the bail-bond for*

(*v*) *Hughes* v. *Walden*, 5 B. & C. 771: see *St. Hanlaire* v. *Byam*, 4 B. & C. 970; 7 D. & R. 458, *S. C.*

(*w*) *Alston* v. *Underhill*, 1 C. & M. 492; 3 Tyr. 427, *S. C.*

(*x*) If the notice be given before the assignment, the court or a judge will stay the proceedings, without costs. (*Anon.*, 2 Chit. Rep. 103: and see *Edwin* v. *Allen*, 5 T.R. 401: *Meysey* v. *Carnell*, Id. 534: *Lepine* v. *Barratt*, 8 T. R. 222). A render before the bail-bond is forfeited, is no discharge. (*Hodgson* v. *Mee*, 5 Nev. & M. 302; 3 Ad. & Ellis, 765, *S. C.*)

(*y*) *Lewis* v. *Grimstone*, 5 Dowl. 711: and see *Smith* v. *Lewis*, 16 East, 168: *Creswell* v. *Hern*, 1 M. & Sel. 742.

(*z*) *Pople* v. *Wyatt*, 15 East, 215.

(*a*) See *Mills* v. *Bond*, 1 Str. 399.

(*b*) *Yeates* v. *Chapman*, 3 Bing. N. C. 262.

(*c*) *Salter* v. *Shergold*, 3 T. R. 572.

(*d* R. H., 2 W. 4, r. 32, *ante*, 510, 511: *Smith* v. *Innes*, 4 M. & Sel. 360: *Kitching* v. *Alder*, 1 Chit. Rep. 282: *Coles* v. *Gunn*, 8 Moore, 526; 1 Bing. 424, *S. C.*

irregularity, with costs. Draw up the rule with one of the masters; serve it; make an affidavit of the service; and proceed to make the rule absolute in the ordinary way. In vacation, *take out a summons before a judge to set aside the attachment or proceedings.* It is not necessary to put in bail (*e*).

For other Causes.

Mistake of Defendant, &c.

For other Causes.] If the bail-bond has been assigned, and the plaintiff proceed upon it, owing to some mistake of the defendant or his attorney in putting in bail, or the like, the court or a judge will stay the proceedings upon the bail-bond upon payment of costs, and order the mistake to be rectified (*f*); and the same, as to proceedings against the sheriff. It is probable, however, that the court would require, in this case, the same affidavit as is required upon the ordinary motion to stay regular proceedings against the sheriff, or upon the bail-bond, upon payment of costs, &c., as mentioned *post*, 569.

Giving Time to Defendant.

If the plaintiff, without the consent of the sheriff, take a *cognovit* from the defendant for the payment of the debt by instalments, he cannot afterwards proceed against the sheriff (*g*): and it would, perhaps, be the same if the plaintiff gave time to the defendant by any other act. So, if the plaintiff, without the consent of the bail, or one of them, give time to the defendant, or take such a *cognovit*, he cannot afterwards proceed upon the bail-bond (*h*); and where a plaintiff, with the consent of the bail to the sheriff, took a *cognovit*, with a stay of execution for a month, it was held, that, although the bail continued liable, the debt not having been paid, yet the plaintiff could not take proceedings against them, without giving them notice that the *cognovit* was unsatisfied: and proceedings taken without such notice were set aside (*i*). And where the defendant, with the consent of the bail, gave a *cognovit* with a stay of execution, and he omitted to pay when the time elapsed, the plaintiff not having given the bail notice of this, it was held that he could not proceed against them half a year afterwards upon the defendant's death (*k*). But after a bail-bond has been forfeited, and an assignment thereof taken, time given to the principal will not discharge the bail, although given without their consent (*l*). A consent by one of the bail would suffice to prevent their discharge (*m*). Where time was given to the defendant, at the instance of one of the bail, the court refused to set aside an attachment against the sheriff on the application of the *bail* (*n*). The consent of the bail or sheriff may be implied from knowledge or other circumstances: an express assent is not absolutely requisite.

Bad Faith.

Where the bail-bond is put in suit contrary to good faith, the proceedings will be irregular, and set aside with costs (*o*).

(*e*) *Heath* v. *Gurley*, 4 Moore, 149.

(*f*) *Garnett* v. *Heaviside*, Barnes, 63: *Hutchinson* v. *Hardcastle*, Id. 103.

(*g*) *R.* v. *Shff. of Surrey*, in *Brewer* v. *Clarke*, 1 Taunt. 159.

(*h*) *Farmer* v. *Thorley*, 4 B. & Ald. 91: and see the cases as to how far it will be a discharge of bail above, *Croft* v. *Johnson*, 5 Taunt. 319; 1 Marsh, 59, *S. C.*: *Thomas* v. *Young*, 15 East, 617: *Bowsfield* v. *Tower*, 4 Taunt. 456: *Melville* v. *Glendining*, 7 Id. 126: *post*, Ch. 13.

(*i*) *Clift* v. *Gye*, 9 B. & C. 422: and see *Surman* v. *Bruce*, 4 M. & Scott, 184; 10 Bing. 434, *S. C.*: *Charleton* v. *Morris*, 4 Moo. & P. 114; 6 Bing. 427, *S. C.*

(*k*) *Surman* v. *Bruce*, 10 Bing. 434; 4 M. & Scott, 184; 2 Dowl. 777, *S. C.*

(*l*) *Woosnam* v. *Price*, 1 C. & M. 852.

(*m*) *Howard* v. *Bradberry*, 3 Dowl. 92.

(*n*) *R.* v. *Shff. of Middlesex*, in *Bradley* v. *Waddell*, 1 D. & R. 388.

(*o*) *Sweeting* v. *Weaver*, 11 Price, 734.

Delay in Proceedings against Sheriff.

If there have been any unnecessary delay in obtaining an attachment against the sheriff, the court or a judge will, in general, set it aside; as, for instance, where the rule to bring in the body was served on the 19th of November, and the attachment not sued out until the 9th of March, the court set aside the attachment (*p*). So, where the rule was served in February, and the defendant had become bankrupt in March, and the attachment did not issue until the 3rd of May, returnable the 4th, whereby the sheriff lost the opportunity of proving the debt under the commission, the court set aside the attachment (*q*). But where the plaintiff, at the instance of the officer, forbore for ten days to enforce an attachment, the court held that the sheriff was not discharged by this indulgence to his officer (*r*).

Delay in Proceedings against Bail.

Perhaps, also, if, by any gross delay of the plaintiff in resorting to his remedy against the bail, the latter were placed in a worse situation than they otherwise would have been, the court or a judge might be induced to relieve them, by setting aside the proceedings upon the bail-bond (*s*).

Injunction.

The defendant's having obtained an injunction staying the proceedings will not excuse the sheriff from obeying the rule or order to bring in the body; and, in case of disobedience thereto, he is liable to an attachment (*t*).

Death of the Defendant.

If the defendant die before the eight days inclusive after the execution of the writ have expired, the court or a judge will, it should seem, set aside the proceedings against the sheriff or upon the bail-bond, and perhaps with costs, if the plaintiff knew of the death at the time he proceeded. But if he die after those eight days have expired, they will not relieve the sheriff, if he were in contempt at the time of the death (*u*); although they will, in many cases, relieve the bail under similar circumstances. And as to them, in such a case the rule, since the doctrine of the relation of judgment to the first day of the term has been abolished, and since 1 & 2 *V. c.* 110, may, perhaps, be this:—If the defendant die either before or pending an action against the bail, the court or a judge will set aside the proceedings against the bail, upon payment of costs (*x*), and, perhaps, without costs, if the plaintiff knew of the death when he commenced his action against them (*y*).

(*p*) *R.* v. *Perring*, 3 B. & P. 151.

(*q*) *R.* v. *Shff. of Surrey*, in *Morris* v. *Duffield*, 9 East, 467: and see *R.* v. *Shff. of Surrey*, 7 T. R. 452.

(*r*) *Pople* v. *Wyatt*, 15 East, 215: see *R.* v. *Shff. of London*, in *March* v. *Russell*, 1 D. & R. 163.

(*s*) See *Heath* v. *Astley*, Barnes, 61: *Davenport* v. *Wall*, Id.: *Surman* v. *Bruce*, 10 Bing 434; 4 M. & Scott, 184, *S. C.*: see *ante*, 566.

(*t*) *R.* v. *Shff. of Middlesex*, 1 Dowl. 454.

(*u*) *R.* v. *Shff. of Middlesex*, 3 T. R. 133. The decision, however, took place in an action commenced by the old process before the Uniformity of Process Act came into force.

(*x*) *Orton* v. *Vincent*, Cowp. 71.

(*y*) Before 1 & 2 V. c. 110, if the defendant died *after* the time at which the plaintiff could have had judgment, (supposing him to have proceeded in the original action), the court would only relieve the bail on the terms of their paying the debt and costs in the original action, to the extent of the penalty and the costs of the action against the bail, unless the delay were caused by the plaintiff's laches, and not by their default. (See *Heath* v. *Astley*, Barnes, 61: *Morley* v. *Carr*, Barnes, 112: *Davenport* v. *Wall*, Id. 62; *Orton* v. *Vincent*, *ubi supra*). Since that act, however, as the bailable proceedings under its provisions are merely collateral to those in the action, the plaintiff cannot be delayed in obtaining judgment by the default of the bail, and any delay must, in general, be his own fault. It would seem, therefore, that proceedings will now, in such cases, (as well as in those where the defendant dies *before* judgment could have been had), be set aside on the terms stated in the text.

Death of the Plaintiff.

If the plaintiff die, and the action be thereby abated:—If he die before the eight days inclusive after the execution of the writ have expired, the court or a judge will, it should seem, set aside proceedings against the sheriff or on the bail-bond (*z*), and, perhaps, with costs; but if he die after the expiration of such eight days, they will set aside proceedings on the bail-bond, on payment of costs (*a*). But they, it should seem, will not relieve the sheriff, where he is in contempt previously to the plaintiff's death. (*Vide supra*).

Bankruptcy of Defendant.

The bankruptcy of the defendant will not, it seems, discharge the bail (*b*). But if the defendant, or his bail, become bankrupt after the bond is forfeited, the plaintiff's demand, being proveable under the fiat, is barred by the certificate (*c*). And where the defendant and both bail became bankrupts, and obtained their certificates, the court relieved them on motion without pleading, and this although the bail-bond had been ordered to stand as a security (*d*). Where a bankrupt obtained his certificate under a third commission, the court refused to cancel a bail-bond given upon arrest for a debt proveable under the commission, he not having paid 15*s.* in the pound under either of the former commissions (*e*).

Where Defendant expelled under Alien Act.

If the defendant be an alien, and be sent out of the kingdom under the alien act before the eight days inclusive after the execution of the writ have expired, the court, upon application, will order the bail-bond to be cancelled (*f*), or set aside proceedings against the sheriff (*f*).

Plaintiff's Attorney uncertificated.

The proceedings cannot, it seems, be set aside, or the bail-bond cancelled, on the ground of the plaintiff's attorney having neglected to take out his certificate (*ante*, 35).

Where two Writs are issued.

If the plaintiff sue out two writs into two counties, and arrest the defendant who gives bail to the sheriff in both, the plaintiff may regularly proceed on the first bail-bond (*g*).

Bail need not be put in before Moving.

It is not necessary to put in bail to the original action before making the application to set aside the proceedings for irregularity or for being against good faith; though it is so before making the application to set aside proceedings which are regular (*h*).

Staying regular Proceedings, upon Payment of Costs.

Staying regular Proceedings, upon Payment of Costs.] The cases we have hitherto considered are those in which, either from irregularity or other cause, the plaintiff ought not to have commenced or continued proceedings against the sheriff or bail. But even in cases where such proceedings are perfectly regular, and have been properly commenced and continued, the court exercise a discretionary power to stay them upon

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(*z*) *Hutchinson* v. *Smith*, 8 Mod. 240. The decision was, however, made in an action commenced by the old process, before the Uniformity of Process Act came into force.

(*a*) The observations made in note (*y*), p. 567, are equally applicable in this case. (See *Willoughby* v. *Rhodes*, Barnes, 70: *Nutkins* v. *Wilkin*, Barnes, 96).

(*b*) *Woolley* v. *Cobb*, 1 Burr. 244; 1 Ken. 504, *S. C.*: *Streeter* v. *Scott*, 2 Dowl. 362: Tidd, 9th ed., 305. Where the *defendant* became bankrupt, and obtained his certificate before any action commenced against his bail, the court set aside the proceedings in such action. (*Saunders* v. *Spinks*, Barnes, 105). Perhaps the safer mode of proceeding for the bail in such a case would be to put in and justify bail, or put in bail and render the defendant, and then apply in the ordinary way to stay the proceedings upon payment of costs. (*Vide infra*).

(*c*) *Bouteflour* v. *Coats*, Cowp. 25: and see *Dinsdale* v. *Eames*, 2 B. & B. 8; 4 Moore, 350, *S. C.*

(*d*) *Streeter* v. *Scott*, 2 Dowl. 362.

(*e*) *Summers* v. *Jones*, 6 Dowl. 139.

(*f*) *Postell* v. *Williams*, 7 T. R. 517.

(*g*) *Bullock* v. *Morris*, 2 Taunt. 67: *Powell* v. *Henderson*, 1 Chit. Rep. 392.

(*h*) *Heath* v. *Gurley*, 4 Moore, 149: *post*, 571.

certain terms, in order to let in a trial on the merits. This power, with respect to proceedings upon bail-bonds, is given to the court (*i*) by stat. 4 & 5 *Ann. c.* 16, *s.* 20, which enables them to afford, by rule, "such relief to the plaintiff or defendant in the original action, and to the bail, as is agreeable to justice and reason; and such rule shall have the nature and effect of a defeazance to the bail-bond;" and, in analogy to this, the court have adopted a similar practice with respect to proceedings against sheriffs.

Terms on which regular Proceedings will be stayed under 2 W. 4, c. 39.

The terms upon which such proceedings, under 2 *W.* 4, *c.* 39, either against sheriffs or upon bail-bonds, were stayed, were these :—If the plaintiff *had not lost a trial*, the proceedings were stayed upon putting in and perfecting bail, or payment into court in lieu of bail, or putting in bail and rendering the defendant (*post*, 571) and payment of the costs incurred by the plaintiff by such proceedings (*k*), and, if necessary, that the defendant should receive a declaration, plead issuably, and take short notice of trial (*l*). And if the proceedings had been against the sheriff, then also upon the payment of damages, if any, occasioned by the sheriff's default in not returning the writ, or bringing in the body, such damages to be ascertained by the master: the plaintiff having, if the default have taken place in vacation, given the sheriff notice of his intention to apply for such damages (*m*). But if the plaintiff *had lost a trial*, then, in addition to these terms, the attachment would have been ordered to remain in the office, or the bail-bond to stand as security for the debt and costs in the original action, or both if the plaintiff should have a verdict (*n*), even although the bail should have rendered their principal (*o*).

Under 1 & 2 V. c. 110, s. 7.

Since 1 & 2 *V. c.* 110, however, it would seem that, in all cases of bailable proceedings under that act, the proceedings will be stayed on putting in and perfecting bail, or payment into court in lieu of bail, or render and payment of costs. This will, it is apprehended, be so, inasmuch as the bailable proceedings under that act are merely collateral to the main proceedings in the action, and cannot affect the time of trial; and, besides, the plaintiff cannot now declare *de bene esse*, (*ante*, 134), which was necessary before 1 & 2 *V.* in order to entitle him to have the attachment, or the bail-bond stand as a security (*p*).

The court cannot impose terms on the *defendant*, where the application is by the bail (*q*).

Affidavit of Merits, when Application

By the rule, *R. M.*, 59 *G.* 3, (in the Queen's Bench, and a similar one of *H. T.*, 7 *W.* 4, in the Exchequer) (*r*), and

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(*i*) *Semble*, therefore, not to a judge at chambers (*ante*, 8). In practice, however, he generally entertains the application.

(*k*) See *R.* v. *Shff. of Middlesex*, in *Watts* v. *Hamilton*, 2 Dowl. 432: *Key* v. *Hill*, 2 B. & Ald. 598; 1 Chit. Rep. 337, *S. C.*

(*l*) See *Dowson* v. *Levi*, 4 B. & Ald. 249.

(*m*) See *R.* v. *Shff. of Essex*, in *Fitch* v. *Courtenay*, 1 T. & G. 629: and see *Brown* v. *Jarvis*, 13 Leg. Obs. 45; Tidd, New Prac. 170.

(*n*) See *Hill* v. *Bolt*, 4 T. R. 352: *Gravett* v. *Williams*, Id. note (*n*): *Callan* v. *Tye*, 2 H. Bl. 235; R. M., 8 A. r. 1, (*c*); 2 Saund. 61 e: *R.* v. *Wettenhall*, 5 Taunt. 606; *Merryman* v. *Carpenter*, 2 Str. 1262: *Standen* v. *Blakie*, 13 Price, 114.

(*o*) *Whitehead* v. *Phillips*, 2 B. & Ald. 585; 1 Chit. Rep. 270, *S. C.*: *Hodge* v. *Hopkins*, 1 Dowl. 431.

(*p*) See R. H., 2 W. 4, r. 5. The practice under this rule has, for the reasons mentioned in the text, been omitted in the present edition.

(*q*) *Call* v. *Thelwell*, 3 Dowl. 445; 1 C., M. & R. 780; 1 Gale, 16, *S. C.*: *Gale* v. *Hayworth*, 6 Dowl. 323.

(*r*) 5 Dowl. 446. See the following cases in the Exch., decided before the rule of H. T., 7 W. 4: 2 M. & W. 219:—*Call* v. *Thelwell*, 3 Dowl. 444; 1 C., M. & R. 780; 1 Gale, 16, *S. C.*: overruling *Rourke* v. *Bourne*, 2 Id. 250; 2 C. & M. 338, *S. C.*

made by the Defendant.

Affidavit on Application by Bail or Sheriff.

which rule is adopted in the Common Pleas (*s*), "no rule shall be drawn up for setting aside an attachment regularly obtained against a sheriff for not bringing in the body, or for staying proceedings regularly commenced on the assignment of any bail-bond, unless the application for such rule shall (if made on the part of the original defendant) be grounded on an *affidavit of merits;* or (if made on the part of the sheriff, or bail, or any officer of the sheriff) be grounded upon an affidavit, shewing that such application is really and truly made on the part of the sheriff, or bail (*t*), or officer of the sheriff, (as the case may be), at his or their own expense (*u*), and for his or their indemnity only (*x*), and without collusion with the original defendant (*y*)." If the affidavit were that the application was made for their "*own*" indemnity (*z*), or for their "only indemnity" (*a*), it would be insufficient. Upon an application to set aside an attachment, the affidavit must be intituled, "The Queen against the Sheriff of ——, in a cause of ——, against ——:" to set aside proceedings on the bail-bond, it is intituled in the original action, or in the action on the bond (*b*). The affidavit of merits above mentioned must state positively, and in terms, that the defendant has a good defence to the action, "upon the merits" (*c*); though, indeed, according to a recent case, it will suffice, if the affidavit be made by the defendant himself, for him to swear that he has a good defence "upon the merits," as he is advised and believes (*d*). If the affidavit of merits be made by an attorney, it must describe him as the attorney to the defendant; and it is not sufficient to shew by other affidavits that there is an attorney of the same christian and surname residing at the same place as that of which the defendant describes himself (*e*). It seems, that though the motion be made on behalf of the bail, yet the affidavit need not

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(*s*) R. v. *Shffs. of London*, in *Wilson* v. *Goldstein*, 1 Moo. & P. 177; 4 Bing. 427, *S. C.*

(*t*) *Merryman* v. *Quibble*, 1 Chit. Rep. 127.

(*u*) R. v. *Shff. of Middlesex*, 1 Dowl. 419: R. v. *Shff. of Surrey*, in *Weston* v. *Woods*, 3 Dowl. 174; 1 C., M. & R. 581, *S. C.*: R. v. *Shffs. of London*, in *Wilson* v. *Goldstein*, 1 Moo. & P. 177; 4 Bing. 427, *S. C.*, S. P. in C. P.: *Call* v. *Thelwall*, 3 Dowl. 444; 1 Gale, 16; 1 C., M. & R. 780, *S. C.*, in Exch.: overruling *R.* v. *Shff. of Middlesex*, in *Shaw* v. *Ward*, 2 Moo. & P. 116.

(*x*) This is the correct form of the rule in the Queen's Bench, as well as in the Exchequer: the words "indemnity only" are incorrectly transposed in the copy of the rule in 2 B. & Ald. 240: *Rex v. Shff. of Cheshire*, 3 M. & W. 605; 6 Dowl. 709, *S. C.*

(*y*) It may be implied from the marginal note of *Norris* v. *Brighton*, 7 Dowl. 144, (and see *S.C.*, 5 Bing. N. C. 114), that the court will grant a rule for the stay of proceedings on the bail-bond, since 1 & 2 V. c. 110, without the production of an affidavit of merits in accordance with this rule, the application being made on behalf of the defendant; but it is apprehended that such is the case only where the defendant was in custody on 1st October, 1838, as in *Norris* v. *Brighton*, and that in all other cases the rule must still be complied with. In an application by bail, both of them must deny the collusion. (*Dowson* v. *Cull*, 2 C. & J. 671). On an application by the officer, he need not deny collusion with the bail. (*R.* v. *Shff. of Middlesex*, 3 Dowl. 194). See the form of this affidavit, where the application is made upon the part of the defendant, Chit. Forms, 242, 244, 245; where the application is made on the part of the bail to the sheriff, Id. 243, 245; on the part of the sheriff's officer, Id. 243, 245; on the part of the sheriff, Id.

(*z*) *Call* v. *Thelwell*, 3 Dowl. 444; 1 C., M. & R. 780; 1 Gale, 16, *S. C.*: *R.* v. *Shff. of Middlesex*, 3 Dowl. 174.

(*a*) *R.* v. *Shff. of Cheshire*, 6 Dowl. 709: 3 M. & W. 605, *S. C.*: an amendment was allowed.

(*b*) See *Lines* v. *Chetwood*, 1 Dowl. 321; 2 C. & J. 332, *S. C.*: 4 T. R. 688, 689: *Kelly* v. *Wrother*, 2 Chit. Rep. 109: *Roberts* v. *Giddins*, 1 B. & P. 337: see, in C. P., *Ham* v. *Philcox*, 7 Moore, 52: *Blackford* v. *Hawkins*, 7 Moore, 600.

(*c*) MS., E. 1822: *Grottick* v. *Bailey*, 5 B. & Ald. 703; 1 D. & R. 155, *S. C.*: *R.* v. *Shff. of Middlesex*, 1 Dowl. 398: *Harlett* v. *Souter*, Id. 680: *Lane* v. *Isaacs*, 3 Id. 652: see *Page* v. *South*, 7 Dowl. 412.

(*d*) *Crosby* v. *Innes*, 5 Dowl. 566.

(*e*) *Bonnefor* v. *Russel*, 5 Dowl. 546.

state on whose behalf it is made, if it state that there is a good defence upon the merits (*f*). If the affidavit be defective, the court will perhaps allow an amendment, or give time to produce a proper one (*g*). The application may, it seems, be made by one of the bail on his own affidavit, denying collusion, without an affidavit from the other bail (*h*).

Application, how made.

Previously to the making of this application, you must either put in and perfect bail in the original action (*i*), (*and the notice of bail in that case must be, that the defendant will put in and perfect bail on such a day* (*k*), *unless bail have been put in already, in which case the notice will be a notice of justification only*); *or put in bail, and render the defendant* (*l*); *or pay money into court in lieu of bail, in pursuance of the* 7 & 8 *G.* 4, *c.* 71. *s.* 1. *The plaintiff may oppose the justification of the bail, without its being a waiver of the proceedings on the bail-bond* (*m*). *Immediately upon the rule's being made absolute, get an appointment on it from one of the masters, serve a copy of it on the plaintiff's attorney, tax costs* (*n*), *and pay them without delay, otherwise the rule or order will not operate as a stay of proceedings.*

When made.

The application may be made at any time. It has been granted even after execution sued out and executed against the bail (*o*). It may be made on the same day the bail justified (*p*).

What Pleas allowed after.

Where the defendant in such a case, before 1 & 2 *V. c.* 110, pleaded the general issue, and afterwards a plea of bankruptcy *puis darrein continuance*; as the affidavit upon which the proceedings on the bail-bond were set aside did not state that the application was made on the part of the bail, the court, in one instance, set aside the latter plea, and restrained the defendant to his plea of the general issue, upon the ground that when the proceedings were stayed in the action upon the bail-bond, it was intended that the defendant should only question the validity of the original debt (*q*). It was, however, afterwards decided, that after the proceedings have been stayed generally on payment of costs, the defendant may plead his bankruptcy in the original action (*r*). But he could not plead in abatement (*s*).

Sheriff not relieved, if guilty of Misconduct.

When the proceedings are against the sheriff, the court will not in general relieve him, if it appear that he has been guilty of a breach of duty, as by letting the defendant out of custody without taking from him such a bail-bond as is required by the statute (*t*); and this, whether the application be made on

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(*f*) *Bell* v. *Taylor*, 1 Chit. Rep. 572.

(*g*) *R.* v. *Shff. of Cheshire*, 3 M. & W. 605; 6 Dowl. 709, *S. C.*: *Call* v. *Thelwell*, 3 Dowl. 441; 1 C., M. & R. 780; 1 Gale, 16, *S. C.*: *Merryman* v. *Quibble*, 1 Chit. Rep. 127; Chit. Sum. Prac. 103.

(*h*) *R.* v. *Shff. of Middlesex*, in *Ridgway* v. *Porter*, 3 Dowl. 186: *sed vide Dawson* v. *Cull*, 2 C. & J. 671: but *Parke*, B., in the case first cited, doubted that decision.

(*i*) *Heath* v. *Gurley*, 4 Moore, 149; where the proceedings were irregular. The rule of allowance must be served. (*R.* v. *Shff. of Middlesex*, in *Shew* v. *Ward*, 2 Dowl. 116). But the affidavit in support of the application need not state that fact. (*Crosby* v. *Innes*, 5 Dowl. 566).

(*k*) *Boldero* v. *Gray*, Cowp. 769.

(*l*) *Whitehead* v. *Phillips*, 2 B. & Ald. 585: see *Hodgson* v. *Mee*, 5 Nev. & M. 302; 3 A. & E. 765, *S. C.* The bail need not justify in order to render. (*R.* v. *Shff. of Middlesex*, in *Hammond* v. *Bean*, 4 Dowl. 673).

(*m*) *Boldero* v. *Gray*, Cowp. 769.

(*n*) *Key* v. *Hill*, 2 B. & Ald. 598; 1 Chit. Rep. 337, *S. C.*

(*o*) *Lepine* v. *Barratt*, 8 T. R. 223: and see *Gregory* v. *Gurdon*, Barnes, 74.

(*p*) *Shawe* v. *Johnstone*, 2 Chit. Rep. 108.

(*q*) *Dowson* v. *Levi*, 4 B. & Ald. 249.

(*r*) *Sainsbury* v. *Gandon*, 3 M. & R. 16.

(*s*) *Anon.*, 2 Salk. 519.

(*t*) *R.* v. *Shff. of Surrey*, 7 T. R. 239: *R.* v. *Shffs. of London*, in *Todd* v. *Jacob*, 2 the part of the sheriff or the defendant (*u*); though it would be otherwise if it were made on behalf of the bail (*x*).

Remedy of Sheriff when Attachment not set aside.

If the attachment be not set aside, the sheriff can be discharged from it only by payment of the whole debt and costs in the original action, to the extent of the penalty of the bail-bond, (and not merely the sum sworn to and costs (*y*)), and also the costs of the attachment, &c. (*z*). The sheriff, after thus being obliged to pay the debt and costs, may put the bail-bond in force against the bail, in order to reimburse himself; but, in general, the sheriff is reimbursed by the officer, and the latter then sues upon the bail-bond in the sheriff's name. The sheriff or officer cannot, after paying the debt and costs, maintain an action against the defendant for money paid (*a*). Nor can he, it seems, detain the defendant in custody for it (*b*). But an action for money paid to the use of the defendant may be maintained by a sheriff's officer who has paid the debt and costs on an attachment against the sheriff, bail above not having been put in through the misconduct of the defendant in imposing insufficient bail on the sheriff, and the defendant having promised to indemnify the officer both before and after the payment: though the officer cannot recover beyond the debt (*c*).

Remedy of Bail, when Proceedings on Bail-bond not set aside.

So, if the proceedings upon the bail-bond be not set aside or stayed, the bail can be discharged from it only by payment of the whole debt and costs in the original action, (and not merely the sum sworn to and costs), to the extent at least of the bail-bond (*d*), together with the costs of the action against the bail. Where several actions, however, are brought against the bail and principal, without sufficient reason for so doing, on application to stay the proceedings, the court or a judge may stay them in all the actions upon payment of the costs in one, unless sufficient reason be shewn for proceeding in more (*e*). The application, for that purpose, should be made in a reasonable time, and, at all events, before verdict (*f*). In taxing the costs on staying proceedings on the bail-bond, the master frequently acts on the authority of this rule, and allows the costs in one action only.

B. & Ald. 354: and see *Fuller* v. *Prest*, 7 T. R. 109: *R.* v. *Lever*, Barnes, 34: *Birn* v. *Bond*, 6 Taunt. 554: *Ibbotson* v. *Tindal*, 1 Bing. 156: *R.* v. *Shffs. of London*, in *Lazarus* v. *Tanner*, 9 Moore, 422; 2 Bing. 227, *S. C.*: *Vanderhaden* v. *Britten*, 4 D. & R. 155: *ante*, 541. And in a recent case, (*R.* v. *Shff. of Kent*, 5 Dowl. 451; 2 M. & W. 316, *S. C.*), where the sheriff made an insufficient return and an attachment was granted against him, the court allowed the return to be amended, and set aside the attachment on payment of costs, though it was urged as a fact that the sheriff had not used due diligence in endeavouring to make the arrest; *Parke*, B. saying, that the court could not decide as to the amount of damage the plaintiff had sustained by the sheriff's neglect in the execution of mesne process.

(*u*) *R.* v. *Shffs. of London*, in *Todd* v. *Jacob*, 2 B. & Ald. 354.

(*x*) *R.* v. *Shff. of Middlesex*, 2 Dowl. 140.

(*y*) *R.* v. *Shff.* (late) *of Devon*, 1 B. & Ad. 159: *Heppel* v. *King*, 7 T. R. 370: *R.* v. *Sheriff of Middlesex*, 3 East, 604: *R.* v. *Shffs. of London*, 9 East, 316: *Fowlds* v. *Mackintosh*, 1 H. Bl. 233

(*z*) See *R.* v. *Shffs. of London*, in *Hollier* v. *Clark*, 2 B. & Ald. 192.

(*a*) *Pitcher* v. *Bailey*, 8 East, 171.

(*b*) *Rimmer* v. *Turner*, 3 Dowl. 601.

(*c*) *White* v. *Laroux*, 1 M. & M. 347.

(*d*) *Stevenson* v. *Cameron*, 8 T. R. 28: *Jackson* v. *Hassel*, Doug. 330: *Orton* v. *Vincent*, Cowp. 71: *Mitchell* v. *Gibbons*, 1 H. Bl. 76: and see *Austen* v. *Fenton*, 1 Taunt. 23.

(*e*) R. H., 2 W. 4, r. 30, *ante*, 562: see *Key* v. *Hill*, 2 B. & Ald. 598; 1 Chit. Rep. 337, *S. C.*

(*f*) *Johnson* v. *Macdonald*, 2 Dowl. 44.

CHAPTER XII.

SPECIAL BAIL.

Special Bail. 1 & 2 V. c. 110, s. 4

"ALL subsequent proceedings as to the putting in and perfecting special bail, or of making deposit and payment of money into court instead of putting in and perfecting special bail, shall be according to the like practice of the said superior courts, or as near thereto as the circumstances of the case will admit"(*a*). The present practice will be stated under the following heads, *viz.*:—

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1. *Bail in Town.*

What, and how many, and in what Cases requisite.

What, and how many, and in what Cases requisite.] Special bail (or bail *above*, as they are sometimes termed) are persons who undertake generally, (or in the Common Pleas in a sum certain), that if the defendant be condemned in the action, he shall satisfy the costs and condemnation, (or in the Common Pleas, that he shall pay the condemnation money), or render himself to the custody of the marshal, (or in the Common Pleas and Exchequer to the custody of the warden), *or* that they will do it for him(*b*).

(*a*) 1 & 2 V. c. 110, s. 4.

(*b*) As to the amount for which the bail are liable, see *post*, Ch. 4, Sect. 5. If bail are put in *after* judgment, their recognisances are taken in double the amount of the sum recovered (*post*, 579). Formerly, if the action was by bill, the bail undertook *generally*, as they now do in the Q. B. and Exch.; if by original, they undertook in a *sum certain*, as they now do in the C. P.

Number of.

The bail must consist of *two* persons at least, one bail not being deemed sufficient even for the purpose of rendering the defendant (c); and a defendant cannot justify *one* bail, who alone appears without the consent of the plaintiff (d). And by a general rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 1, *s.* 18, "notice of more than *two* bail shall be deemed irregular, unless by order of the court or a judge." Where the debt is large, the court or a judge will allow three or four persons to become bail in different sums, amounting together to the requisite sum (e). Where the defendant was poor, and was arrested for 700*l.*, the court granted a rule for three bail to justify instead of two (*f*); and there is also an instance of the court having allowed one bail to justify for 4,000*l.*, and two other bail for 2,000*l.* each, the sum for which bail was required being 4,000*l.* (*g*). And in some cases, where the arrest is for a very large sum, even six or eight persons have been allowed to become bail (*h*).

In what Cases Special Bail, &c., must be put in.

When the defendant has been arrested, and is afterwards at large on bail-bond or otherwise, special bail must be put in: *or*, in lieu of such special bail, the defendant, if he has made a deposit with the sheriff under the 43 *G.* 3, *c.* 46, *s.* 2, (*ante*, 539), must allow that sum, and pay 10*l.* additional as a security for costs to remain in court, and enter a common appearance (*i*); *or*, if he has not made such a deposit with the sheriff, he must in lieu of such special bail, pay the sum indorsed on the writ, with 20*l.* as a security for costs, into court (*k*); and if special bail be not put in, or the money be not so allowed to remain, or be not so paid into court in due time, the plaintiff, if a bail-bond have been taken, has the option either of taking an assignment of it and proceeding thereon against the bail, or of proceeding against the sheriff in order to compel an appearance; or, if a deposit have been made with the sheriff, he may take the money out of court, and afterwards proceed in the action, if he think proper, upon entering a common appearance for the defendant (*l*), or, if no bail-bond have been given, or deposit made, he may proceed against the sheriff either by action as for an escape, or by ruling him to return the writ and bring in the body.

In what Cases not.

But if the defendant, after he is at large on bail-bond, put in special bail (*m*), and surrender himself to the sheriff, within the eight days after the arrest, inclusive of the day of arrest, and the sheriff accept of the surrender (*n*), he is then considered to all intents as having continued in the sheriff's custody since the caption, and no action can afterwards be brought upon the bail-bond (*o*); nor can the plaintiff compel an assign-

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(*c*) *Stewart* v. *Bishop*, Barnes, 60; 1 Chit. Rep. 602, n.

(*d*) *White's Bail*, 5 Dowl. 133.

(*e*) It cannot be done without such leave. (See *Anon.*, 13 Price, 448). See form of affidavit, Chit. Forms, 247.

(*f*) *Euster* v. *Edwards*, 1 Dowl. 39.

(*g*) 1 Sellon, 159: *Jell* v. *Douglass*, 1 Chit. Rep. 601.

(*h*) *Easter* v. *Edwards*, 1 Dowl. 39.

(*i*) Under the process issued in pursuance of 2 W. 4, c. 39, a common appearance must also have been entered; but this seems to be unnecessary in case of process issued under 1 & 2 V. c. 110: and the warning with respect to it is omitted in the form of writ under that act.

(*k*) See 7 & 8 G. 4, c. 71, *post:* and see note (*i*), *supra.*

(*l*) Under the 2 W. 4, c. 39, the plaintiff must have entered a common appearance for the defendant before proceeding; it seems, however, that no appearance need now, under 1 & 2 V. c. 110, be entered, except that under the writ of summons by which the action is commenced.

(*m*) *Hodgson* v. *Mee*, 5 Nev. & M. 302; 3 A. & E. 765, *S. C.*

(*n*) *Hamilton* v. *Wilson*, 1 Fast, 383.

(*o*) *Plimpton* v. *Howell*, 10 East, 100.

ment of it (*p*); and if any proceedings be taken against the sheriff, he may return the writ, &c., in the same manner as if the defendant had never been out of his custody (*q*).

Waiver of Special Bail.

There are also some acts of the plaintiff which, in contemplation of law, amount to a waiver upon his part of special bail; amongst these acts, before 1 & 2 *V.* *c.* 110, was the delivery of a declaration absolutely before bail put in (*r*), or demanding or accepting a plea after a declaration *de bene esse*, and before bail put in (*s*); but it would seem that neither of such acts would now be a waiver of special bail, inasmuch as the bailable proceedings are rarely collateral to the action, and, indeed, the latter cannot take place, inasmuch as the plaintiff cannot declare *de bene esse* (*ante*, 134).

Who may be Bail.

Who may be Bail.] As to who may become bail will, for the most part, be found treated of *post*, 599—601, while treating of the grounds for opposing the justification of bail. It may here be noticed, that where an attorney, knowing that bail were insufficient, put them in, and gave notice of justification, the court held him personally responsible for the costs of the opposition (*t*). Care must be taken that neither of the bail be a practising attorney, or clerk to a practising attorney, otherwise the plaintiff may treat the bail as a nullity, and sue upon the bail-bond as soon as the time for putting in bail has expired, unless good bail be duly put in, in the meantime. This is provided for by the rule of *H. T.*, 2 *W.* 4, *r.* 13, which orders that, "if any person put in as bail to the action, except for the purpose of rendering only, be a *practising attorney* or *clerk* to a practising attorney, the plaintiff may treat the bail as a *nullity*, and sue upon the bail-bond as soon as the time for putting in bail has expired, unless good bail be duly put in in the meantime." This rule is calculated for the benefit of attornies and their clerks, and intended to protect them against the importunities of their clients.

By whom put in.

By whom put in.] Bail is usually put in by the defendant or his attorney. But it may be put in by the sheriff (*u*), or by the bail to the sheriff (*x*), for their indemnity; or, it seems, by an attorney, in pursuance of his undertaking (*y*). In the Common Pleas, the sheriff may, even after he is in contempt for not bringing in the body, put in bail to surrender the defendant without his consent, and although the original bail-piece is on the file (*z*). No objection can, it seems, be taken to bail on account of their having been put in by an uncertificated attorney, unless, perhaps, the defendant was aware of that fact (*ante*, 35). It is usual for the attorney, employed by the sheriff or his bail to put in and justify bail above, to describe

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(*p*) *Stamper* v. *Milbourne*, 7 T. R. 122: *Jones* v. *Lander*, 6 T. R. 753.

(*q*) *Turner* v. *Brown*, 2 Dowl. 547: see *Jones* v. *Lander*, 6 T. R. 753.

(*r*) R. M., 8 Apr. 1; Q. B., R. E., 5 G. 2, r. 1 a; Q. B., Cas. Pr. C. P. 81.

(*s*) *Law* v. *Stevens*, 1 Dowl. 425: *Lister* v. *Wainhouse*, Barnes, 92.

(*t*) *Blundell* v. *Blundell*, 5 B. & Ald. 533; 1 D. & R. 142, *S. C.*: *ante*, 60, 61.

(*u*) Peake, 169: *Wheeler* v. *Rankin*, 1 Chit. Rep. 81; Id. 329; 5 Price, 558: but see *Taylor* v. *Evans*, 8 Moore, 398; 1 Bing. 367, *S. C.*

(*x*) *Berchere* v. *Colson*, 2 Str. 876: see R. v. *Sheriffs of London*, in *Plomer* v. *Houghton*, 2 B. & Ald. 604: *Haggett* v. *Argent*, 7 Taunt. 47; 2 Marsh, 365, *S. C.*: *Birt* v. *Roberts*, 1 M. & M. 177, 178, n.

(*y*) See *Rogers* v. *Reeves*, 1 T. R. 418, 422: *ante*, 58.

(*z*) *Hamilton* v. *Jones*, 6 Bing. 628.

himself as the attorney for the defendant in the notice, though not actually employed by him (*f*). It seems questionable whether bail can be put in by a new attorney, without an order for changing the other attorney (*g*). Where two notices were given by different attornies, one for the defendant and the other for the sheriff, of two different sets of bail, and the bail put in for the sheriff had already justified, the defendant was held entitled to have his bail justified and allowed (*h*).

When put in.

When put in.] Bail *may*, it seems, be put in by the defendant after the writ issued, although no arrest has taken place or bail-bond given (*i*). It *must* be put in within *eight* days after the arrest of the defendant, inclusive of the day of such arrest (*k*), and this, whether the arrest took place in town or country (*l*), otherwise the plaintiff may proceed against the sheriff, or upon the bail-bond, or may proceed to take the deposit (if any) out of court; and a surrender would not prevent it (*m*). If the plaintiff, however, instead of proceeding upon the bail-bond, rule the sheriff to return the writ, the defendant, it should seem, may put in bail at any time before the expiration of the rule; but it is not very safe to depend upon this, as the plaintiff may at any time abandon his rule to return the writ, and commence an action on the bail-bond. Besides, in such a case, you would have to justify the bail, whether excepted to or not (*n*). If the last of the days for putting in bail fall on a Sunday, the defendant has all the Monday following to put in bail (*o*); and so, if the last of the days be Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, the defendant has all the following day to put them in (*p*). And it seems that if the last of these days fall on any day between the Thursday before, and the Wednesday next after, Easter-day, then the Wednesday next after Easter-day will be considered as the last of the eight days (see *ante*, 93): but this is questionable. Bail must be put in and justified in vacation according to the 2 *W*. 4, *c*. 39, *s*. 11, though the defendant is arrested between the 10th of August and the 24th of October (*q*). Bail may be put in on a *dies non juridicus*, provided it be not a Sunday (*r*). They may be put in at any time pending the suit, to release the defendant if a prisoner (*s*), or to make one of the former bail a witness (*t*), and this, even at the trial (*u*). They may be put in even after verdict (*x*),

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(*f*) *Gilmour* v. *Brindley*, 7 D. & R. 259. *Bayley*, J., in that case, seems to intimate that this practice should be altered.

(*g*) *Anon.*, 2 Chit. Rep. 17: *Malperson's bail*, Id. 93: *ante*, 55: *post*, 240, 253: but see *Anon.*, 2 Chit. Rep. 76.

(*h*) *Wheeler* v. *Rankin*, 1 Chit. Rep 81.

(*i*) See Chit. Sum. Prac. 42; Barnes, 43; Imp. C. P. 170: *Hyde* v. *Whiskard*, 8 T. R. 457: *Evans* v. *Sweet*, 9 Moore, 556, 2 Bing. 271, *S. C.*; 1 M & M. 177.

(*k*) See the form of the writ of *capias*, *ante*, 506. Formerly, bail must have been put in, if the arrest were in London or Middlesex, within four days after the return of the process, whether by bill (R. M., 8 A. r. 1) or by original; or within six days, if the arrest were within any other county. (R. M., 8 A. r. 1). See *Coulson* v. *Hammon*, 2 B. & C. 626: 4 D. & R. 160, *S. C.*: *Moses* v. *Norris*, 4 M. & Sel. 397.

(*l*) *Grant* v. *Gibbs*, 1 Hodges, 56.

(*m*) *Hodgson* v, *Mee*, 5 Nev. & M. 302. 3 A. & E. 765, *S. C.*

(*n*) *Post.* See 1 Arch. C. P. Prac. 51.

(*o*) See R. M., 8 A. r. 1 a: *Studley* v. *Sturt*, 2 Stra. 782.

(*p*) See R. H., 2 W. 4, r. 8, *ante*, 93.

(*q*) *R.* v. *Shff. of Middlesex*, in *Wollaston* v. *Wright*, 2 Dowl. 286; 4 C. & M. 333, *S. C.*

(*r*) *Baddeley* v. *Adams*, 5 T. R. 170: and see *Bennett* v. *Potter*, 2 C. & J. 622.

(*s*) Tidd, 9th ed. 272.

(*t*) *Young* v. *Wood*, Barnes, 69: *Anon.*, 2 Chit. Rep. 103.

(*u*) *Baillie* v. *Hole*, 1 M. & M. 289.

(*x*) *Dyott* v. *Dunn*, 2 Chit. Rep. 72; 1 D. & R. 9, *S. C.*: *Todd* v. *Etherington*, 2 Marsh, 375.

or after final judgment, and before defendant is charged in execution (*y*); but bail will not, in general, be allowed to justify after defendant has been brought up to be charged in execution in the cause (*z*).

When Plaintiff obtains Time to inquire after Bail.

If, under the rule of *T. T.*, 1 *W.* 4, the defendant has given notice (*a*) of justifying bail *at the time they are put in*, and the plaintiff has given notice of his being desirous of inquiring after the bail, then (unless otherwise ordered by the court or a judge) the time for putting in and justifying bail will be postponed and proceedings stayed until the expiration of the time required by the plaintiff's notice (*b*). The plaintiff must not, however, by such notice require more than *three* days' time to inquire of the bail in case of town bail, and *six* days in the case of country bail, and such notice must be served at least *one* day before the time appointed for putting in and justifying the bail (*b*).

Where Stay of Proceedings Obtained.

As regards the time for putting in and perfecting bail, *where a rule for staying the proceedings has been obtained*, if the rule should be discharged, the defendant has not then, it seems, as much time for such putting in and perfecting as he had at the time he obtained the rule, but (if not already done) he has only the whole of the day on which the rule is disposed of to put in or perfect, &c., bail (*c*). Therefore the defendant should either put in and perfect bail pending the rule *nisi*, stating that he does so without prejudice, and not serve the rule for the allowance of bail till after the rule *nisi* has been disposed of; or (which would be preferable) should, on affidavits of facts and of the rule *nisi*, obtain an order that, in case the rule should be discharged, he shall have time for putting in and perfecting bail, until three days after the rule *nisi* has been disposed of, without prejudice to such rule, and on terms of placing the plaintiff in the same situation as if bail had been perfected in the ordinary time (*d*).

Extension of Time for putting in Bail.

If you wish an extension of the time for putting in bail, you may, in general, obtain it upon a judge's summons, (returnable before the time for putting in bail has expired), and consenting that the plaintiff shall be put in the same situation as if bail had been put in in due time (*e*). It is usual, however, to accompany this summons with an affidavit of the facts, shewing why you want the time required—such as the dangerous illness of the defendant, or his sudden unavoidable absence preventing his attorney from ascertaining from him the names of his proposed bail, or the like. The plaintiff's consenting to further time for putting in bail, without the consent of the sheriff, would perhaps discharge the latter; and so it would discharge the bail to the sheriff, if without their consent, or the consent of either of them.

How put in.

How put in.] Bail may be put in before a judge in town or

(*y*) *Stanton's bail*, 2 Chit. Rep. 73: *Davis* v. *Fowler*, Id. 74; the recognisance in which case is taken in double the amount of the sum recovered (*post*, 579).

(*z*) *Bircham* v. *Chambers*, 11 Moore, 343.

(*a*) See form of notice, Chit. Forms, 249.

(*b*) R. T., 1 W. 4, r. 1, *post*, 591.

(*c*) *St. Hanlaire* v. *Byam*, 4 B. & C. 970; 7 D. & R. 458, *S. C.*: and see *Glover* v. *Watmore*, 5 B. & C. 769; 8 D. & R. 607, *S. C.*

(*d*) See Chit. Sum. Prac. 325, note: and see the form, Chit. Forms, 251.

(*e*) See *Joyce* v. *Pratt*, 6 Bing. 377.

Before whom.

(in vacation) before a commissioner under 1 & 2 *V. c.* 45, *s.* 4 (*f*), or a commissioner in the county, or a judge of assize in his circuit. It is put in usually at the chambers, but sometimes at the house of one of the judges; and is put in either *absolutely*, (which cannot, however, be done without the consent of the plaintiff or his attorney, and which is not very usual in practice), or *de bene esse*, (that is, conditionally), subject to the plaintiff's afterwards approving of or excepting to them.

Practical Directions as to.

Bail is thus put in:—*Engross a bail-piece on a plain piece of parchment, stating the day on which the bail is put in, and the county into which the writ upon which the defendant was arrested issued* (*g*), *and the names of the parties, together with the names and additions of the bail, and the sum mentioned in the order for arrest* (*h*); *you may procure a printed form at the stationer's. Take it to the judge's chambers; and, having the bail with you, apply to the judge's clerk, who will thereupon take the bail* (*i*). *In the Queen's Bench and Common Pleas the bail do not sign the bail-piece, but in the Exchequer they do. The judge or baron's signature is afterwards affixed to the bail-piece.* In the Queen's Bench *leave the bail-piece at the judge's chambers, where it is filed and entered in the bail-book, and where it remains until the bail are perfected.* In the Common Pleas, *before the recent abolition of the different offices, the bail-piece was filed with the filazer of the county into which the* capias *was directed, and who attended at the judge's chambers to take the bail* (*k*). In the Exchequer, *it was taken away by the attorney to the office of pleas, and delivered to the sworn clerks in attendance there, or their deputy, whose duty it was to make an entry of a corresponding note of the bail put in in their official book, called the "Bail-book."* A rule of that court, of *M. T.*, 1 *W.* 4, *r.* 2, *s.* 4, orders that "all recognisances of bail, in actions in the Office of Pleas, when taken or allowed by a baron, shall be left by the attorney for the defendant or defendants with the sworn or side clerks, or their deputy, in the Office of Pleas, until duly allowed; who shall enter the same in a book to be kept by them for that purpose, having an alphabetical index of reference, which book shall be open to the inspection of the attornies, or their clerks: and notice of such bail being allowed, and left and filed in the said Office of Pleas, with the names, descriptions, and address of the bail, shall be given by the attorney for the defendant or defendants to the attorney for the plaintiff or plaintiffs, within the times prescribed for giving notice of bail by the former rules of this court; and

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(*f*) That section enables the judges of the respective superior courts, or any two of them, of whom the chief to be one, to commission any number of persons, not being attornies or solicitors, to take recognisances of bail in vacation: which, when taken and filed in the proper office, are to have the same effect as if taken before a judge. Fees to be the same as before. And by s. 5, (*post*, 594), the bail may also justify before such commissioners in vacation.

(*g*) R. M., 4 W. 4, *post*, 579 n. (*m*).

(*h*) See the forms, Chit. Forms, 247, 248, 249. The recognisance is entered into in double the sum mentioned in the order.

(*i*) By this expression of "taking the bail," is meant, that, upon expressing their assent to the condition of the recognisance, the bail are formally required to acknowledge that they jointly and severally undertake, that, if the defendant shall be condemned in the action, he shall satisfy the costs and condemnation, or render himself to the prison of the court or gaol of the county in which he was arrested, or that, upon his failure, they (the bail) will do it for him. There is some slight variation in the words and form of the recognisance in the different courts, but the tenor and effect is, in all cases, the same. (See Bagley's Prac. 138. See forms of the recognisance, Chit. Forms, 247).

(*k*) See R. M., 4 G. 4.

proceedings may be thereupon had for excepting to and perfecting such bail, within the times and in like manner as is and are prescribed by the existing rules and practice of this court, except so far as the same may be altered by that or any subsequent rule of this court." But this latter part of the rule is directory, and need not be complied with (*l*).

Form and Requisites of Bail-piece.

Amendment of.

The bail-piece must state the day of the month and year on which the bail is put in. It must also state the county, as in the writ upon which the defendant was arrested (*m*); and, if there be any mistake in this respect, the bail will be deemed irregularly put in (*n*). Where the bail-piece was not intitled of the court or in the cause (*o*), or it did not appear thereby that the person before whom the bail was taken was a commissioner (*p*), time was given to cure the defect. The names of the parties must also be stated correctly (*q*); and the court have refused to amend an error in such a case, without the consent of the bail (*r*); but they have allowed it where the bail were rightly named in the notice of bail, the bail re-acknowledging their obligation (*s*); and, on an error in this respect, they will allow the bail to justify a second time (*t*). If the defendant has been arrested by a wrong name, the bail-piece should state his right name, and that he was sued by the name in the writ; for, if bail be put in by the name in the writ, the defendant will afterwards be estopped by it in that action from taking any advantage of the misnomer (*u*). But where the plaintiff sued out a writ against the defendant in his wrong name, the *præcipe* being right, and the defendant put in bail in his right name, the court set aside an attachment obtained against the sheriff for not bringing in the body, but without costs on either side (*x*); and where the defendant was named in the notice of bail by his right name, as having been sued by a wrong one, but in the bail-piece he was called by the wrong name only, this was deemed sufficient (*y*). The bail-piece must also state correctly the sum sworn to; but the court have allowed an amendment in this respect, where it appeared clearly to have arisen from a mistake (*z*).

Form of Bail after Judgment.

Where bail is put in *after* judgment, the recognisance is taken in double the amount of the sum recovered (*a*).

Consequence of Defect.

If the bail-piece is defective, it may, in general, be treated as a nullity, and, at all events, it is a ground for opposing the bail (*post*, 597, 598).

Notice of put-

Notice of putting in Bail.] When bail are thus put in *de*

(*l*) *Rigley* v. *Edwards*, 2 C. & M. 320; 2 Dowl. 282, *S. C.*

(*m*) See R. M., 4 W. 4; 5 B. & Ad. 816; 10 Bing. 344; 2 C. & M. 352. By that rule, "it is ordered, where a defendant is arrested upon an *alias* or *pluries capias*, issued into another county, pursuant to the rule of Michaelmas term, (3 W. 4, s. 7), the defendant must put in bail in the county where he was arrested." (See *R.* v. *Shff. of Essex*, 3 M. & Scott, 870).

(*n*) *Smith* v. *Miller*, 7 T. R. 96: see *R.* v. *Shff of Middlesex*, in *Bridger* v. *Smith*, M. & Sel. 532.

(*o*) *Hall's bail*, 1 Chit. Rep. 79.

(*p*) *Simmons' bail*, 1 Chit. Rep. 9.

(*q*) See *Holt* v. *Frank*, 1 M. & Sel. 199: *Fenton* v. *Ruggles*, 1 B. & P. 356.

(*r*) 1 Barnard, 214.

(*s*) *Anderson* v. *Noah*, 1 B. & P. 31: *Croft* v. *Coggs*, 4 Moore, 65.

(*t*) MS., E. T. 1814.

(*u*) See *ante*, 510: *Hole* v. *Finch*, 2 Wils. 393: *Smithson* v. *Smith*, Willes, 462; Barnes, 94: *Meredith* v. *Hodges*, 2 New Rep. 453.

(*x*) *Boswell* v. *Atkins*, 2 Chit. Rep. 56.

(*y*) *Anon.*, 2 Chit. Rep. 81.

(*z*) *Faget* v. *Vanthiennen*, Barnes, 59.

(*a*) *Hill* v. *Stanton*, 2 Chit. Rep. 73: Tidd, 9th ed. 251.

ting in Bail must be given.

bene esse, (*ante*, 578), the defendant's attorney should *give a written notice thereof to the attorney of the plaintiff without delay*(b), *and before the time for putting in bail has expired*, *in order to prevent an assignment of the bail-bond.* It is no bail until such notice has been given(c). But when bail are put in merely to render, no notice of their having been put in is, it seems, necessary(d).

When to be Given.

The notice may be given *before* the bail are put in. And in cases where you intend justifying the bail at the time of putting them in, (as you may do under the rule of *T. T.*, 1 *W.* 4, *r.* 1, *post*, 591), you must give four days' notice of such putting in the bail, previously, before eleven o'clock in the morning, and exclusive of Sunday. Where you do not intend so justifying the bail at the time of putting them in, then it is not usual to give the notice until after they are put in(e).

Form of the Notice.

As regards the *form* of this notice, it must be intitled in the court and cause(*f*). "Notice of more bail than *two* shall be deemed irregular, unless by order of the court or a judge"(g); and if the court or judge so order it, the rule or order should be served before or at the time of the notice.

It must set forth with truth and certainty the *names* of the bail(*h*), and their *addition of degree* or *mystery*(*i*). A schoolmaster(*k*), or clerk in the Custom House(*l*), or clerk in the Post Office(*m*), may be described as a gentleman. "A shopkeeper" is, in general, a sufficient description(*n*), so is "yeoman"(*n*); but a "manufacturer" is not, it being too vague, as there are so many classes of manufacturers of different commodities(*o*). If a false addition be given to the bail; as, for instance, "gentleman," where the person was a baker, or Scotch ale agent, or clerk in a mercantile house, or the like(*p*); or, if the bail be not styled "the younger," where he and his father are of the same name(*q*), the notice will be defective. But even where the names, &c., had, by mistake, been omitted altogether, the court held, that the notice of bail could not therefore be treated as an absolute nullity(*r*).

In addition to these descriptions of the bail, by rule of *T. T.*, 1 *W.* 4, *r.* 2, "every notice of bail shall, in addition to the descriptions of the bail, mention the *street* or *place*, and *number* (if any) where each of the bail *resides*, and all the streets or

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(b) R. M., 16 C. 2, K. B.: R. E , 49 G. 3, C. P.

(c) Tidd, 9th ed. 253: R. E., 49 G. 3: 1 Taunt 616: *Grant* v. *Gibbs*, 1 Hodges' Rep. C. P. 56.

(d) *Wilson* v. *Griffin*, 2 C. & J. 683. The case was decided under process, issuing before the Uniformity of Process Act.

(e) See the forms of notices in either case, Chit. Forms, 249, 250.

(*f*) Lofft. 237: *Anon.*, 2 Chit. Rep. 77: *Anon*, Id. 81. As to what is an improper title in an affidavit, see *post*, Vol. II. Book IV. Part I. Ch. 35. See *post*, 594, as to the notice of justification.

(g) R. H., 2 W. 4, r. 18. See form of affidavit, &c., for leave to put in more than two bail, Chit. Forms, 247; Chit. Sum. Prac 319.

(*h*) Lofft, 187. "Frances" for "Francis" is bad. (*Anon.*, 1 Moore, 126). Initials will not suffice. (*White's bail*, 2 H. & W. 134, *semb.*)

(*i*) Lofft, 281, 187: *Anon.*, 6 Mod. 24: *Anon.*, 11 Mod. 2: *Wood* v. *Chadwick*, 2 Taunt. 173: —— v. *Costar*, 5 Id. 554.

(*k*) —— v. *Pasman*, 5 Taunt. 759.

(*l*) *Anon.*, 1 Chit. Rep. 494, n

(*m*) *Wood* v. *Ray*, 2 Dowl 692.

(*n*) *Lanyon's bail*, 3 Dowl. 85.

(*o*) *Fearnley's bail*, 1 Dowl. 40: *see Lanyon's bail*, 3 Dowl. 87.

(*p*) *Wood* v. *Chadwick*, 2 Taunt. 173: Lofft, 281, 187: *Anon.*, 1 Chit. 494, n.: *Darcey's bail*, Id. 76: *Moss* v. *Heariside*, 9 D. & R. 772: *Flemming's bail*, 1 C. & M. 111; 1 Dowl. 641, *S. C*: *Hamlet's bail*, 1 Id. 501: *Fenton* v. *Ruggles*, 1 B. & P. 356.

(*q*) *Smith* v. *Mellon*, 5 Taunt. 854; 1 Marsh. 386, *S. C.*

(*r*) *Pugh* v. *Emery*, 4 D. & R. 30.

Form of Notice.

places, and number (if any) in which each of them has been *resident at any time within the last six months*, and whether he is a *housekeeper* or *freeholder*"(*s*). This rule (which extends both to town and country bail)(*t*) must be strictly complied with. A notice omitting to state the residence of the bail for the last six months is an irregularity of which the court will take notice, though the bail be unopposed(*u*). A notice that the bail had, "*if within* the last six months," (instead of *for* or *during* the last six months), resided," &c., is not sufficient(*x*). The actual, and not the mere constructive, residence of the bail must be stated(*y*). The name of a *township*, without the name of the street, stated to be in a certain parish named in the notice of bail, has been deemed sufficient(*z*). And the residence of a bail is, it seems, sufficiently described by stating it to be at a small place, well known as a village, without mentioning any street in it(*a*); but describing the residence to be of a parish only, without mentioning the street, &c., would, it seems, be bad(*b*). Where the number of the house was omitted, but it appeared that the bail had been found and were not opposed upon any other ground, *Bayley*, J., allowed them to justify on paying the costs of the opposition(*c*). In another case this was refused, though the court would not allow the plaintiff the costs of the opposition(*d*). The notice must, in express terms, state that the bail has resided in his residence or residences for the last six months(*e*). If the bail has had two places of residence during the *whole* of the six months, one only of them need be mentioned in the notice(*f*); the object of this part of the rule being to trace the party for six months in one residence. The rule requires the notice to state whether the bail are *housekeepers* or *freeholders*. A notice describing one of the bail as a *householder*, instead of a housekeeper, is, it seems, insufficient(*g*); so is a notice, describing him as a housekeeper, if he is only a lodger, although on examination it appears he is a freeholder(*h*). This rule and form of notice must be complied with, notwithstanding there be an affidavit of the sufficiency of the bail accompanying it(*i*); but, it seems that a mistake in the notice, in the description of the residence of the bail, may sometimes be cured by the affidavit

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(*s*) Before this rule, it was not necessary to mention in the notice the *number* of the house in the street, or the street, in which they were stated to reside, though, when mentioned therein, a mistake in the number was a ground of objection. (*Jackson's bail*, 1 Chit. Rep. 493: Tidd, Prac. 9th ed. 254: and see *Weddall* v. *Berger*, 1 B. & P. 325: —— v. *Costar*, 5 Taunt. 554: *Rickman* v. *Hawes*, 5 Taunt. 173).

(*t*) *Anon.*, 1 M. & Scott, 296; 1 Dowl. 259, *S. C.*: *Beal's bail*, 3 Dowl. 708.

(*u*) *Sywood* v. *Dogherty*, 1 Scott, 59; 3 Dowl. 116, *S. C.*: *Welsh* v. *Lywood*, 1 Bing. N. C. 258.

(*x*) *Johnson's bail*, 1 Dowl. 438: *Ward's bail*, Exch., 12th Nov. 1832, 1 Dowl. 595; 1 C. & M. 28, *S. C.*

(*y*) *Thomson* v. *Smith*, 1 Dowl. 340.

(*z*) *Lanyon's bail*, 3 Dowl. 85.

(*a*) *Smith's bail*, 1 Dowl. 499. There the bail were described as of "Chigwell Road:" *sed vide Topham* v. *Calvert*; (1 Price, N. R. 140): in which a description of one of the bail as of "Cloth Fair," omitting the name of the street in that quarter wherein he resided, was deemed insufficient.

(*b*) *Hanwell's bail*, 3 Dowl. 425: *sed vide Treasurer's bail*, 2 Id. 670.

(*c*) *Muir* v. *Smith*, 2 Tyr. 742; 2 C. & J. 634, *S. C.*

(*d*) *Hanwell's bail*, 3 Dowl. 425. The court refused to allow defendant to amend.

(*e*) *Per Vaughan*, B., 2 Tyr. 592, n.: overruling *Anon.*, 1 Dowl. 160: *Fenton* v. *Warre*, 2 C. & J. 54; 2 Tyr. 158; 1 Dowl. 295, S. C.

(*f*) *Anon.*, 1 Dowl. 159: *Fortescue's bail*, 2 Id. 5[illegible]1.

(*g*) *Gablentz's bail*, 1 H. & W. 111.

(*h*) *Wilson's bail*, 2 Dowl. 431.

(*i*) *Anon.*, 1 Dowl. 160.

of their sufficiency, if that be correct(*k*). And the objection to a notice of bail, that the number of the street is not stated, must be taken in the first instance, and it is waived by obtaining time to inquire, unless it be shewn that the residence of the bail cannot be discovered(*l*).

If the defendant be a prisoner, the notice in the Exchequer should state that fact(*m*). Notice of bail, as put in before one judge, when, in fact, they were put in before another, is irregular(*n*). The notice need not state where the bail-piece is filed(*o*). If the bail to the sheriff have become bail above, it was usual to state that circumstance in the notice of bail; but this seems now unnecessary.

By whom to be given.

The notice should regularly be given by the attorney for the party who puts in the bail. In a case, however, where an attorney, appointed by the bail to the sheriff, also put in and gave notice of bail, and proceeded to justification, this was holden to be regular, although the defendant's attorney had also given notice of bail, and there was no order to change the attorney(*p*).

To whom to be given, and how.

The notice should be served either upon the plaintiff's attorney personally, or upon some clerk or servant in his office(*q*). If he cannot be met with, and his office be not open, it will suffice to stick up a copy of the notice in the office of the court, and put another under the attorney's door(*r*); and leaving the notice at a stationer's, where the plaintiff's attorney's papers were usually left for him, has been deemed sufficient service(*s*). But the service on the master of a house in which the attorney had an office, is not, it seems, sufficient, unless some privity be shewn to exist between them(*t*); nor would, it seems, a service on the attorney's laundress(*u*), nor on the laundress's servant(*x*). The service must be made before nine o'clock at night(*y*); and though received and read after that hour, it is not available even as a notice of the next day(*z*).

Consequence of Defects in Notice.

If the notice of bail be in any respect defective, or the service of it irregular, it will afford a ground for opposing the justification, and relieving the plaintiff from paying the costs of it; but, in general, a defect in the notice will not make it a nullity, so as to admit of the plaintiff's taking an assignment of the bail-bond, or proceeding against the sheriff &c.(*a*). Obtaining time to inquire after the bail would, in general, be a waiver of any defect in the notice, unless the defect were in

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(*k*) *Ward's bail*, Exch., 5 Leg. Obs. 63; 1 C. & M. 28; 1 Dowl. 596, *S. C.*: and see *Higg's bail*, 1 Dowl. 124.

(*l*) *Foster's bail*, 2 Dowl. 586.

(*m*) *Fuller's bail*, 5 Tyr. 491: and see cases, *post*, 612.

(*n*) *Kelly* v. *Wrother*, 2 Chit. Rep. 109: see *Crawford* v. *Oxley*, 3 Smith, 515.

(*o*) *Rigley* v. *Edwards*, 2 Dowl. 282: 2 C. & M. 320, *S. C.* See the rule of M. T., 1 W. 4, r. 2, s. 4, in Exch: *ante*, 578.

(*p*) *R.* v. *Shff. of London*, in *Plomer* v. *Houghton*, 2 B. & Ald. 604: *ante*, 55, 575: *post*, 593.

(*q*) See *ante*, 52, as to service of notices on attornies.

(*r*) *Atkinson* v. *Thomson*, 2 Chit. Rep. 81: *Anon.*, Id. 89.

(*s*) *Anon.*, 2 Chit. Rep. 82: *Thomson's bail*, Id. 87.

(*t*) *Freeman's bail*, 2 Chit. Rep. 88.

(*u*) *Dodd* v. *Drummond*, 1 Dowl. 381: and see *Stout* v. *Smith*, Id.: but see *per Bayley*, B., in *Smith* v. *Spurr*, 2 Id. 231.

(*x*) *Smith* v. *Spurr*, 2 Dowl. 231.

(*y*) R. H., 2 W. 4, r. 50, *ante*, 53.

(*z*) *Anon.*, 2 Chit. Rep. 88: *sed vide Horsley* v. *Purdon*, 2 Dowl. 228.

(*a*) *Fearnley's bail*, 1 Dowl. 40: *Bell* v. *Foster*, 8 Bing. 334; 1 Dowl. 271, *S. C.*: *Wallace* v. *Arrowsmith*, 2 B. & P. 49: *Pugh* v. *Emery*, 4 D. & R. 30: *R.* v. *Shff. of Middlesex*, in *Duncombe* v. *Crisp*, 1 C. & M. 482; 2 Dowl. 5, *S. C.*: *Wigley* v. *Edwards*, 2 C. & M. 320; 2 Dowl. 281, *S. C.*

Amendment of.

the description of the residence of the bail, and it were sworn on the plaintiff's behalf that their residence could not be found (*b*). Sometimes the court will allow a defect in the notice to be amended, where the bail have been put in in time and the defect was purely unintentional, and the plaintiff's attorney has not been misled by it. Formerly, the court in several cases set aside the rule for the allowance of bail, on the ground that their places or one of their places of residence were mis-stated (*c*); but this practice was soon found inconvenient that it was laid aside, and now it seems that the only remedy is by indicting the party for perjury if he has mis-described himself.

Affidavit of Justification of Bail.

Rules of Court as to.

Affidavit of Justification, accompanying Notice of putting in Bail.] By rule of all the courts of *T. T.*, 1 *W.* 4, *r.* 3, "*if the notice of bail shall be accompanied by an affidavit of each of the bail*, according to the form hereto subjoined, and if the plaintiff afterwards *except* to such bail, he shall, if such bail are allowed, pay the *costs* of justification; and if such bail are rejected, the defendant shall pay the costs of opposition, unless the court, or a judge thereof, shall otherwise order."

By a subsequent rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 19, "affidavits of justification shall be deemed insufficient unless they state that each person justifying is *worth* the amount required by the practice of the courts *over and above what will pay* his just debts, and over and above every other sum for which he is then bail."

The following is the form of this affidavit:—

Form of the Affidavit.

"*In the Queen's Bench* [or *Common Pleas* or *Exchequer of Pleas*]."

"*Between* { *A. B., Plaintiff,*
and
C. D., Defendant."

"*A. B., of* ——— (*d*), *one of the bail for the above-named defendant, maketh oath and saith, that he is a housekeeper* [or *freeholder*, as the case may be] *residing at* ———, [describing particularly the street or place, and the number, if any], *that he is worth* [supra] *property to the amount of* £——— [the amount required by the practice of the courts] *over and above what will pay all his just debts;* [if bail in any other action, add, "*and every other sum for which he is now bail*"]; *that he is not bail for any defendant except in this action*, [or, if bail in any other action or actions, add, "*except for C. D., at the suit of E. F. in the Court of* ———, *in the sum of* £——— ;" "*of G. H. at the suit of I. K. in the Court of* ———, *in the sum of* £——— ;" specifying the several actions, with the courts in which they are brought, and the sums in which the deponent is bail]; *that the deponent's property, to the amount of the said sum of* £———, [and if bail in any other action or actions, "*of all other sums for which he is now bail as aforesaid*"], *consists of* [here specify the nature and value of the property, in respect of which the bail proposes to justify, as follows:—

(*b*) *Foster's bail*, 2 Dowl. 586.

(*c*) See *Eaglefield* v. *Stephens*, 2 Dowl. 438: Tidd, New Prac. 147.

(*d*) It is necessary to give the deponent some addition, though the form does not contain this word "of," or otherwise expressly require it. (See *Benbow's bail*, 5 Dowl. 714: *Treasure's bail*, 2 Dowl. 670: *Stone's bail*, 1 Gale, 15).

"Stock in trade, in his business of ——, carried on by him at ——, of the value of £ —— ;" "of good book debts owing to him to the amount of £ —— ;" "of furniture in his house at ——, of the value of £ —— ;" "of a freehold or leasehold farm, of the value of £ ——, situate at ——, occupied by ——," or *"of a dwelling-house of the value of £ ——, situate at ——, occupied by ——* ; [or of other property, particularizing each description of property, with the value thereof]; *and that the deponent hath for the last six months resided at ——* [describing the place or places of such residence]."

The Original or Copy of Affidavit must accompany the Notice.

Either the original, or a copy of this affidavit, must accompany the notice of bail, otherwise it would not be proceeding according to the above rules(e). *If it be a copy, as is most usual, then head it with the word "copy," or else refer to the original in some other way, by the notice of bail or otherwise*(e).

The Form prescribed must be pursued.

The form of affidavit, as prescribed by these rules, should be strictly (*f*) and, at all events, substantially pursued (*g*). Though the form thus prescribed is several, it may nevertheless be made jointly by the bail (*h*). They must swear themselves to be *housekeepers* or *freeholders;* swearing that they are *householders* is not sufficient (*i*) ; and if bail be described as a housekeeper, and he is not, the fact of his being a *freeholder* will not cure the defect (*k*). The form, as prescribed by the rule of *T. T.*, 1 *W.* 4, *r.* 3, requires the bail to swear that they are "possessed of" the property ; but the later rule of *H. T.*, 2 *W.* 4, *r.* 19, requires that they shall swear that they are "worth" it, and, if they do not, the affidavit will be insufficient (*l*). So, according to the more recent cases, it will be insufficient, if they swear that they are worth the amount required "over and above all their just debts," instead of "over and above *what will pay* all their just debts" (*m*). An affidavit made by a bail, in stating of what his property consisted, instead of swearing to good *book* debts owing to him, omitting the word *book*, has been deemed sufficient (*n*). Where one kind of property only was described, it was holden that the value sufficiently appeared by reference to the previous part of the affidavit, wherein it was sworn that the bail was worth a sufficient sum, &c. (*o*). But as the intention of this affidavit is, that the plaintiff may have an opportunity and the means of ascertaining, by inquiry, whether the bail be really possessed of the property described in it, so that, if he is satisfied of the truth of the affidavit, he may not give the bail the trouble of attending personally to justify, the property must be described with such certainty as will enable the plaintiff to make those inquiries (*p*). An affidavit that the property of the bail consisted of household furniture and effects, without stating what they were, was held insufficient, and the bail was rejected (*q*). In another case, where the affidavit merely described the bail as "possessed of money in the funds," without stating in what fund the money was, the court gave the plaintiff time to inquire further as to the bail (*r*). And, as a general rule, where an affidavit of sufficiency, either of town or country bail, attempts to describe the property in respect of which the bail seeks to justify, the form above prescribed must be followed (*s*). An affidavit that they are not bail for any defendant except the above-named C. D. (the defendant) is bad (*t*). An affidavit that the deponent is not bail for *any*, without adding "other person," has been deemed sufficient (*u*). If a bail has had two residences during the *whole* of the six months mentioned in the affidavit, one only of them need be mentioned, the object of this part of the affidavit being to enable the plaintiff to trace the bail for six months in one residence (*x*). The affidavit should state the deponent's addition (*x*).

(e) *West* v. *Williams*, 1 Dowl. 162; 3 B. & Ad. 345, *S. C.*: *De Bode's bail*, 1 Dowl. 368.

(f) *Per cur.*, *Miller's bail*, 5 Dowl. 602.

(g) *Perry's bail*, 1 Dowl. 606: *Bell* v. *Foster*, 1 M. & Scott. 518: *Hunt's bail*, 4 Dowl. 272: 1 H. & W. 520, *S. C.*: *Henshaw* v. *Woolrich*, 1 C. & J. 150: *Boyd's bail*, 1 Hodges, 93. see *Lanyon's bail*, 3 Dowl. 85: *Smith's bail*, 1 Id. 514.

(h) *Anon.*, 1 Dowl. 115.

(i) *Anon.*, 1 Dowl. 127: see *Gablentz's bail*, 1 H. & W. 111.

(k) *Wilson's bail*, 2 Dowl. 431.

(l) *Hutchinson's bail*, 1 Dowl. 572; 2 C. & J. 487, *S. C.*: *Okill's bail*, 2 Dowl. 19: *Thompson's bail*, Id. 50: *Simpson's bail*, MS., 12th Nov. 1832: 1 Dowl. 605: *Rogers* v. *Jones*, 3 Tyr. 256; 1 C. & M. 323; 1 Dowl. 704. *S. C.*

(m) *Stevens* v. *Miller*. 2 M. & W. 368 ; 5 Dowl. 602, *S. C.*: *Edmunds* v. *Keats*, 6 Dowl. 359. But according to the cases of *Body's bail*, 1 Hodges, 93; 1 Scott, 698, *S. C.*: *Lanyon's bail*, 3 Dowl. 85: *Hunt's bail*, 4 Dowl. 272; 1 H. & W. 520, *S. C.*, it would be sufficient.

(n) *Lanyon's bail*, 3 Dowl. 85: and see *Okill's bail*, 2 Dowl. 19.

(o) *Boyd's bail*, 1 Hodges, 93; 1 Scott, 698, *S. C.*

(p) *Anon.*, 1 Dowl. 159.

When it need not.

An affidavit of justification by *country bail*, purporting to be according to the above form, and not containing all its requisites, is good, if it be sufficient according to the old form, noticed *post*, 608. Also the above rules do not apply to the case of a *prisoner* (*y*). Nor where the *bail are not put in in due time*, for then the bail must actually justify, as formerly, without an exception, before a motion can be made to set aside proceedings, upon the ground that bail have been put in and justified (*z*).

Consequences of defective affidavit.

If the affidavit omit any material part of the above form, it cannot be used as an affidavit within the above rules, if the plaintiff object to it on that ground (*a*). And although the courts in several instances have given time to amend the affidavit (*b*), yet, in more recent cases, the Court of Exchequer have refused it (*c*). The bail, however, may justify if it appear that they are sufficient (*d*); but the defendant will not be allowed his costs of justification (*e*); and if the bail justify in respect of other property not described in the affidavit (*f*), the bail will be admitted, but the costs of the opposition will be costs in the cause (*g*). In general, it seems that the defendant must pay the plaintiff's costs of opposition, if the objection to the affidavit be not purely technical (*h*).

Amendment of.

Accepting of,

Accepting of, or Excepting to, Bail.] If the plaintiff, or his

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(*q*) *Cooper's bail*, 3 Dowl. 692: *Hodgson* v. *Cooper*, 2 C., M. & R. 43; 5 Tyr. 740, *S. C.*: *Weller's bail*, 6 Dowl. 312.

(*r*) *Anon.*, 1 Dowl. 159.

(*s*) *Weller's bail*, 6 Dowl. 312.

(*t*) *Warren* v. *De Burgh*, 7 Dowl. 96. Amendment allowed, and costs to be costs in the cause.

(*u*) *Smith's bail*, 1 Dowl. 514.

(*x*) *Benbow's bail*, 5 Dowl. 714: *Treasure's bail*. 2 Id. 670.

(*y*) *Webb's bail*, 1 Dowl. 446.

(*z*) *R.* v. *Shff. of Middlesex*, in *Rogers* v. *Porter*, 3 Dowl. 255: see *R.* v. *Shff. of Middlesex*, 2 Jurist, 1090.

(*a*) *Martin* v. *Gell*, 2 Tyr. 166.

(*b*) *Roberts* v. *Jonnes*, 1 Dowl. 704: *Henshaw* v. *Woolrich*, 1 C. & J. 150: *Samson's bail*, 1 Dowl. 605: *Darling* v. *Hutchinson*, 2 C. & J. 487; 1 Dowl. 571, *S. C.*

(*c*) *Nayler's bail*, 3 Dowl. 452: *Woolinson's bail*, 2 Id. 53: *Carter's bail*, 5 Id. 577.

(*d*) *De Bode's bail*, 1 Dowl. 301: *Anon.*, Id. 126: *Popjoy's bail*, 3 Id. 170: *Hodgson* v. *Cooper*, 2 C., M. & R. 43; 5 Tyr. 740, *S. C.*

(*e*) Id.: *Miller's bail*, 5 Dowl. 602: *Thompson's bail*, 2 Id. 50: *Heald's bail*, 3 Id. 423; 5 Tyr. 231, *S. C.*

(*f*) *Jackson's bail*, 1 Dowl. 172: *Hemming* v. *Blake*, Id. 179.

(*g*) *Brown* v. *Ahrenfeldt*, 4 M. & W. 76; 7 Dowl. 46, *S. C.*: overruling *Hemming* v. *Blake*, 1 Dowl. 179: see *Jackson's bail*, 1 Dowl. 172: *Stevens* v. *Miller*, 2 M. & W. 368.

(*h*) *Innis* v. *Muir*, 2 C. & J. 634; 2 Tyr. 742, *S. C.*: and see *Hanwell's bail*, 3 Dowl. 425. See further as to the costs, *post*, 601, 602, 603.

or Excepting to, Bail.

attorney or agent, consider the bail, of whom notice have been given, sufficient, he will proceed in the action as usual, and the bail will be considered as justified. If, on the other hand, he considers them or one of them insufficient, or the proceedings as to them irregular, he will then except to them, (or one only of them if he think fit (*i*)), *and for which purpose he will have to enter such exception, and give a notice thereof as mentioned below.* He should, however, be cautious in making such exception, especially in cases where the notice of bail has been accompanied by a proper affidavit by each of the bail of their sufficiency, in pursuance of the rule of court of *T. T.*, 1 *W.* 4 (*ante*, 583); for if the plaintiff in such case except to the bail, and they justify, he will in general, as we have just seen, (*ante*, 583), have to pay the costs of the justification; and though the bail should be rejected, he might, if the court or judge so ordered it, have to pay his own costs of the opposition.

Consequences of.

Exception, when necessary, and Time for making it.

If the defendant has given the four-day *notice that he will put in and justify the bail at the same time*, and has *accompanied the notice with affidavits by them of their sufficiency*, according to the rules noticed, *post*, 591, *ante*, 583, (provided they are to be so put in in due time), the plaintiff must, if he be desirous of excepting to and opposing the bail, give notice of and enter his exception to them at all events *one day* before the time for so putting in and justifying the bail, (or before the further time, if any, required by and allowed to plaintiff for inquiry into the bail), has expired, otherwise they will be considered as justified (*k*). If the defendant has given such notice of justifying bail at the time of putting them in, but has *not* accompanied the notice with such *affidavits* by them of their sufficiency, then the plaintiff need not, it seems, give any notice of his excepting to them, and they must justify, and plaintiff may oppose such justification, at the time appointed. If the defendant has *not* given such notice of justifying bail at the time of putting them in, then the plaintiff is at liberty to except to the bail at any time within *twenty days* after the service of the notice of bail; and if he do not except to them within that time, they will be considered as accepted and justified (*l*). If the twentieth day happen to fall on a Sunday, then the exception may

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(*i*) *Felton* v. *King*, 5 Dowl. 658.

(*k*) Some doubt has been entertained in the profession, as to the meaning of the rule of T. T., 1 W. 4, r. 4; the words of the rule are, "If the notice of bail shall be accompanied with an affidavit of each of the bail according to the form thereto subjoined, (*ante*, 583), and the plaintiff shall not give *one day's notice of exception* to the bail *by whom such affidavit shall have been made*; the recognisance of such bail may be taken out of court without further justification than such affidavit." It is to be observed, that the rule, in its wording, is extended to *all cases* in which such affidavit of the sufficiency of the bail is made; but this could hardly be deemed the intention of it; for, even before the rule, it was in all cases (except in the cases expressly mentioned in the above text, and in the case of bail for a prisoner, and bail put in after the time for putting in bail has expired) necessary to except to the bail, in order to compel a justification. It is submitted, that the meaning of the rule is as stated in the text, and that it is confined to cases where the defendant has given notice of justifying the bail *at the time of putting them in*, and has accompanied such notice with the affidavit of sufficiency. It would seem, however, from the case of *R.* v. *Wilson*, (3 Dowl. 255), that the rule is not confined to cases where the defendant has given notice of justifying the bail at the time of putting them in. At all events, the rule does not apply to bail for a prisoner; nor to a case where bail are put in after the time for putting in bail has expired; nor to any case where notice of exception is not necessary. (*Webb's bail*, 1 Dowl. 446: *R.* v. *Wilson*, 3 Id. 255). It applies to the ordinary cases of bail put in by the defendant, and not to the case of a sheriff bound by a judge's order to put in and perfect bail. (*R.* v. *Shff. of Middlesex*, 4 M. & W. 529).

(*l*) See *Oldham* v. *Burrell*, 7 T. R. 26:

be made on the Monday. It is not necessary, or indeed usual, to except to *added* bail, if the original bail have been excepted to, for they must justify whether excepted to or not (*m*). And generally, if bail be not put in in due time, they must afterwards justify, whether excepted to or not (*n*). When the bail are put in in proper time, and notice thereof given, they should be excepted to, and notice of such exception given to defendant's attorney, before the sheriff is ruled (*o*). But if they are not put in at the time of ruling the sheriff, he must put in and perfect bail at his peril, or put in bail and render the defendant in four days in a town cause, or eight days in a country cause, without any exception; for otherwise, if the plaintiff excepted, the sheriff would have four days after exception to perfect bail, and by that means would have more than the time allowed him by the practice of the court to return the writ and bring in the body (*p*). If two sets of bail be put in, both must be excepted to. *To render the exception of any avail, the plaintiff must, as we shall presently more fully notice, enter it, and afterwards give notice of the entry to the defendant's attorney or agent.*

Assignment of Bail-bond no Waiver of Exception.

It would seem that, since the 1 & 2 *V. c.* 110, the plaintiff will not waive his right to except, by declaring absolutely or demanding a plea, &c., as he would have done before (*q*). By the rule of *H. T.*, 2 *W.* 4, *r.* 15, "when bail to the sheriff become bail to the action, the plaintiff may except to them, though he has taken an assignment of the bail-bond;" and even before this rule, when an assignment of the bail-bond was taken *after* exception, it was, in the Queen's Bench, no waiver of the exception, but the bail were bound to justify (*r*).

Exception waived by Laches.

It must be observed, that the plaintiff's attorney, by not excepting to bail in time, is deemed to acquiesce in their sufficiency, and in the regularity of the proceedings; and, therefore, he cannot afterwards treat the bail as a nullity, and take an assignment of the bail-bond, although the bail put in were persons not allowed to be bail by the rules of the court (*s*).

Filing Bail-piece where Bail are not excepted to.

If the plaintiff or his attorney *accept* of the bail, or, which is the same thing, if he do not except to them within the limited time after the service of the notice of bail, or is precluded from excepting to them, *the defendant's attorney may at once obtain the bail-piece from the judge's clerk, and file it with one of the masters* (*t*).

Entering of Exception.

Entering of, and Notice of Exception.] In order to except to

Goddard v. *Davis*, 9 Bing. 88; 1 Dowl. 278, *S. C.:* and R. M., 8 A. r. 2.

(*m*) *Gregory* v. *Gurdon*, Barnes, 74.

(*n*) *Turner* v. *Cary*, 7 East, 607: *Fuller* v. *Prest*, 7 T. R. 109: *Boldero* v. *Gray*, Cowp. 769: *Nunn* v. *Rogers*, 2 Chit. Rep. 108: *R.* v. *Wilson*, 3 Dowl. 255.

(*o*) Lofft, 159: *R.* v. *Shff. of Middlesex*, 8 T. R. 258.

(*p*) Tidd, 9th ed. 256.

(*q*) R. M., 8 A. r. 2: and see *Lister* v. *Wainhouse*, Barnes, 92; 1 Sel. 152: see *R.* v. *Shffs. of London*, in *Marsh* v. *Russell*, 1 D. & R. 163: *R.* v. *Shff. of Middlesex*, in *Halliday* v. *Locke*, 4 Id. 835: *post*, 586. Where, notice of justification of bail having been given, the plaintiff delivered a declaration *de bene esse*, to which the defendant demurred; and the plaintiff, after an ineffectual attempt to have the demurrer set aside as frivolous, obtained an order for time to join in demurrer; the court held, that after this the bail could not be opposed, nor could they justify; (*Bolton* v. *Johnson*, 2 M. & W. 42); but this was before 1 & 2 V. c. 110.

(*r*) *Hill* v. *Jones*, 11 East, 321: see the former practice, Tidd, 9th ed. 255, 306: Tidd, New Prac. 148.

(*s*) *Bologne* v. *Vautrin*, Cowp. 828: 2 Doug. 467, n., *S. C.: R.* v. *Shff. of Surrey*, 2 East, 181: and see *Huggins* v. *Bambridge*, Barnes, 81: *Bell* v. *Gate*, 1 Taunt. 162: but see *Fenton* v. *Huggles*, 1 B. & P. 356: *Wallace* v. *Arrowsmith*, 2 Id. 49, *cont.* Except indeed the bail were practising attornies or clerks to practising attornies, in which case, we have seen, the plaintiff may treat the bail as a nullity. (R. H., 2 W. 4, r. 13).

(*t*) See R. M., 16 C. 2: R. M., 8 A. r. 2: 1 Sellon, 148, 149.

bail, the first step is to enter such exception. The giving notice of exception without actually *entering* the exception, is a mere nullity, and is, it seems, not simply an irregularity which may be waived by the defendant's acting on the notice (*u*). *In general, the exception must be entered in the bail-book at the judge's chambers* (*x*), *within twenty days after service of the notice of bail* (*y*); and this even in the case put in on a *habeas corpus* (*z*). In the Common Pleas and Exchequer, *this exception is entered in the master's book, or on the bail-piece if taken by commission.* If the twentieth day happen to fall on a Sunday, the exception may be entered on the Monday (*a*). But, in cases where the defendant has given notice of justifying bail at the time of putting them in, and has accompanied the notice with affidavits by them of their sufficiency, according to the rules of court of *T. T.*, 1 *W.* 4, (*ante*, 583, *post*, 591), then it seems the plaintiff must, if he be desirous of excepting to them, enter his exception *one day* or more before the time of so putting in and justifying them has expired. All this, however, must be understood as applying to bail put in in due time (*b*); for if bail be put in after the time limited for doing so, they must afterwards justify, whether they are excepted to or not (*c*). Also, in the case of a prisoner, no exception is necessary.

Notice of Exception, when and how given.

After entering the exception, notice of it must be given to the defendant's attorney (*d*), otherwise the entry itself will be of no avail (*e*): and on the other hand, if notice of exception be given, but no exception be actually entered, it will be a mere nullity, and not simply an irregularity which may afterwards be waived by the defendant's acting on the notice (*f*). In general, this notice must be given within *twenty days after the service of the notice of bail*, or the exception will be void, and the bail need not justify (*g*). In cases where the defendant has given notice of justifying bail at the time of putting them in, and has accompanied the notice with affidavits by them of their sufficiency, according to the rules *ante*, 583, *post*, 591, then it seems the plaintiff must, if he be desirous of excepting to them, give notice of such exception *one day* or more before the time of putting them in and justifying them has expired (*h*). The notice must be in writing; a verbal notice is not sufficient (*i*). It must be intitled in the cause (*k*), and in the proper court. A notice, intitled by mistake "in the Mayor's Court," instead of "in the King's Bench," was held a nullity; and an attachment against the sheriff was, in consequence, set aside (*l*). But if merely a verbal notice (*m*),

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(*u*) *Thwaites* v. *Gallington*, 4 D. & R. 365: *Hodson* v. *Garrett*, 1 Chit. Rep. 174: and see *Rogers* v. *Mapleback*, 1 H. Bl. 106: *sed vide Hanwell's bail*, 3 Dowl. 425, in which the court considered that a notice of justification waived the want of the entry of the exception.

(*x*) *R.* v. *Shff. of Middlesex*, 5 B. & C. 389; 8 D. & R. 149, *S. C.*

(*y*) R. M., 8 A. r. 2.

(*z*) R. H., 2 W. 4, r. 25.

(*a*) See form of the entry, Chit. Forms, 252.

(*b*) See *Gould* v. *Holmstrom*, 7 East, 510; 3 Smith, 575, *S. C.*

(*c*) *R.* v. *Shff. of Middlesex*, in *Rogers* v. *Porter*, 3 Dowl. 255: *Turner* v. *Cary*, 7 East, 607: *Fuller* v. *Prest*, 7 T. R. 109: *Boldero* v. *Gray*, Cowp. 769.

(*d*) R. M., 8 A. r. 2: R. E., 2 G. 2.

(*e*) *Oldham* v. *Burrell*, 7 T. R. 26: *R.* v. *Shff. of Middlesex*, 5 B. & C. 389, 8 D. & R. 149. *S. C.*

(*f*) *Thwaites* v. *Gallington*, 4 D. & R. 365: *Hodson* v. *Garrett*, 1 Chit Rep. 174.

(*g*) *Oldham* v. *Burrell*, 7 T. R. 26: R. H., 2 W. 4, r. 25

(*h*) See R. T., 1 W. 4, r. 4, *ante*, 586.

(*i*) *Cohn* v. *Davis*, 1 H. Bl. 80: *R.* v. *Shff. of Middlesex*, 5 B. & C. 389; 8 D. & R. 149, *S. C.*

(*k*) *R.* v. *Shff. of Middlesex*, 1 Chit. Rep. 741.

(*l*) *Anon.*, 1 Chit. Rep. 374.

(*m*) *Cohn* v. *Davis*, 1 H. Bl. 80.

or no notice whatever be given (*n*), or if there be any other irregularity in the notice or service of it, yet, if the defendant afterwards give notice of justification, *he* thereby waives the irregularity (*o*).

Justification at Chambers, both in Term and Vacation.

By the general rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 17, if bail "are excepted to in *vacation*, and the notice of exception require them to justify before a judge, the bail shall justify within *four* days from the time of such notice, otherwise on the *first* day of the following term." And bail could not be justified by a defendant not in custody, at a judge's chambers in vacation, unless required by the *plaintiff* pursuant to this rule (*p*). But now, by the rule of *H. T.*, 1 *Vict. r.* 2, "it is ordered that the 18th article of the rule made in Hilary Term, 2 William IV., for regulating the practice of all the courts of Queen's Bench, Common Pleas, and Exchequer of Pleas, be henceforth annulled, and that, in all cases, special bail may be justified before a judge at chambers, both in term and in vacation."

Adding or Changing Bail.

When allowed.

Adding or Changing Bail.] Formerly, before the time for justification expired, (*vide post*, 591), if the bail already put in did not mean to justify, others might be added as of course, within the time allowed for their justification; and, if there was not sufficient time for that purpose, then the defendant might have taken out a summons and procured an order for further time. But now, in order to secure, in the first instance, the sufficiency of the bail put in, and put an end to the former practice of putting in sham bail, by the rule of *T. T.*, 1 *W.* 4, *r.* 5, "the bail of whom notice shall be given, shall not be changed without leave of the court or a judge (*q*)." This rule applies to bail for prisoners (*r*), and to bail put in by the sheriff (*s*), as well as to that put in by a party (*t*). On proper occasions, such leave will be given. And if, after notice of putting in bail, or of putting in and justifying bail, or of justifying bail, and before the day appointed for justifying, the defendant discover that one or both of the bail will not be able to justify, either on account of illness or unforeseen accident, &c. (*u*), the defendant should *immediately, and without any delay, procure other bail, and make an affidavit of the facts, and of the sufficiency of the first bail, and apply to the court for a rule, or to a judge for a summons* (*v*), *for leave to add another or two other bail, and, if necessary, for time to justify the same, and for a stay of proceedings till the time given by the court or judge shall have expired. A copy of the affidavit, and of the summons, should immediately be delivered to the plaintiff's attorney or agent, and, when justice requires, the court or judge will make an order. If the time will not allow an earlier application, then it must be made to the judge at the time appointed for the*

Practical Directions as to.

(*n*) *Rogers* v. *Mapleback*, 1 H. Bl. 106.

(*o*) See form of the notice, Chit. Forms, 252.

(*p*) *Barratt* v. *James*, 5 Dowl. 123.

(*q*) See where the first bail were rejected, *Vestris's bail*, 5 Dowl. 622.

(*r*) *Stroud* v. *Kenny*, Jervis's Rules, 3rd ed. p. 28, n.: 4 M. & Scott, 248, *S. C.*: *sed vide Bird's bail*, 2 Dowl. 583, *contra*.

(*s*) R. v. *Shff. of Essex*, in *Levy* v. *Paine*, 2 Dowl. 782; 4 M. & Scott, 247, *S. C.*

(*t*) *Jones* v. *Vestris*, 3 Bing. N. C. 677.

(*u*) See the instances where time will be given, *post*, 603: and see forms of affidavits, Chit Forms, 253, 254.

(*v*) See form, Chit. Forms, 254.

justification of the original bail; but when it can be made sooner, it ought (*x*). *In any case, you should take care that the summons be returnable before the time for justifying bail has expired*; *and such summons will be a stay of proceedings* (*y*). The court or judge will refuse the application unless they be satisfied by the affidavit that the original bail would have justified, but that a good reason exists why they do not come up to justify (*z*). The circumstance of the defendant not having procured sufficient bail because he expected the cause would be settled, is not enough to allow of the changing the bail (*a*). *After this leave is obtained in the Court of Queen's Bench, add the names and additions of the added bail on the back of the bail-piece at the judge's chambers, or, in the Common Pleas or Exchequer, with the masters* (*b*), *or you may do it at Westminster the morning you justify, if you intend then obtaining leave of the court to add bail; and for this purpose, in the Court of Queen's Bench, you should get the bail-piece from the judge's clerk the evening before. Serve the plaintiff's attorney or agent with a two days'* (*c*) *notice of the added bail.* If the rule or order to add bail be made upon payment of costs, the costs must be paid before the bail can justify (*d*). As to the *notice of justification* of added bail, see *post*, 592.

Added Bail need not be Excepted to.

It is not necessary to *except* to added bail, if the original bail have been excepted to; for they must justify whether excepted to or not (*e*); and for this reason the notice of their being added is always included in the notice of justification.

Original Bail-piece, when a Nullity.

It may be necessary to mention, that if one or both of the bail who come up to justify be rejected for insufficiency, the bail-piece becomes a nullity for this purpose; and you cannot afterwards add new bail upon it; but if you would proceed to a justification of bail, you must give a new notice of putting in and justifying them (*f*), after obtaining leave from the court or a judge (*g*).

Exoneretur of former Bail where others are added.

When bail are added, the court, upon application, will order an *exoneretur* to be entered on the bail-piece as to the former bail, at any time before a *scire facias* is brought against them (*h*); or even after *scire facias* the court will stay proceedings against them (*i*), or allow an *exoneretur* to be entered *nunc pro tunc* (*i*), upon payment of costs.

Notice of Justification.

Notice of Justification of Bail.] Formerly bail could not, unless by consent, or in the case of a prisoner, have justified at the same time they were put in; and the consequence was, that the bail had the trouble of attending twice, (if excepted to), at different times and places; first, at the judge's cham-

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(*x*) See Chit. Sum. Prac. 329.

(*y*) *Redford* v. *Edie*, 6 Taunt. 640.

(*z*) *Elliott* v. *Gutteridge*, 6 Dowl. 255; more fully reported in the Jurist, Vol. 11. p. 135: see *Whitehead* v. *Minn*, 2 C. & J. 54; 2 Tyr. 160, *S. C.*; but this case was decided just after the passing of the above rule of T. T.

(*a*) *Orchard* v. *Glover*, 9 Bing. 318; 2 M. & Scott, 396; 1 Dowl. 707, *S. C.*

(*b*) See the forms, Chit. Forms, 256.

(*c*) *Perry's bail*, 2 C. & J. 475; 1 Dowl. 564, *S. C.*

(*d*) *Jourdain* v. *Green*, 2 Tyr. 491.

(*e*) This is an enabling and not a disabling rule. (See *Davies* v. *Gray*, 2 C. & J. 309: *Gregory* v. *Gurdon*, Barnes, 74).

(*f*) *Lewis* v. *Gadderer*, 5 B. & Ald. 704; 1 D. & R. 350, *S. C.*

(*g*) *Vestris's bail*, 5 Dowl. 622.

(*h*) *Tubb* v. *Tubb*, Say. 58: *Waller* v. *Green*, Id. 308.

(*i*) *Fulke* v. *Bourke*, 1 W. Bl. 462: *Humphrey* v. *Leite*, 4 Burr. 2107.

When to be given, where Bail justify at the time of being put in.

bers when they were put in, and afterwards, in court to justify. To remedy this, by rule of all the courts of *T. T.*, 1 *W.* 4, *r.* 1, "a defendant *may justify bail at the same time at which they are put in*, upon giving *four days' notice* for that purpose, before eleven o'clock in the morning, and exclusive of Sunday" (*k*). "And if the plaintiff is *desirous of time to inquire after the bail*, and shall give *one day's notice* thereof as aforesaid to the defendant, his attorney or agent, as the case may be, before the time appointed for justification, stating therein what further time is required, such time not to exceed *three days* in the case of town bail, and *six days* in the case of country bail, then (unless the court or a judge shall otherwise order) the time for putting in and justifying bail shall be postponed accordingly, and all proceedings shall be stayed in the meantime." The first part of this rule does not apply to country bail (*l*); and, in the case of *town* bail, it is not compulsory on the defendant to adopt it; and he may, if he think fit, proceed as formerly, by putting in bail before a judge, and waiting till they are excepted to, before justification, and then justifying them on their personal attendance in open court, or before a judge or baron at his chambers (*m*). And in the case of a prisoner, he may still, as formerly, put in and justify bail upon a *two* days' notice for that purpose (*n*). The case of *added* bail also is not within the rule (*o*). The notice to be given in pursuance of the rule must be framed and served in the same manner as a notice of justification in other cases, presently noticed, or the bail may in general be opposed for a material defect in it. If in the notice of bail their residences for the last six months be stated, it is not necessary to repeat it in the notice of justification (*p*).

When given in other cases.

In *other cases*, (where you do not purpose justifying bail at the same time at which they are put in), it should be premised that the bail must justify within *four days after notice of exception*, if the notice be given in *term time* (*q*); or if the notice of exception be given in *vacation*, and *the notice require the bail to justify before a judge*, they must justify within *four* days from the time of such notice, otherwise on the *first* day of the ensuing term (*ante*, 589): and these rules, it seems, apply, even although the defendant may have put in bail before the time allowed him for that purpose had expired (*r*). But, after a rule to bring in the body, the defendant has the same time to justify as the sheriff has to bring in the body, namely, four days in town, and eight (*s*) in country cases (*t*). *Notice of justification*

(*k*) This rule does not seem affected by that of R. H., 2 W. 4, r. 16, *post*, 592: *Jenkins* v. *Maltby*, 2 C. & J. 124.

(*l*) *Jones's bail*, 2 Dowl. 159: *Harbottle* v. *Clark*, 4 Dowl. 12: and see *Goddard* v. *Jarvis*, 9 Bing. 88; 2 M. & Scott, 160; 1 Dowl. 278, *S. C.*

(*m*) Tidd, New Prac. 154.

(*n*) *Davies* v. *Grey*, 2 C. & J. 309; 2 Tyr. 277, *S. C.*: *King's bail*, 1 Dowl. 509. The affidavit, however, must state that the defendant is a prisoner where he applies to justify under a two days' notice. (*Poole's bail*, 2 M. & W. 312; 5 Dowl. 449; 1 M. & W. 48, *S. C.*: but see *Pierce's bail*, 5 Dowl. 252, *semb.*, *cont.*)

(*o*) *Key* v. *M'Intyre*, 2 M. & W. 347; 5 Dowl. 453, *S. C.*: *Perry's bail*, 2 C. & J. 475; 1 Dowl. 564, *S. C.*

(*p*) *Higg's bail*, 1 Dowl. 124: see *Johnson's bail*, Id. 438.

(*q*) R. E., 5 G. 2, r. 1.

(*r*) *Seaver* v. *Spraggon*, 2 N. R. 85.

(*s*) R. M., 7 W. 4, *ante*, 554.

(*t*) *Whittle* v. *Oldaker*, 7 B. & C. 478; 1 M. & R. 298, *S. C.*: *Wright* v. *Walker*, 3 B. & P. 564: R. M., 1 W. 4, r. 15, *ante*, 587; but which rule was made after the case of *Ladd* v. *Arnaboldi*, 1 C. & J. 97.

must be given accordingly. If the four or eight days expire on the last day of the term, and the bail do not justify before the rising of the court on that day, the plaintiff may take an assignment of the bail-bond the same evening, and proceed upon it (*u*), or move for an attachment against the sheriff, at the rising of the court, if the rule to bring in the body have expired (*ante*, 555, 556). It should also be observed, that if you are to give notice to justify on the last day of the time limited for justification, and that day happen to be a holiday on which the court do not sit, you must, notwithstanding, give notice for the holiday, in order to prevent an assignment of the bail-bond, and the bail may justify on the day after as a matter of course (*x*).

Time of Service of Notice of Justification.

As to the *time of service* of the notice of justification in these cases, (where you do not purpose justifying the bail at the time of putting them in), if the bail *originally* put in and excepted to intend to justify, by rule of *H. T.*, 2 *W.* 4, *r.* 16, "it shall be *sufficient*, in all cases, if notice of justification of bail be given *two days* before the time of justification." Before this rule, by the practice of the Courts of Queen's Bench (*y*) and Exchequer (*z*), where an exception was entered in the vacation, notice of justification for the ensuing term must have been given within *four* days after such exception, or the plaintiff might take an assignment of the bail-bond: by the practice of the Common Pleas, notice of justification might be given any time in vacation, so that two days' notice was given before the first day of the following term (*a*). This rule seems to have been framed to meet this discrepancy in the practice, and does not alter the notice required by the practice of the different courts where the bail are put in in term, *viz.* in the Queen's Bench one day (*b*), unless Sunday intervene, as Saturday for Monday, Tuesday for Wednesday; and in the Common Pleas and Exchequer *two* days, as Thursday for Saturday, Saturday for Tuesday; the notice in each case to be served before eleven o'clock, A.M. Neither does this rule alter the notice of bail to be put in and justified at the same time (*c*).

If bail are *added*, unless otherwise ordered, there must be *two* days' notice of justification; as Thursday for Saturday, Saturday for Tuesday, (Sunday not being reckoned), &c. The rule of *T. T.*, 1 *W.* 4, *r.* 1, (*ante*, 591), requiring four days' notice of justification when bail are to justify at the same time they are put in, does not apply to added bail (*d*).

The notice of justification, whether of the bail originally put in, or of added bail, must be *served before eleven o'clock in the forenoon of the day in which it is required to be given according to the practice of the court* (*e*) But bail, justifying under a rule or order for time, do not come within this rule, in which

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(*u*) *Dent* v. *Weston*, 8 T. R. 4.

(*x*) Tidd, 9th ed. 260: Imp. B. R. 173.

(*y*) *Milson* v. *King*, 9 East, 434.

(*z*) Man. Prac. 103.

(*a*) *Fowles* v. *Grosvenor*, Barnes, 101.

(*b*) *Wilson* v. *Hawkins*, 5 Dowl. 436; W. W. & D. 45, *S. C.*

(*c*) Jervis's Rules, 58, 59: but see Tidd's Sup. 25: see also *Jones's bail*, 2 Dowl. 159.

(*d*) *Key* v. *M'Intyre*, 2 M. & W. 347; 5 Dowl. 453; 1 M. & H. 44, *S. C.*: *Perry's bail*, 2 C. & J. 475; 1 Dowl. 564, *S. C.*

(*e*) R. T., 59 G. 3, Q. B.: R. M., 60 G. 3, c. 9.

case the notice should, in general, be given before *three* o'clock of the afternoon of the same day (*post*, 604, 605).

How made.

The service should be made in the same manner as the service of a notice of bail already pointed out, ante, 582(*f*); *and the affidavit must state the service accordingly.*

Form of Notice.

As to the *form of the notice* of justification, it must be properly intitled in the court and in the cause; therefore, where it was in the name of one only of two plaintiffs, it was holden bad(*g*). By rule of *H. T.*, 2 *W.* 4, *r.* 18, (*ante*, 580), it must not be of more than *two* bail, unless by leave of the court or a judge, otherwise it will be irregular; and if the court or a judge so order it, you should serve the rule or order on the plaintiff's attorney or agent, before or at the time of the service of the notice of justification. Before this rule a notice that *three* would justify was good in the Queen's Bench and in the Exchequer(*h*); but not so a notice that A., B., and C., *or two of them*, would justify(*i*). The notice should, it seems, contain the christian and surnames of the bail(*k*); but in the Court of Queen's Bench and in the Exchequer, it need not state their *addition* or places of abode, unless it be a notice of justification of added bail(*l*). In an action against several, it is no objection to the notice of justification, that it states the bail will justify for three, bail for two only having been put in(*m*). The notice must state the *time* when the bail will justify, otherwise it will be bad, and the objection cannot be cured by service of a fresh notice in due time, and the allowance of bail upon such a notice would be set aside(*n*). An objection to bail, on the ground that the notice of justification did not state whether they would justify personally or by affidavit, is not good if the bail appear personally (*o*).

By what Attorney given.

Care must be taken that the notice of justification be given by the same attorney that gave the notice of bail (unless, in the meantime, the defendant have obtained an order to change his attorney); otherwise the bail will not be allowed to justify(*p*). But where the defendant's attorney refused to proceed to the justification, the court allowed the bail to appear and justify by their own attorney(*q*). So, where the defendant's attorney gave notice of bail, and the bail to the sheriff by their attorney gave notice of adding and justifying other bail, the court held it to be sufficient(*r*).

Notice Waived. Defects in Exception.

By giving notice of justification, the defendant waives every defect in the notice of exception, and any irregularity in the service of it(*s*).

Justification,

Justification, when, how, and where, &c.] If the defendant, or

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(*f*) *Fowler's bail*, 1 Chit. Rep. 78.

(*g*) Lofft, 237: *Anon.*, 2 Chit. Rep. 77.

(*h*) Lofft, 252: *Jell* v. *Douglass*, 1 Chit. Rep. 601; Forrest, 138; *aliter* in C. P.: *Allen* v. *Keyt*, 2 W. Bl. 1122.

(*i*) Lofft, 26.

(*k*) *Taylor* v. *Halliburton*, 1 Chit. Rep. 351, n.: see *Richardson* v. *Mellish*, 9 Moore, 579.

(*l*) *England* v. *Kerwan*, 1 B. & P. 335: and see *Higg's bail*, 1 Dowl. 124; *aliter* in C. P.: see R. M., 7 G. 4: 4 Bing. 51. See the forms of notices of adding and justifying added bail, Chit. Forms, 255.

(*m*) *Denton's bail*, 1 Dowl. 2.

(*n*) *Staines* v. *Stoneham*, 4 Dowl 678.

(*o*) *Norton's bail*, 1 M. & W. 632; Dowl. 86, *S. C.*

(*p*) *Macpherson* v. *Rorison*, 1 Doug. 217: *Kaye* v. *De Mattos*, 2 W. Bl. 1323: *Hill* v. *Roe*, 2 Marsh. 257; 6 Taunt. 532, *S. C.*

(*q*) *Haggett* v. *Argent*, 7 Taunt. 47.

(*r*) *R.* v. *Shffs. of London*, in *Plomer* v. *Houghton*, 2 B. & Ald. 604: and see *ante*, 55, 575, 576, 582.

(*s*) *Rogers* v. *Mapleback*, 1 H. Bl. 106: *Cohn* v. *Davis*, Id. 80: and *ante*, 589.

when, how, and where, &c.

In what cases the Bail must Justify.

his attorney, has given notice of justifying the bail *at the time of putting them in, and has accompanied the notice with affidavits by them of their sufficiency*, according to the rule of *T. T.*, 1 *W.* 4, *r.* 3, (*ante*, 583), then, unless the plaintiff has given notice of, and entered, his exception to them, at all events, *one* day before the time for so putting in and justifying the bail has expired, they will be considered as justified. If the defendant has given such notice of justifying bail at the time of their being put in, but has *not* accompanied the notice with such affidavit by them of their sufficiency, then they must justify at the time appointed, whether excepted to or not. In other cases, where the defendant has *not given such notice* of justifying the bail *at the time of putting them in*, but has put the bail in in due time, the bail must justify within the time limited for that purpose, (see *ante*, 591), if they be excepted to, but not otherwise. When bail are not put in in due time, they must justify, whether they are excepted to or not (*ante*, 588).

Before 1 & 2 *V. c.* 110, the plaintiff was deemed to have waived justification if he proceeded in the cause; for instance, if he declared absolutely, or demanded, or accepted a plea after declaring *de bene esse* (*t*). Such proceedings, however, cannot, it would seem, amount to a waiver of justification under the *capias* given by that statute (*ante*, 575). Formerly, where bail to the sheriff became bail above, and the plaintiff had taken an assignment of the bail-bond before exception, the necessity for a justification was deemed waived; but this is now otherwise, and they must justify if excepted to (*ante*, 587).

Where and when.

The bail must justify in *open court*, or before a *judge at chambers*, or in vacation before a commissioner under 1 & 2 *V. c.* 45 (*u*), and they may, by stat. 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 12, either in term or vacation, justify before a judge at chambers, or in some other convenient place, to be appointed by him, and this, whether defendant be in custody or not (*x*). Agreeably to this statute a rule in *M. T.*, 1 *W.* 4, *r.* 2, *s.* 16, was made in the Exchequer, "that all special bail shall be justified, within *four* days after exception before a baron at chambers, as well in term as in vacation" (*y*). And now, by rule of all the courts of *H. T.*, 1 *Vict.*, "in all cases, special bail may be justified before a judge in chambers both in term and in vacation" (*z*). It may be proper to observe, that the justification must take place in the usual time, notwithstanding the defendant was arrested between the 10th of August and the 24th of October (*a*). If a judge be not attending at chambers, so that the bail are prevented from justifying in proper time, that will be a good reason for their not doing so (*a*).

How Justified at Chambers.

Before a judge at chambers, bail are thus justified:—If the action be in the Queen's Bench, *as the bail-piece remains at the*

(*t*) R. M., 8 A. r. 1: Id. r. 2: *Lister* v. *Wainhouse*, Barnes, 92: *Law* v. *Stevens*, 1 Dowl. 425. The rule, however, does not extend to prisoners. (See further, *R.* v. *Shffs. of Middlesex*, in *Halliday* v. *Locke*, 4 D. & R. 835: *R.* v. *Shffs. of London*, in *Marsh* v. *Russell*, 1 Id. 163).

(*u*) See *ante*, 578.

(*x*) Before this act bail were justified in *term*, either in *full* court or in the Q. B., before a judge in the Bail Court, except where the defendant was a prisoner, in which case they might have justified before a judge at chambers in *vacation*, by stat. 43 G. 3, c. 46, s. 6.

(*y*) 1 C. & J. 281: 1 Tyr. 163.

(*z*) See the former rules H. T., 1 W. 4, Ex. and H. T., 2 W. 4, s. 17.

(*a*) *R.* v. *Shff. of Middlesex*, in *Wollaston* v. *Wright*, 2 Dowl. 286.

judge's chambers, let the bail accompany you there. If the bail be opposed but not rejected, or if unopposed, after waiting on him and ascertaining that the opposite party does not attend, they may be sworn by the judge's clerk, and upon answering two questions put by him—that they are housekeepers or freeholders, (as the case may be), and are worth the required amount of property, (post, 596), *their justification is complete, and they are ordered to be admitted to bail; but the recognisance of bail must be finally allowed by a rule of court founded on the judge's order* (*b*). If the action be in the Common Pleas or Exchequer, *the practice is the same, except that, the evening before the day of justification, desire the master's clerk to have his book or the bail piece at the judge's chambers.* The justification before a commissioner in vacation, under 1 & 2 *V. c.* 45, may be effected in nearly the same way, *mutatis mutandis.*

Before a Commissioner.

In Court.

In Court, bail are thus justified:—If the action be in the Queen's Bench, *the evening before, desire the judge's clerk to bring the bail-piece into court, and he will accordingly do so, and deliver it to one of the masters; or the judge's clerk will give you the bail-piece, and you may deliver it the next morning to one of the masters in court. If the bail-piece be not in court the bail cannot justify. Make an affidavit of service of the notice of justification, with a copy of the notice annexed* (*c*). *If you have accompanied the notice of bail with an affidavit by the bail of their sufficiency, according to the rules*, ante, 583, *then let the affidavit of service of the notice of justification also state that fact, and let a copy of the notice of bail and the affidavits of sufficiency be annexed* (*d*). If the action be in the Common Pleas or Exchequer, *the practice is the same, except that, on the evening before the day of justification, desire the master's clerk to have his book or the bail-piece in court on the following morning.* The affidavit should state how the service was made (*e*), and must be properly intitled (*f*). If the service of the affidavit was originally defective, but was rendered sufficient by the plaintiff's attorney having acknowledged the receipt of it, or by his having consented to waive the improper service or otherwise, then let the affidavit state the facts accordingly (*g*). *In either of the courts give the affidavit to counsel, with a motion paper indorsed to "move to justify the within bail," who will move it accordingly. Attend at Westminster with the bail, and they will be called in their turn, and sworn.* They will be allowed to justify, as a matter of course, unless opposed.

In Bail Court.

The Bail Court of the Court of Queen's Bench is in Westminster Hall, at Westminster; and one of the puisne judges (*h*) of the Court of Queen's Bench attends there every morning before ten o'clock (*i*), usually at half-past nine, for the purpose of taking the justification of bail, and continues to sit until all the bail have justified. The bail should be in attendance at the court by half-past nine in the morning; and

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(*b*) See Bagley's Prac. 147.

(*c*) See the form, Chit. Forms, 256.

(*d*) Id. 257.

(*e*) *Yates's bail*, 1 Chit. Rep. 43.

(*f*) *Hayward's bail*, 1 Chit. Rep. 1. Where the notice of justification was served, and affidavit of service thereof was made by different attornies, without a rule to change the former attorney, the bail was rejected. (*Anon.*, 2 Chit. Rep. 87).

(*g*) See *Saunder's bail*, 1 Chit. Rep. 77. See forms, Chit. Sum. Prac. 334.

(*h*) See the 11 G. 4 & 1 W. 4, c. 70, s. 1.

(*i*) R. T., 35 G. 3: H., 46 G. 3.

if bail be not ready and papers delivered to counsel by ten o'clock, no bail is to be taken after that hour (*k*). Where there are but few bail, the bail must be very punctual, for, if not ready, the judge will not wait even till ten o'clock; but when bail are numerous, the exact time of their attendance is not usually inquired into; and sometimes the judge has even returned to the court *ex gratiâ*, to prevent expense and inconvenience, to receive the justification when the bail have attended immediately after the rising of the court, at or before ten o'clock; and, under particular circumstances, after the rising of the judge in the Bail Court, the full court have, on the same day, granted a rule for justifying bail on a subsequent day, with a stay, in the meantime, of any proceedings, so as to prevent an assignment of the bail-bond, or attachment against the sheriff; and such an indulgence may now be obtained on motion to the single judge in the morning (*l*). On the last day of term bail may justify at the rising of the court.

In C. P. and Exch.

In the Common Pleas and Exchequer, there is no distinct or separate court for the justification of bail. In the Common Pleas, it is a rule (*m*) that "bail shall justify at the *sitting* of the court only, and at no other time, except on the last day of term, when bail, who may have been prevented from attending at the sitting of the court, shall be permitted to justify at the *rising* of the court." And, in the Exchequer, the *junior* baron attends in court alone, a few minutes before ten o'clock, every morning during term, for the purpose of taking the justification of bail, and such motions as are merely of course; and it is expected that all such matters should be then brought on, in order that they may be disposed of before the court is full, that they may not interfere with the more important business (*n*). This, however, does not extend to the justification of bail by affidavit (*o*). But no bail will be permitted to justify in person, unless they are in attendance, and counsel instructed, by half-past *ten* o'clock at the latest (*p*).

Amount to which Bail must justify.

Each of the bail must swear that he is a housekeeper or freeholder (*q*), *and worth double the sum sworn to, after all his just debts are paid.* Where the sum sworn to, however, exceeds 1,000*l.*, it is required only that he should justify for 1,000*l.* more (*r*); as, if the sum sworn to be 1,500*l.*, each of the bail must justify for 2,500*l.* Bail put in *after* judgment must justify to double the amount of the sum recovered (*s*). We shall hereafter notice how the plaintiff may act if the bail be guilty of perjury or prevarication, &c. (*post*, 607).

Consequences of not Justifying.

If the bail do not justify within the time limited for that purpose, and no further time be given, they are out of court, and proceedings may be had against the sheriff or on the bail-

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(*k*) R. T., 35 G. 3: R. H., 46 G. 3: R. H., 59 G. 3.

(*l*) Chit. Sum. Prac. 56.

(*m*) R. M., 51 G. 3, C. P.: 3 Taunt. 569: 2 Chit. Rep. 378: Tidd, 9th ed. 263: but see *Hoper* v. *Jacobs*, 8 Taunt. 56; where bail were permitted to justify, under particular circumstances, at the *rising* of the court before the last day of term.

(*n*) 8 Price, 612: and see R. E., 56 G. 3, in Scac.: 2 Chit Rep. 381: 2 Price, 327: 4 Price, 155: 2 Chit. Rep. 94.

(*o*) 3 Price, 35.

(*p*) 9 Price, 57.

(*q*) *Per cur.*, M. T., 10 G. 4, C. P.; after conference with all the judges (*post*, 599).

(*r*) R. M., 51 G. 3.

(*s*) Ante, 579.

bond (*t*). The court or a judge in such a case will, upon application, order their names to be struck out of the bail-piece (*u*). Whilst their names remain on the bail-piece, they are still considered bail for the purpose of rendering their principal (*x*).

Opposing the Justification of Bail.

Opposing the Justification of Bail.] Bail are allowed to justify, as a matter of course, unless opposed; and it may be necessary to mention, that, by opposing them, you do not waive any right you may have of proceeding afterwards upon the bail-bond (*y*), or against the sheriff (*z*). If you intend to oppose the justification, *you should, as soon as the affidavits (if any) of sufficiency, or the notice of justification, has been served on you, make inquiries as to the solvency or sufficiency of the bail. Inquiries of the collectors of taxes, rates, &c., in the parishes in which the bail respectively reside, to ascertain whether they are in arrear for their taxes, &c., or of their landlords or neighbours, to ascertain their credit and responsibility, may perhaps furnish you with objections to their justifying.* If the justification takes place in court, *then deliver a brief to counsel for that purpose, and he will oppose them, either by examining them, after they are sworn, as to any matter of objection you may have suggested in the brief, or as to the matters of any affidavit with which you may have furnished him (which must first, however, be given in to one of the masters, and read (a)); or by shewing, before he has examined the bail, some defect in the notices required previous to justification, or some irregularity in the service of them.* If the justification takes place at a judge's chambers, *then you may oppose the bail without the aid of counsel, if you think fit.* If an affidavit be used against bail, it must set forth the particular objections intended to be relied on against them; merely stating matters of report and general opinion will not suffice (*b*). The bail may be asked questions respecting their qualifications as housekeepers or freeholders, and the nature and extent of their property to the amount of the sum for which they are required to be answerable, but no further; and the questions are not allowed to be asked which will unnecessarily expose the circumstances of bail, or of other persons (*c*). The counsel who moved to justify the bail may, before the judge has finally decided against admitting the bail, interpose and put questions to them, tending to remove any *primâ facie* objections, and may prevent the opposing counsel from pressing improper questions (*d*). If bail be opposed in two actions, they must be opposed in each separately (*e*). A mistake of counsel, in omitting to oppose in time, will not be a ground for being afterwards permitted to examine them (*f*).

Usual Grounds of Opposition.

The usual grounds of opposition to bail are as follows:—

1. That there is some defect in the notice of bail; as, that it

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(*t*) See *Hardwick* v. *Bluck*, 7 T. R. 297: *Dent* v. *Weston*, 8 Id. 4; 2 Saund. 61 a.

(*u*) *Humphrey* v. *Leite*, 4 Burr. 2107: *Jones* v. *Tub*, 1 Wils. 337; Say. 58: *Fulke* v. *Bourke*, 1 W. Bl. 462.

(*x*) MS., E. 1817: R. H., 2 W. 4, r. 20: and see *R.* v. *Shff. of Essex*, 5 T. R. 633.

(*y*) *Boldero* v. *Gray*, Cowp. 769.

(*z*) *Williams* v. *Waterfield*, 1 B. & P. 334.

(*a*) *Anon.*, 1 Chit. Rep. 373, n.

(*b*) *Sanderson's bail*, 1 Chit. Rep. 676: *Williams* v *Hunt*, Id. 321.

(*c*) Tidd, 9th ed. 274.

(*d*) Chit. Sum. Prac. 59. See form of affidavit to oppose bail, Chit. Forms, 258.

(*e*) *Anon.*, 2 Chit. Rep. 94.

(*f*) *Butler's bail*, 1 Chit. Rep. 83: *Waterhouse's bail*, Id. 573, n: *Hawkins* v. *Wilson*, 4 Taunt. 666: but see *Addison* v. *Foster*, 2 Chit. Rep. 98.

1. Defects in the Notice of Bail.

is given by a wrong attorney, (see *ante*, 582), or that it is not correctly intitled in the court or cause (*ante*, 579); or, that it contains a notice of more than two bail (*ante*, 580); or that the names or additions of the bail, or their places of abode, are omitted, or not stated with truth or with sufficient certainty; or that they are not described as housekeepers or freeholders (see *ante*, 580) (*g*): for the notice of bail must be framed with such a reasonable degree of certainty, as will render it very improbable that the plaintiff shall not be able to find out the residence of the bail, and make his inquiries as to their sufficiency, or that he shall mistake them for other persons. Obtaining time to inquire after the bail will, in general, cure a defect in the notice of them, unless it be such as would mislead plaintiff in his inquiries (*h*). It seems that, in the Court of Common Pleas, any uncertainty in the description of the bail in the notice of bail, is cured by the plaintiff's excepting to them, though this seems questionable (*i*).

2. Irregular Service of that Notice.

2. That there has been some irregularity in the service of the notice of bail. (*See ante*, 582).

3. Defect in Notice of Justification.

3. That there is some defect in the notice of justification (*ante*, 593); and it must be observed, that when a notice of added bail is contained in the notice of justification, their additions and places of abode must be stated with the same certainty, &c., as in the notice of bail; and the notice of justification in such a case is consequently liable to the same objections. An objection to a notice of justification, which stated that the bail would justify at eleven instead of ten, is waived by the plaintiff's appearing to oppose at ten (*j*).

4. Irregular Service of that Notice.

4. That there has been some irregularity in the service of the notice of justification: as that it was not served in time, or served after nine o'clock at night, or the like (*ante*, 592).

5. Irregular Affidavits of Sufficiency.

5. That the affidavits or affidavit (if any) of the sufficiency of the bail, or the copies of them, are insufficient, (see *ante*, 583), or have been improperly served (*ante*, 584). If the affidavit be insufficient, the insufficiency will not be waived by the plaintiff's not appearing to oppose the bail (*k*).

Preceding Objections, in general, useless.

There is not, in general, much use in making any opposition upon the grounds stated in these five preceding objections; if you have found the bail, so as to be able to make inquiries as to their responsibility, the court or judge will frequently overlook the objection altogether, although they will not allow the defendant the costs of justification (*l*); or if you have been misled by the notice, &c., so as not to be able to make such inquiries, the court or a judge will give you time for that purpose, and order the bail to attend to justify at another time, or else order the defendant to give a fresh notice (*m*); the defendant in either case being generally ordered to pay the costs of the first attendance of the plaintiff to oppose the bail, and also, in the event of the bail being afterwards rejected, the costs of the second attendance to oppose them.

(*g*) *Bell* v. *Foster*, 8 Bing. 335.

(*h*) *Foster's bail*, 2 Dowl. 586.

(*i*) *Bigg* v. *Dick*, 1 Taunt. 17: see *Welsh* v. *Lywood*, 1 Bing. N. C. 258.

(*j*) *Beale's bail*, 3 Dowl. 708.

(*k*) *Welsh* v. *Lywood*, 1 Bing. N. C. 258.

(*l*) *De Bode's bail*, 1 Dowl 368: *Stevens* v. *Miller*, 2 M. & W. 368: Bagley's Prac. 159.

(*m*) See *Fearnley's bail*, 1 Dowl. 40.

6. No Bail-bond taken, &c.

6. That no bail-bond has been taken, and that an action for an escape has been brought against the sheriff (*n*).

7. That the Bail are not Housekeepers or Freeholders.

7. That the bail are not housekeepers or freeholders.—If they be, however, the amount of the rent of their houses or annual value of their freeholds is not material (*o*); nor is it necessary that they should be assessed to the poor's rate, &c. (*p*). A copyhold estate of the bail in right of his wife is not sufficient (*q*). Although, in one case (*r*), it was decided that long beneficial leases, at small rents, were sufficient to entitle the bail to justify; yet it is now settled that no bail shall be allowed to justify, unless he be a housekeeper or freeholder (*s*). The bail must be in actual possession of the whole or some main part of the house (*t*). A notice of bail, describing him as a housekeeper, is insufficient, if he is only a lodger, although on examination it appears that he is a freeholder (*u*). If the bail be likely to become a housekeeper in two or three days, time to justify might be allowed (*x*). Being a housekeeper or freeholder in Scotland or Ireland will not suffice (*y*). The Court of Common Pleas have allowed a person to justify as bail in respect of a house kept by him and his partner, who carried on business therein, where the rent and taxes were paid by them jointly, and his partner resided in the house, though he lodged himself at a considerable distance therefrom (*z*); and where a person had taken a house occupied by several tenants or lodgers, from one of whom he had received rent, he was holden to be qualified to justify as bail, though he had not occupied the house himself (*a*). With the plaintiff's consent, persons who are not housekeepers or freeholders may justify (*b*).

8. That the Bail are not worth double the Sum indorsed on the Writ, &c.

8. That they are not worth double the sum indorsed on the writ, (or if that sum exceed 1,000*l*., then 1,000*l*. in addition to it), after payment of all their just debts; or, that they are uncertificated bankrupts; or have been bankrupts a second time, and have not paid 15*s*. in the pound under their second commission; or insolvent debtors, and have not paid 20*s*. in the pound on the debts inserted in their schedule (*c*). So counsel may examine them as to any circumstance of suspicion that may be suggested to him, such as their being unable to pay their rent, taxes (*d*), small debts, &c. It is no objection of itself, however, that the bail is drawer or indorser of the bill of exchange upon which the action is brought against the defendant (*e*). But it is an objection that he remains liable on outstanding dishonoured bills (*f*); and the acceptor of a dishonoured bill was, in a late case, held not competent to become

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(*n*) *Fuller* v. *Prest*, 7 T. R. 109: *Webb* v. *Matthew*, 1 B. & P. 225: and see *R.* v. *Shffs. of London*, in *Todd* v. *Jacob*, 2 B. & Ald. 354.

(*o*) Lofft, 148.

(*p*) Id. 328.

(*q*) *Anon.*, 2 Chit. Rep. 97.

(*r*) Id. 96.

(*s*) *Smith's bail*, 1 Dowl. 1: *et per cur.*, M. T., 10 G. 4, C. P., after conference with all the judges: and *Anon.*, 1 Dowl. 127.

(*t*) *Bold's bail*, 1 Chit. Rep. 288: *Anon.*, Id. 6: *Walker's bail*, Id. 316: *Slade's bail*, Id. 502.

(*u*) *Wilson's bail*, 2 Dowl. 431.

(*x*) *Bold's bail*, 1 Chit. Rep. 288.

(*y*) See *Anon.*, 1 Dowl. 61.

(*z*) *Hemming* v. *Plenty*, 1 Moore, 529: *Savage* v. *Hall*, 1 Bing. 430; 8 Moore, 525, *S. C.*

(*a*) *Coehn* v. *Waterhouse*, 8 Moore, 365.

(*b*) *Saggers* v. *Gordon*, 5 Taunt. 174.

(*c*) See *Smith* v. *Roberts*, 1 Chit. Rep. 9.

(*d*) *Lewis* v. *Thompson*, Id. 309.

(*e*) *Prime* v. *Beeseley*, 3 Bing. N. C. 391; 5 Dowl. 477, *S. C.*: *Harris* v. *Manley*, 2 B. & P. 526: *Mitchell's bail*, 1 Chit. Rep. 287.

(*f*) *Barnesdall* v. *Stretton*, 2 Id. 79.

bail in an action against the drawer(*g*). Where the qualifying property consisted of money deposited in the hands of bail to indemnify him, the qualification was held insufficient(*h*).

Where the bail had suffered his children(*i*) or father (*j*) to receive parochial relief, he was rejected.

Where the bail did not know whether he had been arrested or not during the space of two years, he was rejected(*k*).

9. That the Bail are Foreigners.

9. That they are foreigners, and have no property in this country(*l*). Yet a *native* of England has been allowed to justify, in respect of property partly in England and partly abroad (*m*).

10. That they are privileged Persons.

10. That they are privileged persons:—as, for instance, any person having privilege of parliament will not be allowed to justify, on account of his privilege from arrest(*n*); so a person entitled to privilege as one of the servants in ordinary of the queen(*o*), or a domestic servant of a foreign ambassador(*p*), will not be allowed to justify; and it has been doubted whether a person living within the verge of the palace shall be allowed to justify, particularly if there be suspicious circumstances in the case, such as his being much in debt, or the like(*q*).

11. That they have been Bail before, &c.

11. That they have been bail before, and know not in how many actions, or for what sums(*r*). A bail was rejected who had been bail to the sheriff in a former action and not excepted to, it appearing that his property was not sufficient for both actions(*s*).

12. That they have been previously rejected as Bail.

12. That they have been before rejected as bail.—And the court will not allow them to justify, even though unopposed(*t*). There is a book kept by the master, containing the names of such bail as have been rejected for insufficiency, prevarication, or the like, and are not deemed proper persons to become bail; and that the name of the bail is inserted in this book, is, in general, considered so conclusive an objection to him, that the court will not allow him to justify (*u*). Even where it was not discovered, until after bail had been opposed and allowed, that one of them had, on a former occasion, been rejected for insufficiency, the court set aside the rule of allowance, although it appeared that he had since become a person of considerable property (*x*). But the court will not extend this objection to cases clearly not within the reason of the rule: and, therefore, where the former rejection was merely on the

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(*g*) *Anon.*, 1 Dowl. 183.

(*h*) *Nicholl's bail*, 1 Hodges, 77.

(*i*) *Anon.*, 2 Chit. Rep. 77.

(*j*) *Holm* v. *Booth*, 2 Chit. Rep. 78.

(*k*) *Newman's bail*, 2 Chit. Rep. 95.

(*l*) *Boddy* v. *Leyland*, 4 Burr. 2526: *Levy's bail*, 1 Chit. Rep. 285: but see *Guichard* v. *Roberts*, 1 W. Bl. 444; 2 Id. 1323, 957: Tidd, 9th ed. 270.

(*m*) *Beardmore* v. *Phillips*, 4 M. & Sel. 173: *Graham* v. *Anderson*, Id. 371: and see Tidd, 9th ed. 246: *Tomsey* v. *Napier*, 8 Taunt. 148. The distinction seems to be between *foreigners* and *British subjects*. The former are not allowed to justify in respect of property abroad, but the latter, under circumstances, may. (See Tidd, 9th ed. 271: 1 Chit. Rep. 285, n.)

(*n*) *Duncan* v. *Hill*, 1 D. & R. 126; 2 B. & B. 682; 5 Moore, 567, *S. C.*: *Graham* v. *Stuart*, 4 Taunt. 249.

(*o*) See *ante*, 464: *Anon.*, 1 D. & R. 127.

(*p*) *Lock's bail*, 1 Dowl. 124.

(*q*) *Glead* v. *Mackay*, 2 W. Bl. 956.

(*r*) Lofft, 72, 194.

(*s*) *Varden* v. *Wilson*, 1 Chit. Rep. 287.

(*t*) *Laporte's bail*, 3 Dowl. 110.

(*u*) See Tidd, 9th ed. 275: *Snell's bail*, 1 Chit. Rep. 82; though rejected in another court. (*Monk's bail*, Id. 676).

(*x*) *Pickard* v. *Dobson*, 3 D. & R. 5: and see *Gould* v. *Berry*, 1 Chit. Rep. 143: *Waterhouse's bail*, Id. 307.

ground of the bail being on that occasion indemnified by the defendant's attorney, the court allowed him to justify (*y*).

13. That they are hired.

13. That they are hired bail (*z*).—In a recent case bail was rejected where he was to receive a commission on the amount for which he proposed to justify (*a*).

14. That they do not know the Defendant.

14. That they do not know the defendant.—This, however, is but a mere circumstance of suspicion, and may be satisfactorily explained (*b*).

15. That they are Attornies of Clerks.

15. That they are attornies (*c*); or the clerks (whether articled or not) of such an attorney (*d*); and it makes no difference, that they are not the clerks of the defendant's attorney (*e*).—The plaintiff may, indeed, if he chooses, treat such bail as a *nullity*, if they be *practising* attornies, or clerks of practising attornies (*f*). For the same reason, bail who have been indemnified by an attorney are not allowed to justify (*g*), for this would be a mere evasion of the rule; but it is no objection that they are indemnified by any other person (*h*). Such indemnified bail, however, could not be treated as a nullity.

16. That they are Sheriff's Officers, Bailiffs, &c.

16. That they are sheriff's officers, bailiffs, or other persons concerned in the execution of process (*i*); and this rule extends to Marshalsea court officers, and all other officers having the execution of the process of any court (*k*), and to the keeper of the Poultry Compter (*l*), and the like (*m*). For the same reason, bail who have been indemnified by a sheriff's officer shall not be allowed to justify (*n*), for this would be a mere evasion of the rule.

17. That they have been guilty of a Crime.

17. That they have been in the pillory for perjury; and they may be asked this question (*o*).

It is no objection that the bail is a gaming-house keeper (*p*), or a brothel-house keeper (*q*), or that he has been transported (*r*); the inquiry being not as to the character of the bail, but as to the sufficiency of his property.

18. That they have been Outlawed.

18. That they have been outlawed after judgment (*s*).

Costs of Justification or Opposition. Where Affidavit of Justifi-

Costs of Justification or Opposition.] We have seen, (*ante*, 583), that if the plaintiff except to the bail *after the notice of putting them in has been accompanied with an affidavit of justification*, (as prescribed by the rule of court of *T. T.*,

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(*y*) —— v. *Hallet*, 1 D. & R. 488.

(*z*) See 4 Bing. 38: 7 D. & R. 783.

(*a*) *Foxall's bail*, 7 D. & R. 783: and see *Wylie* v. *Jones*, 2 D. & R. 253: *Ward* v. *Jones*, 1 B. & Cres. 268, *S. C.*: *post*, 607.

(*b*) *Jameson's bail*, 2 Chit. Rep. 97: *Anon.*, 1 Dowl. 1.

(*c*) R. H., 2 W. 4, r. 13, *ante*, 48: R. M., 14 G. 2, r. 1: Doug. 467, n., &c.

(*d*) R. H., 2 W. 4, r. 13, *ante*, 48: 1 H. Bl. 76: 2 Id. 350.

(*e*) *Redit* v. *Broomhead*, 2 B. & P. 564: *Bozon* v. *Falconer*, MS., E. 1824.

(*f*) R. H., 2 W. 4, r. 13, *ante*, 48.

(*g*) Whether the indemnity be in writing or not. (*Greensill* v. *Hopley*, 1 B. & P. 103: *Preston* v. *Bindley*, Tidd, 9th ed. 269: *Anon.*, 1 Dowl. 1). In which latter case the bail, though not actually indemnified, expected to be indemnified by the defendant's attorney, and was rejected. (See, however, *Hunt* v. *Blackquiere*, 4 Bing 588).

(*h*) *Neat* v. *Allen*, 1 B. & P. 21.

(*i*) R. M., 14 G. 2. r. 2: see *Bolland* v. *Pritchard*, 2 W. Bl. 799: *Doldern* v. *Feast*, 2 Str. 890: Lofft, 153.

(*k*) *Bolland* v. *Pritchard*, 2 W. Bl. 799.

(*l*) *Hawkins* v. *Magnall*, Doug. 466.

(*m*) See *Daly* v. *Brooshoft*, 2 B. & B. 359; 5 Moore, 72, *S. C.*: but see *Faulkner* v. *Wis* , 2 B. & P. 150.

(*n*) —— v. *Harvey*, MS., E. 1824: *sed vide Chick's bail*, 1 Chit. Rep. 714, *contra*.

(*o*) *R.* v. *Edwards*, 4 T. R. 440. The punishment of pillory is now abolished altogether, by 50 G. 3, c. 138, and 1 V. c. 3.

(*p*) *Anon.*, 1 Dowl. 160.

(*q*) *Gouge's bail*, 3 Dowl. 320.

(*r*) *Hatfield's case*, 2 Chit. 98.

(*s*) *R.* v. *Edwards*, 4 T. R. 440.

cation served with Notice of Bail.

1 *W.* 4, *r.* 3, *ante*, 583), and the bail *justify*, the plaintiff will have to pay the costs of such justification: if, on the other hand, the bail, after making such affidavit, be *rejected*, the defendant will have to pay the costs of the *opposition*, unless otherwise ordered. And this applies equally to *country* as to town bail(*t*).

When Bail justify after such Affidavit.

If the bail justify, and the affidavit of justification be such as is required by the above rule, the plaintiff will then, as of course, have to pay the costs of justification. The defendant should apply for them at the time of justification(*u*). On the other hand, where they justify, but such affidavit is substantially defective, the justification will be, in general, allowed only on the terms of defendant's paying the costs of opposition. Thus, those terms will be imposed if the bail have not property according to that described in the affidavit, but have *other* property sufficient to enable him to justify(*x*). Where a notice of bail did not state the number of the houses where the bail had resided, the court, upon that ground, although the bail had been found and proved to be sufficient, made the defendant pay the costs of the opposition(*y*). If the defect in the affidavit be of a technical nature only, then the court do not, in general, make the defendant pay the costs of the opposition, but merely deprive him of the costs of justification. As where the affidavit of justification stated the bail to be *possessed* instead of *worth* the required sum, the defendant was deprived of the costs of justification(*z*); so he was deprived of them where the affidavit described the bail as of a particular place, but did not go on to state that he *resided* there(*a*); and so where there was a defect in the notice of bail, and further time was given to inquire after them, and they ultimately justified(*b*). If the defendant give a second or amended notice of bail, after a first, accompanied by affidavits of justification, the second notice must also, it seems, be accompanied by such affidavits, to entitle him to the costs of an unsuccessful opposition(*c*). Where the notice of bail was accompanied by a writing which purported to be made by both the bail, but which, on examination, was evidently not the original affidavit, nor was it headed "copy," nor was anything stated on the face of it to shew that it was a copy, the court disallowed the costs of justification(*d*).

When Bail rejected after such Affidavit.

When the bail are *rejected*, the costs of opposing them are granted as a matter of course to the plaintiff, under the above rule of *T. T.*, unless some very strong grounds be shewn on the part of the defendant for putting in bail who could not justify(*e*). Where bail were rejected, on the ground of a defect in the affidavit of justification, in omitting to describe one of the bail as a housekeeper or freeholder, the court refused to allow the plaintiff the costs of his opposition, or of

(*t*) See *Grant's bail*, 3 Dowl. 165; 1 C., M. & R. 598, *S. C.*

(*u*) *Fream* v. *Best*, 2 Dowl. 590.

(*x*) *Jackson's bail*, 1 Dowl. 172: *Hemming* v. *Blake*, Id. 179.

(*y*) *Innis* v. *Muir*, 2 C. & J. 634; 2 Tyr. 742, *S. C.*

(*z*) *Carter's bail*, 5 Dowl. 577: *Thomson's bail*, 2 Dowl. 50: and see *Popjoy's bail*, 1 C., M. & R. 594: *Miller's bail*, 5 Dowl. 602.

(*a*) *Heald's bail*, 3 Dowl. 423; 5 Tyr. 231, *S. C.*

(*b*) *Anon.*, 1 Dowl. 127: and see *Thomson's bail*, Id. 497.

(*c*) Tidd's New Rules, 26 (published in 1832): *Anon.*, *per Bayley*, J., MS., 1831.

(*d*) *West* v. *Williams*, 3 B. & Ad. 345; 1 Dowl. 162, *S. C.*

(*e*) *Evans's bail*, 1 Dowl. 384: Tidd, New Prac. 157.

the opposition to a former justification, on the ground of a defective notice (*f*). And, in general, it seems the costs of opposing bail will not be allowed, where they have been rejected on purely technical grounds (*g*).

In Q. B. where several Notices of Justification given, and Bail appear to Justify.

By *R. H.*, 1822, Q. B., "whenever two or more notices of justification of bail shall have been given before the notice on which the bail shall appear to justify, no bail shall be permitted to justify without first paying (or securing to the satisfaction of the plaintiff, his attorney, or agent) the reasonable costs incurred by such prior notices, although the names of the persons intended to justify, or one of them, may not have been changed, and whether the bail mentioned in any such prior notice shall not have appeared or shall have been rejected" (*h*). The rule does not extend to country bail, the words "*appear* to justify" indicating that it is intended to apply to town bail only (*i*).

The like, where they do not appear.

Where several notices of bail are vexatiously given, without justifying, the court will compel the defendant, or his attorney, to pay the costs occasioned by them to the plaintiff, though the bail do not appear to justify (*k*); and, in some cases, the defendant's attorney might be ordered to pay the costs (*l*).

In C. P. and Exch., of former Opposition.

In the Common Pleas (*m*) and Exchequer (*n*), if bail be *once* successfully opposed, the costs must be paid, or a deposit with the master of a sufficient sum to cover them, before other bail will be allowed to justify. And this in the case of country bail as well as town bail (*o*), or in the case of a prisoner (*p*). The application for these costs should, it seems, be made before the bail are sworn (*q*). In practice, it is usual in these cases to deposit a sum of money (generally 5*l.*) with the master in court to satisfy the amount of costs when taxed, unless indeed the plaintiff's attorney consent to take the defendant's attorney's undertaking for the payment of them.

Further Time for Justifying.

Further Time for Justifying.] Before the time for justification has expired, if the defendant's attorney wish for an extension of time to add and justify bail, he may in general obtain it *upon summons*, if it appear to the judge to be necessary, and not sought merely for the purpose of delay (*r*). And this, even where money has been deposited with the sheriff in lieu of bail (*s*).

In what Cases granted.

As to the cases in which time for justifying will be granted, if the bail, from illness or any unforeseen accident, cannot

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(*f*) *Kibble* v. *Thorburn*, 2 M. & Scott, 359: see *Beal's bail*, 3 Dowl. 708.

(*g*) *Innis* v. *Muir*, 2 C. & J. 634; 2 Tyr. 742, *S. C.*: *Hanwell's bail*, 3 Dowl. 425: Tidd, New Prac. 157.

(*h*) See *Blundell* v. *Blundell*, 1 D. & R. 142; 5 B. & Ald. 533, *S. C.*

(*i*) *Henderson* v. *Dorling*, MS., E. 1824: *Fennell* v. *Gardner*, MS., E. 1829.

(*k*) See *Aldiss* v. *Burgess*, 3 B. & Ald. 759.

(*l*) See *Blundell* v. *Blundell*, 1 D. & R. 142; 5 B. & Ald. 533, *S. C.*: and —— v. *Clarke*, 2 Chit. Rep. 89.

(*m*) *R.* v. *Shff. of Middlesex*, in *Irwin* v. *Hogg*, 1 Taunt. 57: *Knight's bail*, 4 Dowl. 328; Tidd, 9th ed. 271.

(*n*) *Smith* v. *Cooper's Assignees*, 1 Dowl. 287; 1 C. & J. 460; 1 Tyr. 378, *S. C.*: *Barrow* v. *Whitehead*, 2 Y. & J. 3: *Pasmore's bail*, 3 Dowl. 214.

(*o*) *Turley's bail*, 4 Dowl. 498.

(*p*) *Pasmore's bail*, 3 Dowl. 214 (*sed vide Davis* v. *Gray*, there cited): *R.* v. *Shff. of Middlesex*, in *Irwin* v. *Hogg*, 1 Taunt. 57.

(*q*) See *Knight's bail*, 4 Dowl. 328.

(*r*) See *Maude* v. *Jowett*, 3 East, 145: see *Joyce* v. *Platt*, 6 Bing. 377, where the Court of Common Pleas refused to grant time to put in bail, in order to await the decision of the judges on an indictment preferred against the defendant.

(*s*) *Parker* v. *Turner*, 2 Chit. Rep. 71.

attend, or if, after notice of justification given, they refuse to attend, the court or a judge, upon an affidavit of the fact, and that the person who has not attended had consented to become bail; and that, if he had attended, he would have been able to justify as good and sufficient bail in the action, and that the defendant has been taken by surprise, will, in general, grant a further time, either to justify the same bail, or to add and justify others (*t*). So, if bail be not allowed to justify, from some defect in the affidavit of justification, or in the notice of bail or of justification, or in country affidavits, the court or a judge will frequently allow a further time (*u*). But if the bail attempt to justify, and be rejected for any *personal* insufficiency before they are put in, they will seldom give a further time to add and justify others; though it may be otherwise where the insufficiency arises *after* they are put in (*v*). There are two cases, however, in which the court will not grant this indulgence; namely, where the defendant is in custody, (in which case further time would be useless, for he derives the same benefit from giving a new notice), and in bail upon a *habeas corpus:* there have been, indeed, two or three instances of the court's granting a further time in this latter case, but they were under very peculiar circumstances.

Order for, Conclusive.

A judge will not, in general, interfere with another judge's order of time to justify (*w*).

Where one Bail only attends.

If one of the bail only attend, and the court give a further time to justify, or to add and justify another, the one in attendance will, in general, if the plaintiff consent, be allowed to justify immediately, and not be put to the trouble of attending a second time; and the same in all other cases where a further time is required and granted, as to one of the bail only; but this cannot be done without the plaintiff's consent (*x*).

Practical Directions, &c., as to the Order.

Where the application for time to justify bail is made to a judge at chambers, take care that the summons is returnable before the time for justifying has expired, or the plaintiff will be at liberty to proceed against the sheriff or on the bail-bond (*y*). *The rule or summons should be for a stay of proceedings, as well as for time to justify. The application must be supported by an affidavit of the special facts alleged in excuse of the bail not attending; or, in case further time be given on the suggestion of counsel, a similar affidavit must be produced at the time so granted, otherwise the bail will not be allowed to justify* (*z*).

Affidavit for.

Such affidavit must state that the persons not attending had consented to become bail, and were believed to be competent to justify (*a*); but that, from illness, or some alarm, or the like (*supra*), they had not been able to attend, or that the reason of their non-attendance is unknown. But, in the latter case, it is not unusual for the

(*t*) See *West's bail*, 1 Chit. Rep. 96: *Dixon* v. *Clarke*, Id. 3: *Bold's bail*, Id. 288: *Gwillim* v. *Howes*, 2 Id. 107: *Gablentz's bail*, 1 H. & W. 10. Where the plaintiff alarmed the bail, and deterred them from justifying, the court compelled him to pay the costs of putting in fresh bail (*Gwinn* v. *Fuller*, 1 Dowl. 444); and there is no doubt that in such a case further time would be allowed. And see form of affidavit, Chit. Forms, 253.

(*u*) Lofft, 194: *Carrington's bail*, 1 Chit. Rep. 495: *Drabble* v. *Denham*, 2 Chit. 92.

(*v*) Tidd, 9th ed., 273; 1 Sellon, 158; 1 Chit. Rep. 2, n.

(*w*) *Tomlinson* v. *Harvey*, 2 Chit. Rep. 83.

(*x*) *White's bail*, 5 Dowl. 133.

(*y*) *Redford* v. *Edie*, 6 Taunt. 240.

(*z*) R. M., 36 G. 3, Q. B.: see Price's New Prac. 158: Bagley, 150.

(*a*) *West's bail*, 1 Chit. Rep. 92.

judge to suspend giving time, till an affidavit, satisfactorily explaining the non-attendance, has been laid before him.

Proceedings where Order Obtained.

When a rule or order is thus made for further time, *you must serve a new notice of justification (unless otherwise ordered by the court or judge) before 3 o'clock in the afternoon of the same day, and the affidavit of service must state at what hour it was served*(*b*), *otherwise the bail cannot justify*(*c*). *Draw up the rule or order, and serve it before 9 o'clock in the evening*(*d*). *Have the rule or order in readiness, and be prepared with an affidavit of the service thereof, when the bail afterwards come up to justify.*

By the terms of the rule or order, the plaintiff is to be placed in the same situation as if the bail had justified on the day it was made. A mistake in drawing up a rule for further time to justify bail on a wrong day, has been held immaterial (*e*).

The Bail must justify though not excepted to.

It may be here observed, that when bail are not put in within the time required, according to the ordinary practice, but are afterwards put in under a rule or order for enlarging the time, the indulgence operates in effect as a dispensation of the notice of exception, and the bail must justify, although not excepted to by the plaintiff (*f*).

Error in Process Waived by.

It is also proper to observe, that, in general, a defendant cannot take advantage of any error or defect in process after he has obtained time to put in bail (*g*).

Time to Plaintiff to inquire after Bail.

In general.

Time to Plaintiff to Inquire after Bail.] We have seen (*ante*, 591) that where the defendant has given a four days' notice (before eleven in the morning, and exclusive of Sunday) of his intention to *justify bail at the same time at which they are put in*, and the plaintiff is desirous of inquiring after them, he should give *one day's notice* thereof to the defendant, his attorney or agent, before the time appointed for justification, stating therein what further time is required, such time not to exceed *three days* in the case of town bail, and six days in the case of country bail; and then, unless the court or a judge otherwise order, the time for putting in and justifying bail shall be postponed accordingly, and *all proceedings shall be stayed* in the meantime (*h*).

Where Plaintiff misled or taken by surprise.

In *other cases*, if the plaintiff has been taken by surprise, or there be some defect in the notice of bail, or notice of justification (*i*), which may have misled or deprived the plaintiff of the means of making due inquiries, or the bail, on examination, give evasive answers (*k*), or the account given of them be suspicious (*l*), the court or a judge will, in general, give the plaintiff further time to inquire into their character and circumstances.

Proceedings after Expira-

At the expiration of the time required and given to inquire after the bail, they may justify without further notice (*m*).

(*b*) R. T., 59 G. 3, Q. B. & Exch.: R. M., 60 G. 3, C. P.

(*c*) *Newton's bail*, 4 Dowl. 270.

(*d*) See form of the rule, Chit. Forms, 259; of the notice of justification, Id. 260; and of the affidavit of service of the rule, Id. 261.

(*e*) *Donaldson's bail*, 2 Chit. Rep. 83.

(*f*) 2 Chit. Rep. 108: 7 T. R. 109: 7 East, 607: *ante*, 586, 588.

(*g*) *Moore* v. *Stockwell*, 9 D. & R. 124, 6 B. & C. 76, *S. C.*: *ante*, 522.

(*h*) See form of such notice, Chit. Forms, 252.

(*i*) *Vandermoolen's bail*, 1 Chit. Rep. 289.

(*k*) *Anon.*, 1 Chit. Rep. 354, n.

(*l*) *Spurdens* v. *Mahony*, 1 Chit. Rep. 309, n.

(*m*) Price's New Prac. 165.

tion of the Time given.

The obtaining time to inquire after the bail will, in general, cure any defect in the notice of bail, &c. (*n*).

Waiver of Irregularities.

Rule of Allowance.

Rule of Allowance.] After the bail have justified, *draw up a rule of allowance with one of the masters* (*o*), *and serve a copy of it upon the plaintiff's attorney without delay*(*p*); for until this rule has been obtained and served, the bail are not deemed perfected, and the plaintiff may proceed against the sheriff or upon the bail-bond even although he were present, and opposed the bail, at the time they justified (*q*). *If the rule cannot, on account of pressure of business, be obtained immediately after the bail have justified, and the time for justifying bail has expired, a written notice of the justification, and that the rule for allowance will be served as soon as the same can be obtained, should be immediately served on plaintiff's attorney.* Bail are not, in general, in a condition to make any motion to the court until they are allowed (*r*). If the defendant be in the custody of the warden or sheriff of any other county than London or Middlesex, a *supersedeas* seems requisite to get him out of custody, the mere production of the rule for allowance not being sufficient (*post*, 614).

Whe Set Aside.

If bail have been improperly allowed, the court will frequently set aside the rule for allowance. (*See post*, 607).

Filing Bail-piece, &c., after Bail perfected.

Filing Bail-piece, &c., after Bail perfected.] After the service of the rule or order of allowance, the bail-piece in the Court of Queen's Bench should be filed with one of the masters. *We have before observed*, (ante, 595), *that, in that court, when the bail justify in court, the bail-piece is given to one of the masters in court at the time the bail justify; and he carries it with him to his office, where it is filed. If the bail have justified at chambers, the judge's clerk will give you the bail-piece; pay him* 1*s.*; *then take it to one of the masters and file it with him, for the doing of which the rule of allowance will be his authority.* If the plaintiff accept of the bail, the defendant's attorney should cause the bail-piece to be filed with the master within *twenty* days after such acceptance (*s*); or, if the plaintiff do not except to the bail for insufficiency within twenty days next after notice thereof given to him or his attorney, then, upon an affidavit in writing of such notice on the back of the bail-piece, for which affidavit no fee shall be taken, the bail-piece shall be filed by the defendant's attorney within *four* days next after the end of the twenty days (*t*). In practice the bail-piece is seldom filed, until immediately before a render, or proceedings had against the bail (*u*). If the defendant neglect to file

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(*n*) See *Foster's bail*, 2 Dowl. 586 : *ante*, 522.

(*o*) See the forms, Chit. Forms, 259, 261.

(*p*) See *Ward* v. *Nethercoate*, 7 Taunt. 145; 1 Chit. Rep. 675, n.

(*q*) *R.* v. *Sheriff of Middlesex*, 4 T.R. 493: *Holland* v. *White*, 2 B. & P. 41 : *Bignold* v. *Holding*, 2 D. & R. 436 : *Bignold* v. *Lee*, 1 B. & C. 285, *S. C.*: *R.* v. *Shff. of Middlesex*, in ——— v. *Farquhar*, 2 Chit. Rep. 99.

(*r*) See *Sharp* v. *Sheriff*, 7 T. R. 226 : *Joyce* v. *Pratt*, 6 Bing. 377.

(*s*) R. T., 13 Car. 2, Q. B.

(*t*) R. M., 16 Car. 2, Q. B.

(*u*) When writs were returnable in term only, regularly, the bail-piece ought to have been filed during the same term the bail were allowed. (R. H., 1650, r. 3). Formerly, also, when writs were returnable in term only, every bail taken on or before the continuance day, (that is, a certain day, usually eight or ten days after every term, appointed by the master, on or before which entries, &c., made by the officers of the court might be made as of the preceding term, (see *Pearson* v. *Rawlings*, 1 East, 406, and R. E., 11 W.

the bail-piece, the plaintiff may file it, if he want to sue upon the recognisance: but the defendant, if he render in discharge of his bail, must file it, in order to get an *exoneretur* entered on it.

Entering Recognisance on Roll.

When the bail-piece is filed in the Court of Queen's Bench, or bail are perfected in the Common Pleas, their recognisance should be entered on a roll (*x*), called the "recognisance roll," which should be docketted and carried into the treasury chamber. This is usually done by the plaintiff, and it need not be done until you purpose taking proceedings against the bail. (*See further as to this, the next Chapter*).

Fraud, &c., in procuring Justification.

Fraud, &c., in procuring Justification, &c.] If any fraud or mal-practice have been used in procuring the justification of the bail, and which was not known to the plaintiff or his attorney at the time, the court or a judge, upon application, will, in general, set aside the rule of allowance; in which case you may immediately proceed against the sheriff or upon the bail-bond. When it was discovered, after bail were opposed and allowed, that one of them had, on a former occasion, been rejected, the court set aside the rule of allowance, although it appeared that he had since become a person of considerable property (*y*). In another case, where it appeared that one of the bail received money from the defendant's attorney, for his trouble and loss of time in coming up to justify, the court, upon application, were inclined to set aside the rule of allowance, but ultimately allowed the bail to stand, upon the terms of producing an affidavit of merits, bringing the sum for which the bail justified into court, and taking short notice of trial (*z*).

Perjury of Bail.

If the bail forswear themselves, they may be indicted for the perjury (*a*); and if the defendant, or his attorney, have been concerned in procuring them to do so, the court, perhaps, would punish them in a summary way (*b*). But the court will not, in such a case, set aside the rule of allowance (*c*); at least, unless it appear that the defendant, or his attorney, were privy to the fraud (*d*). In one case, however, the rule for the allowance of bail was discharged on an affidavit of perjury by one of the bail, such affidavit being uncontradicted; though the court refused to detain the principal in custody, the knowledge of such perjury not being brought home to him (*e*).

Personating Bail.

If bail personate other persons, it is a felony, whether committed in court, &c. (*f*), or before a commissioner (*g*). And

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3, r. 2)), was a bail, and to be filed, of the preceding term; and every bail taken after the continuance day was a bail, and to be filed, of the subsequent term. But where new bail were added to other bail taken on or before the continuance day, the new bail were to be taken and filed as of that term in which the first bail was put in. (R. E., 5 G. 2, r. 1: Gilb. B. R. 341). Although, however, bail, when added and justified in vacation, were filed as of the preceding term; yet, bail acknowledged and justified in a subsequent term were not so filed, even when substituted for other bail put in of the preceding term. (*Brandon* v. *Henry*, 3 B. & Ald. 514).

(*x*) See the forms of the entries, Chit. Forms, Book I. Part II. Ch. 13.

(*y*) *Pickard* v. *Dobson*, 3 D. & R. 5: *ante*, 600.

(*z*) *Wylie* v. *Jones*, 2 D. & R. 253: *Foxall's bail*, 7 Id. 733.

(*a*) *Royson's case*, Cro. Car. 146: see *Eaglefield* v. *Stevens*, 2 Dowl. 438.

(*b*) *A'Becket* v. *Rawley*, 5 Taunt. 776: see *Dicas* v. *Warne*, 4 M. & Scott, 470.

(*c*) *Englefield* v. *Stephens*, 2 Dowl. 438: see Tidd, New Prac. 147.

(*d*) *A'Becket* v. *Rawley*, 5 Taunt. 776: *Shee* v. *Abbott*, 2 B. & B. 619; 5 Moore, 321, *S. C.*: *Stockham* v. *French*, 1 Bing. 365; 8 Moore, 381, *S. C.*

(*e*) *Barling* v. *Waters*, 6 Bing. 423.

(*f*) 21 J. 1, c. 26.

(*g*) 4 & 5 W. & M. c. 4, s. 4.

where they had merely assumed feigned names, the court ordered that the bail and the attorney should stand in the pillory (*h*).

2. *Bail put in in the Country.*

2. Bail put in in the Country.

Before whom to be put in.

Before whom to be put in.] In all cases where the proposed bail do not reside "within the cities of London or Westminster, or within ten miles thereof" (*i*), instead of attending personally in London for the purpose of being put in and justifying, they may be put in before a commissioner in the country, and may justify by affidavit. And for the purpose of taking the recognisances in such cases, it is enacted, by stat. 4 *W.* & *M. c.* 4, *s.* 1, that the chief justice, and other the justices of the Court of Queen's Bench, or any two of them, whereof the chief justice shall be one, for the said Court of Queen's Bench, and the chief justice of the Common Pleas and other the justices, or any two of them, whereof the chief justice of that court shall be one, for the said Court of Common Pleas, and also the chief baron and barons of the coif of the Exchequer, or any two of them, whereof the chief baron shall be one, for the said Court of Exchequer, shall grant commissions to such persons as they shall think fit, (not being common attornies and solicitors), in the several counties of England and Wales, and in the town of Berwick-upon-Tweed, to take all such recognisances of bail as any person shall be desirous to acknowledge before them, in any action depending in the said respective courts, in such manner and form as the justices of the said respective courts are used to take the same. So, any judge of assize, in his circuit, may take such recognisance (*j*); and the recognisance or bail-piece so taken shall be of the like effect as if the same were taken *de bene esse* before one of the judges of the court (*k*).

In County where Arrested.

The recognisance need not necessarily be taken before a commissioner in that county where the defendant was arrested; thus, if the arrest be in Middlesex, the bail may be put in before a commissioner in Denbighshire or elsewhere (*l*). But by rule of all the courts of *M. T.*, 4 *W.* 4, "where a defendant is arrested upon an *alias* or *pluries capias*, issued into another county, pursuant to the rule of *M. T.*, 3 *W.* 4. *s.* 6, the defendant must put in bail in the county where he was arrested" (*m*).

By whom, and when put in.

By whom, and when put in.] We have already seen *by whom* bail may be put in; also *when* it should be put in in the case of town bail (*n*); and the same observations will apply to the case of country bail (*ante*, 575, 576).

How put in.

How put in.] In the Queen's Bench and Exchequer, *make out a bail-piece on a plain piece of parchment* (*o*). In the Common Pleas *write a copy of the writ upon a piece of parchment, and, at the foot of it, write the bail-piece. Write out an*

Affidavits of Justification.

(*h*) *Anon.*, 1 Str. 384. The punishment of pillory, however, is now wholly abolished, by 1 Vict. c. 23.

(*i*) See 4 W. & M. c. 4, s. 2: *Anon.*, 1 C. & J., 516.

(*j*) 4 W. & M. c. 4, s. 3.

(*k*) Id. s. 1.

(*l*) *Moore* v. *Kendrick*, 3 Bing. 603.

(*m*) See *R.* v. *Shff. of Essex*, in *Levy* v. *Paine*, 3 M. & Scott, 870: and see the former practice, Tidd, New Prac. 145.

(*n*) Only eight days are allowed, as in town bail. (*Grant* v. *Gibbs*, 1 Hodges, 56; 3 Dowl. 409, *S. C.*)

(*o*) See the forms, Chit. Forms, 261.

affidavit or affidavits of justification on plain paper, according to the form prescribed by the rules, noticed ante, 583; *or it may be according to the old form, stating that the bail are housekeepers or freeholders, and worth double the sum sworn to, over and above what will pay all their just debts*(*p*), *and over and above every other sum for which he is then bail.* The former is the most advisable when the bail are really sufficient, because if the plaintiff excepts to them, and they justify, the defendant will get the costs of the justification. The affidavit purporting to be according to those rules, and not containing all its requisites, is good, if it be sufficient according to the old form (*q*), provided that the defendant has taken his proceedings as to the justification according to the old practice; but not so if *vice versâ* (*r*). If the affidavit, whether according to the old or new form, merely states that the bail are *possessed* of so much money over and above their just debts, it will be bad; it ought to state that they are *worth* that sum (*s*). In a case were bail were opposed on the ground of the affidavit being defective, not swearing that they were "worth" the requisite amount, and a fresh affidavit, curing the defect, was produced, and the bail justified, *Parke*, B., refused to make the defendant pay the costs of the opposition, but would not allow him to have the costs of the justification (*t*). *Take the bail-piece and affidavit or affidavits to a commissioner of the court for taking recognisances, and let the bail accompany you.* It is not necessary that both the bail should justify before the same commissioner (*u*), and one of the bail might justify before him, and the other might justify in town (*v*). *The commissioner will then take their recognisance and sign the bail-piece; and at the same time let the bail swear the affidavit or affidavits of justification before him.*

Affidavit of Caption.

Next write out an affidavit of the due acknowledgment of the recognisance or bail-piece on plain paper (*w*), *and let it be sworn before a commissioner for taking affidavits* (*x*), *in the court in which the action is* (*y*), (*not being the defendant's attorney or his clerk*) (*z*), *or before a judge of the court* (*y*), *by the attorney or person who accompanied the bail to the commissioner.* This affidavit of caption need not be sworn before the same commissioner as the affidavit of justification (*a*). These affidavits must state in the *jurat* the names of all the deponents (*b*), and the place of swearing (*c*). *Lastly, send these affidavits and the bail-piece, without delay, to your agent in town, so that he may have them in time to file, and give notice of bail on the eighth day, at furthest, after the arrest, inclusive of the day of the arrest.*

Before Judge of Assize.

Bail may be put in before a judge of assize in the same manner, excepting that no affidavit of the due acknowledgment of the recognisance is in that case necessary (*d*).

(*p*) See the form, Id. 62. The rule of H. T., 2 W. 4, r. 19, *ante*, 583, applies to all affidavits of justification.

(*q*) *Anon*, 1 Dowl. 115.

(*r*) See *Penson's bail*, 4 Dowl. 627; 1 H. & W. 663, *S. C.*: *Simpson's bail*, 1 Dowl. 605.

(*s*) *Simpson's bail*, 1 Dowl. 605: *Henshaw* v. *Woolwrich*, 1 C. & J. 150: and see cases *ante*, 584.

(*t*) *Popjoy's bail*, 3 Dowl. 170.

(*u*) *Anon.*, 2 Chit. Rep. 91.

(*v*) *Mandorff's bail*, Id. 90.

(*w*) See the form, Chit. Forms, 261.

(*x*) If merely a commissioner for taking bail, it will not do. (*Salmon's bail*, 1 M'Cl. & Y. 149).

(*y*) R., 8 W. 3, r. 3, s. 2.

(*z*) See R. F., 15 G. 2, r. 2, Q. B.: R. E., 13 G. 1, r 1, C. P., *ante*, 496.

(*a*) *Brealey* v. *Holt*, 2 Chit. Rep. 91.

(*b*) *Wellings* v. *Marsh*, 11 Price, 509.

(*c*) *Webster's bail*, 1 Chit. Rep. 10: *Carrington's bail*, Id. 495.

(*d*) 4 W. & M. c. 4, s. 3.

Bail-piece, when and how Transmitted.

Bail-piece, when and how Transmitted.] The recognisance or bail-piece so taken shall be transmitted to one of the judges of the court, who, upon affidavit made of the due taking of such recognisance or bail-piece, by some person present at the taking thereof, shall receive the same, upon payment of the usual fees; which recognisance or bail-piece, so taken *and* transmitted, shall be of the like effect as if the same were taken *de bene esse* before one of the said judges (*e*).

Within what Time.

By a rule of *H. T.*, 2 *W.* 4, *r.* 14, "the bail-piece shall be transmitted and filed within *eight* days, unless the defendant reside more than *forty* miles from *London*; and, in that case, within *fifteen* days after the taking thereof." But this rule is, it seems, annulled by the Uniformity of Process Act, 2 *W.* 4, *c.* 39, and the bail-piece must now be transmitted and filed within the *eight* days, and this whether the defendant is arrested in town or country (*f*). And whether the rule be annulled or not, if time to put in bail in a country cause is given by a judge's order, the bail must not only be taken, but the bail-piece transmitted and filed within the time limited by the order (*g*).

Filing of Bail-piece.

Filing of.] *As soon as the agent in town receives the bail-piece and affidavits, he should take all of them to the judge's chambers, and get the bail-piece allowed, and file the bail-piece and affidavits there.* In the Common Pleas and Exchequer, *after the allowance of the bail-piece, take it and the affidavits to the master's office, and file them there* (*h*). The affidavits of justification need not be so filed in either court if not framed according to, and the defendant does not intend adopting, the rules *ante*, 583.

Notice of Bail, &c.

Notice of Bail, &c.] *After transmitting and filing the bail-piece, &c., serve a notice thereof on the agent of the plaintiff's attorney* (*i*). This should be done before the time for putting in bail has expired. Bail is not deemed as put in until this notice is served (*k*). *It is usual also, although not absolutely necessary, to give him at the same time a copy of the affidavit or affidavits of justification, as it may have the effect of preventing an exception. But if the affidavits are framed according to, and the defendant intends adopting, the rules* ante, 88, 583, *then a copy* (*describing it as such*) *of them must be served with the notice of bail, and the notice must state where the original affidavits were filed.* The observations already made, (*ante*, 580—582), as to the form and service of the notice of bail in town cases, will apply to the case of country bail (*l*).

Exception.

Exception.] *The practice and mode of excepting to bail in country bail is the same as in the case of town bail* (ante, 586—588) (*m*).

In the Queen's Bench, *if no exception be entered within the time limited, take the bail-piece from the judge's chambers and file it with one of the masters, as directed* ante, 606.

(*e*) Id. s. 1.

(*f*) *Grant* v. *Gibbs*, 1 Scott, 390; 1 Hodges, 56; 3 Dowl. 409, *S. C.*: see *Day* v. *Greenway*, 5 Dowl. 243. In *Craig* v. *Evans*, 5 Dowl. 664, the Court of Queen's Bench did not decide this point, which was mooted in it.

(*g*) *Craig* v. *Evans*, 5 Dowl. 664.

(*h*) See R. H., 6 G. 1, Q. B.: M., 13 G. 1, C. P.

(*i*) See the form, Chit. Forms, 263.

(*k*) *Grant* v. *Gibbs*, 1 Scott, 390; 3 Dowl. 409; 1 Hodges, 56, *S. C.*

(*l*) See *Anon.*, 1 Dowl. 259; 1 M. & Scott, 296, *S. C.*: *Beale's bail*, 3 Dowl. 708.

(*m*) See the forms, Chit. Forms, 252, 253.

Notice of Justification.

Notice of Justification.] Notice of justification must be given within the same time as when bail are put in in town, (see *ante*, 591), and in the same manner, excepting that the notice states that the bail will justify themselves by affidavit in open court (*n*). It seems, however, that if notice of country bail is given, who are to justify pursuant to the old practice, the four days' notice of justification required by the *R. T.*, 1 *W.* 4, (*ante*, 591), need not be given, and the ordinary two days' notice required by the practice antecedent to that rule will suffice (*o*).

Justification, &c.

Justification, &c.] Most of the observations already made, (*ante*, 594 *to* 606), as to the justification, opposition, and allowance, &c., of bail in town cases, will apply to bail in country cases.

Where.

In the case of country bail there are three modes of justification; in open court, or before a judge at chambers, or by affidavit (*p*). If the bail reside in *London* or *Westminster*, or *within ten miles thereof*, they must, in person, justify in open court, or before a judge at chambers; or, in vacation, before a commissioner, under 1 & 2 *V. c.* 45, as in ordinary cases where the bail is put in in town (*q*); but if they reside *above ten miles from London or Westminster*, they shall not be obliged to appear personally in court, but may justify by affidavit (*r*).

At Chambers.

As to the mode of justification at chambers, see *ante*, 595, *except that the bail justify by affidavit and not in person, and they are opposed by cross affidavits; as to the rest, see* infra.

In Court.

The mode of justifying by affidavit in court is thus:—*The evening before, desire the judge's clerk (or, in the Common Pleas or Exchequer, the master's clerk) to bring the bail-piece and affidavits into court the following morning. Make an affidavit of service of the notice of justification, as in ordinary cases* (*s*); *and annex it and the affidavit or affidavits of justification, or a copy of them if they have been filed, to a motion paper, and give them to counsel to move. The motion must be made before ten o'clock. If the bail are opposed, it must be by cross affidavits* (*t*). *The bail are of course liable to the same objections precisely as if they had all attended to justify in person, as to which see* ante, 597. If the bail be opposed, the judge will give time, if necessary, to answer the matters of the affidavits (*u*); so, if any of the affidavits be defective, the judge may give time to have the defect remedied (*x*). But time to amend a mistake in the *jurat*, occasioned by the error of the commissioner in the country, was refused, where the defendant did not produce an affidavit of merits (*y*). The defendant's attorney will have to pay the costs of the amendment.

Costs.

The rules (noticed *ante*, 601) as to costs, apply to country as well as town bail (*z*).

(*n*) See the form, Chit. Forms, 252, 253.

(*o*) *Harbottle* v. *Clarke*, 4 Dowl. 12.

(*p*) R., 8 W. 3, r. 3, s. 5.

(*q*) *Anon.*, 1 Dowl. 293, 79; 1 C. & J. 516.

(*r*) 4 W. & M. c. 4, s. 2: *Anon.*, 1 C. & J. 516.

(*s*) See the form, Chit. Forms, 256, 257.

(*t*) See the form of such an affidavit, Chit. Forms, 258; and see the observations *ante*, 597.

(*u*) Where time has been thus given to answer affidavits, the defendant will not be allowed to put in fresh bail, instead of answering. (*Cockburn* v. *Ling*, 6 Bing. 132: *Green* v. *Hartley*, 1 Chit. Rep. 354).

(*x*) See as to the rule for further time, *ante*, 603, 604: Chit. Forms, 258, 260.

(*y*) *Burford* v. *Holloway*, 2 D. & R. 362: but see 1 Chit. Rep. 10, 495: *Shillitoe's bail*, 9 D. & R. 6.

(*z*) *Grant's bail*, 1 C., M. & R. 598; 3 Dowl. 165, S. C.

Rule of Allowance. Filing Bail-piece.

After justification, draw up the rule of allowance and serve it, and in the Queen's Bench file the bail-piece, as in ordinary cases, as directed ante, 606(*a*).

3. *Bail put in and justified, when the Defendant is in Custody.*

3. Bail put in and Justified, when the Defendant is in Custody.

Although the defendant be in custody of the sheriff, or marshal or warden, after the expiration of the eight days after the arrest, yet special bail may be put in and perfected at any time before the defendant is charged in execution (*b*).

In Term-time.

In *term* time, this is done in nearly the usual way, except that, in the Exchequer, you mention in the bail-piece that the defendant is in custody (*c*), and of whom, and make the like mention in the notice of justification, &c.; and also, except that in all the courts the notices of bail and of justification may, in all cases, be incorporated in one, and, also, except that the bail may be put in and justified at the same time, upon a two days' notice of putting in and justifying; and this, notwithstanding the recent rule of *T. T.*, 1 *W.* 4, (*ante*, 591), requiring a four days' notice for that purpose where the defendant intends justifying bail at the same time at which they are put in (*d*). No exception is necessary; and the rule of *T. T.*, 1 *W.* 4, *r.* 4, (*ante*, 588), which entitles the defendants to have the recognisance entered into under *r.* 3 out of court, without further justification, if a one day's notice of exception be not entered by the plaintiff, does not apply to the case of a prisoner (*e*); nor does the rule of *T. T.*, 1 *W.* 4, *r.* 5, (*ante*, 589), as to the changing of bail (*f*). *The bail justify as in other cases.* Where one of the bail justifies, time should be obtained for the justification of another, though, if neither justified, this would be unnecessary (*g*). In the Court of Queen's Bench, *after you have served the copy of the rule of allowance, take the rule to the marshal's office in the Queen's Bench prison, (if the defendant be in the custody of the marshal), and it will be a sufficient warrant to him to discharge the defendant; and the same if the defendant be in the custody of the sheriffs of London or Middlesex. But if the defendant be in the custody of the sheriff of any other county, as the rule in that case contains an order, not for his discharge, but for a* supersedeas *merely, write out a* supersedeas *on plain parchment* (*h*) *; take it, together with the rule of allowance, and also the bail-piece, to one of the masters, who will sign it; get it sealed by the sealer of the writs. Lodge the writ with the gaoler, who will thereupon immediately discharge the defendant, if there be no other detainer against him* (*i*). In the Common Pleas, *after the*

(*a*) See the form of the rule of allowance, Chit. Forms, 266.

(*b*) See *ante*, 576, 577; Barnes, 92.

(*c*) *Fuller's bail*, 5 Tyr. 491; *Bullen's bail*, 3 Dowl. 422: *Crighton's bail*, 1 C. & M. 335; 1 Dowl. 609, *S. C.*: *Frith's bail*, 2 Dowl. 229. It may be questionable whether this is requisite in the Queen's Bench and Common Pleas. There does not appear any very good reason for the rule.

(*d*) *Davies* v. *Gray*, 10 Law, J., 80; 2 Tyr. 277; 2 C. & J. 309, *S. C.*: *King's bail*, 1 Dowl. 509. Such new rule of T. T., 1 W. 4, is an enabling, and not a disabling rule. See the form of the bail-piece, Chit. Forms, 264: of notice of bail and justification, Id. 265; and of the affidavit of service thereof, Id. 266. The affidavit of sufficiency must, it seems, in the Exchequer, state that the defendant is a prisoner where he applies to justify under a two days' notice. (*Poole's bail*, 2 M. & W. 312; 5 Dowl. 449; 1 M. & R. 48, *S. C.*: *sed vide Pierce's bail*, 5 Dowl. 252, *semb.*, *contra*).

(*e*) *Webb's bail*, 1 Dowl. 446: *ante*, 586, n. (*k*).

(*f*) *Bird's bail*, 2 Dowl. 583.

(*g*) *Foy's bail*, 2 Dowl. 442.

(*h*) See the form, Chit. Forms, 267.

(*i*) See *Knowlys* v. *Reading*, 1 B. & P. 811.

bail are justified, draw up the rule of allowance with one of the masters, which rule, however, in this case contains an order that the defendant be discharged out of the custody of the warden or sheriff, as to that action, by writ of supersedeas. *Serve a copy of the rule upon the plaintiff's attorney or agent. Then write out a writ of* supersedeas *upon plain parchment; take it, together with the rule of allowance, to one of the masters, who will sign the writ, and keep and file the rule*(*k*). *Get the writ sealed by the sealer of the writs; then take it to the warden or sheriff to whom it was directed, and he will discharge the defendant if there be no other detainer against him.* By a rule of *H. T.*, 1838, in that court(*l*) "it is ordered, that from and after the first day of this present term, every rule or order of a judge, directing the discharge of a defendant out of custody upon special bail being put in and perfected, shall also direct a *supersedeas* to issue forthwith." In the Exchequer, the practice to obtain the discharge seems to be the same as in the Common Pleas.

In Vacation.

In *vacation*, the mode is different. By 43 *G.* 3, *c.* 46, *s.* 6, a defendant imprisoned or detained on mesne process, after the return of such process, may put in and justify bail, in *vacation*, before a judge of the court from which the process issued whereupon he was arrested, upon due notice thereof being given to the plaintiff's attorney; and such judge shall thereupon, if he think fit, order a rule to issue for the allowance of such bail, and may further order the defendant to be discharged out of custody by writ of *supersedeas* or otherwise, according to the practice of such court, in like manner as the same is and may be done by an order of the court in term time. And now, by stat. 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 12, (*ante*, 594), "bail may be justified before a judge at chambers, or in some other convenient place, to be by him appointed, as well in term as in vacation; and whether the defendant be actually in custody or not." *Give notice that you will put in and justify bail, as in ordinary cases, as directed* ante, 579, 580(*m*). *Make an affidavit of the service of the notice of bail and justification. No exception is necessary. At the time specified in the notice, attend at the judge's chambers, and wait there an hour; and if in that time the opposite attorney does not attend to oppose the justification, the bail will be allowed to justify as of course, upon producing the affidavit of service of the notices; but if the opposite attorney attend, the bail may be opposed and examined in the manner stated* ante, 597, *et seq. If the bail be allowed to justify, the judge will make an order directing one of the masters to draw up a rule of allowance*(*n*). *Draw up the rule with one of the masters*(*n*); *and serve a copy of it on the opposite attorney. Then proceed to obtain the discharge of the defendant, as directed* ante, 612, 613.

4. *Paying Money into Court in lieu of Special Bail.*

4 Paying Money into Court in lieu of Special Bail.

43 G. 3, c. 46, s. 2.

In cases where the defendant has, in pursuance of the 43 *G.* 3, *c.* 46, *s.* 2, (*ante*, 539), *in lieu of bail to the sheriff, deposited in his hands* the sum indorsed on the writ, and 10*l.* for costs, to

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(*k*) See R. F., 57 G. 3: 1 Taunt. 437.

(*l*) 4 Bing. N. C. 366.

(*m*) See the form of the notice, Chit. Forms, 265.

(*n*) See the form, Chit. Forms, 266.

answer the costs up to the eighth day inclusive after the arrest, and the sheriff has paid these into court, as he is bound to do, the defendant, instead of putting in and perfecting special bail, may, by virtue of the 7 & 8 *G.* 4, *c.* 71, *s.* 1, allow such sums, together with the additional sum of 10*l.* to be paid into court by the defendant, as a further security for costs, to remain in court to abide the event of the suit. In other cases, where the defendant has *not* made such deposit with the sheriff, the defendant, instead of putting in and perfecting special bail, may deposit and pay into court the sum indorsed on the writ, and 20*l.* as a security for the costs of the action; there to remain to abide the event of the suit (*o*). In either case, defendant should enter a common appearance, unless it has been already entered, to the writ of summons; or if he do not, the plaintiff may enter it for him. And if judgment be given for the *plaintiff*, he will be entitled, by order of the court, upon motion, to receive the money so remaining in, or so deposited or paid into the court, or so much thereof as will be sufficient to satisfy the sum recovered by the judgment and the costs of the application. And if judgment be given for the *defendant*, or the plaintiff discontinue, or be otherwise barred, or if the sum deposited and paid into court be more than sufficient to satisfy the plaintiff, the money so deposited or paid into court, or so much thereof as shall remain, will, by order of the court, upon motion, be repaid to the defendant.

7 & 8 G. 4, c. 71, s. 1.

In a case prior to this statute of 7 & 8 *G.* 4, the Court of Common Pleas allowed a defendant, instead of putting in bail, to pay into court the sum sworn to and 40*l.* to answer costs, upon his paying such costs as had already been incurred in opposing bail which he had previously attempted to justify, and the costs of the proceedings against the sheriff (*p*). Money paid into court under the above statute is not a payment to a creditor within the protection of the Bankrupt Act (*q*); nor, if paid in after an act of bankruptcy, and less than two months before a commission issued, is it within the protection of the 81st section of that act (*r*). Money cannot be paid into court under this act, in lieu of bail in error, unless by consent (*s*). Also, where an action had been commenced in the Lord Mayor's Court by attachment against the goods of the defendant, and removed by *certiorari*, it was doubted whether the defendant could pay money into court under this act in lieu of special bail (*t*).

Where Defendant has paid Money to the Sheriff in lieu of Bail.

In cases where the defendant has paid money into the hands of the sheriff in lieu of bail to him, and is desirous of thus allowing the same to remain in lieu of special bail, *he should give notice thereof to the plaintiff's attorney* (*u*), *and pay into court an additional sum of* 10*l.*, *as a security for costs.* This may, it seems, be done at any time before or on the day al-

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(*o*) The defendant must, before 1 & 2 V. c. 110, have entered a common appearance within the time for putting in and perfecting special bail, or in default the plaintiff might have entered an appearance for him; but this will now be unnecessary under the *capias* given by that act, in cases where the appearance is previously entered in the usual way on the writ of summons by which the action is commenced.

(*p*) *Fowell* v. *Leo*, 1 Taunt. 425: and see *Wilks* v. *Adcock*, 8 T. R. 28.

(*q*) 6 G. 4, c. 16, s. 82.

(*r*) *Ferrall* v. *Alexander*, 1 Dowl. 132: *Hanwell* v. *Moore*, 2 Id. 155.

(*s*) *Collins* v. *Gwynne*, 2 M. & Scott, 775.

(*t*) *Morgan* v. *Pedlar*, 4 Dowl. 645.

(*u*) See a form, Chit. Forms, 267.

lowed for *perfecting* the special bail (*y*). Also, in the other cases of the payment of money into court in lieu of bail, it may, it seems, be made at any time before or on such day. To pay into court this additional 10*l*., where you have deposited money with the sheriff, in lieu of bail to him, or to pay into court the monies above mentioned to be paid in in lieu of special bail, leave of the court is necessary. "*In all cases in which money may be paid into court, leave to pay it in may be obtained by a side-bar rule*" (*z*). *Make out a præcipe or memorandum of the rule you want. Pay the money into Hoare's bank in Fleet-street, and get a receipt; take this præcipe and receipt to one of the masters, who will thereupon give you his receipt in exchange.* He is not entitled to any poundage on the money (*a*). *The master will draw up the rule* (*b*). *Serve a copy of it and the receipt on the plaintiff's attorney, then enter an appearance, unless it has been already entered, to the writ of summons* (*c*). Upon this, in the case of a bail-bond given, the defendant would be entitled to have it delivered up to be cancelled (*d*). It is to be observed that the defendant cannot pay the additional 10*l*. into court under 7 & 8 *G*. 4. *c*. 71, (so as to prevent the plaintiff from obtaining the deposit with the sheriff), until the sheriff has paid the deposit into court; and, where the sheriff neglected to pay the money into court until the evening of the day on which the time for putting in bail expired, and the defendant on the next day paid an additional sum of 10*l*. into court for costs, which the officer had refused to receive before the money was paid in by the sheriff, and the latter sum had been paid to the plaintiff under a rule against which the defendant might have shewn cause, the court refused to order the plaintiff to refund the money (*e*).

Taking out Deposit on perfecting Special Bail.

The defendant who has made this deposit and payment into court may, at any time before issue joined in law or fact (*f*), or, in the case of a judgment by default or confession before final or interlocutory judgment signed, or perhaps at any time before execution (*g*), receive the same out of court (*h*), by order of the court, upon putting in and perfecting special bail in the cause, and payment of such costs to plaintiff as the court may direct (*i*). And if when the application is made, the cause is in such a state that issue may be joined before

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(*y*) *Rowe* v. *Softly*, 4 Moo. & P. 464; 6 Bing. 634, *S. C.*: *Stratford* v. *Love*, 3 Dowl. 593; 1 H. & W. 195, *S. C.* In the Exchequer, before bail above are perfected, or until the time for excepting to them has passed, the defendant is entitled, as a matter of right, to pay in the debt, with a sum for costs, under the above statute; and therefore, where he does not pay in the money until after he has put in, though not justified, bail above, and the plaintiff has been put to expense by searching for them and making inquiries, the defendant is not liable to pay those expenses, but they are properly costs in the cause. (*Stanforth* v. *M'Cann*, 4 Dowl. 367; 1 Tyr. & G. 169; 1 Gale, 344, *S. C.*)

(*z*) It may be a question if this rule is applicable to a case of this kind; if not, the rule must be obtained on a motion-paper, and signed by counsel. (See R. H., 2 W. 4, r. 55).

(*a*) *Hunn* v. *Brine*, 6 Moore, 124: *Haines* v. *Nairn*, 2 Dowl. 43.

(*b*) See the forms, Chit. Forms, 267, 268.

(*c*) After this, the defendant, before 1 & 2 V. c. 110, must have entered a common appearance in all cases; but this seems now unnecessary in cases where an appearance has already been entered.

(*d*) *Smith* v. *Jordan*, 2 Moo. & P. 428. see *Stanford* v. *M'Cann*, 1 Gale, 344.

(*e*) *Hannah* v. *Willis*, 6 Dowl. 417.

(*f*) *Hanwell* v. *Mure*, 2 Dowl. 155: *Ferrall* v. *Alexander*, 1 Id. 132.

(*g*) See *per Littledale*, J., *Geach* v. *Coppin*, 3 Dowl. 78. "As a prisoner may bail his person out of custody at any time before execution, the defendant may, perhaps, be allowed to bail his money (if such an expression may be used) out of court." (See *Young* v. *Maltby*, Id. 604).

(*h*) As to the mode of taking out money paid into court, see *post*, Vol. II. Book IV. Part I. Ch. 9.

(*i*) 7 & 8 G. 4, c. 71, s. 3.

the rule is disposed of, the court will grant it with a stay of proceedings (*j*). But the money thus deposited in court in lieu of bail cannot be transferred to the account of a payment into court on a plea of tender (*k*). And it cannot be taken out on the ground of a defect in the affidavit to hold to bail (*l*).

Entering Exoneretur or Bail-piece on making Deposit in lieu thereof.

The defendant also, *who has put in and perfected special bail*, may, upon motion to the court, if the court think fit, deposit and pay into court the sum which would have been deposited and paid in in case the defendant had originally elected so to do, together with such further sum, to answer the costs, as the court may direct, to abide the event of the suit, and to be disposed of in manner aforesaid; and thereupon the court will direct a common appearance to be entered for defendant, and an *exoneretur* to be entered upon the bail-piece (*m*).

Application that Plaintiff shall take out part in full satisfaction.

On the application of the defendant, the court will, it seems, make an order that the plaintiff shall be at liberty to take out of court a part of the sum paid in; and that unless he consent to accept thereof, with costs, in full discharge of the action, the same shall be struck out of the declaration; and that the plaintiff shall not give any evidence at the trial as to that sum (*n*).

How taken out of Court on Judgment for Plaintiff.

In case of a judgment for the *plaintiff*, the money still remaining in the court, then, in order to get it out of court, *give a motion paper with an affidavit of the money having been paid in, and of the judgment being signed, to counsel to move for a rule to shew cause* (*o*) *why the plaintiff should not receive all the money out of court, or, in case the judgment be for less, then so much thereof as will be sufficient to satisfy the sum recovered, and the costs of the application.* And if the money paid into court be not sufficient, the court will, nevertheless, make an order upon the defendant to pay such costs (*p*). Where the money paid into court is not so by the defendant himself, but by one of the bail, and the plaintiff obtains judgment, he is entitled to have the money paid out to him in discharge of the debt and costs (*q*). The plaintiff is not entitled to the money unless judgment has been obtained by him, or the suit is otherwise legally determined (*r*). It seems, that a previous notice of the motion should be given to the solicitor of the Treasury (*s*). *If a rule be granted, draw it up with one of the masters, and serve a copy of it, as in other cases* (see *post*, *Vol. II. Book IV. Ch.* 33). *The master will thereupon pay you the money.* The plaintiff is bound to resort to this money in the first instance, and can issue execution for the surplus only (*t*). If, after satisfying the judgment, &c., any part of the money still remain in court, they will, on motion, order it to be repaid to defendant (7 & 8 *Geo.* 4, *c.* 71, *s.* 2, *ante*, 614).

(*j*) *Bloor* v. *Cox*, 6 Dowl. 266.

(*k*) *Stultz* v. *Heneage*, 2 Dowl. 806; 10 Bing. 561; 4 M. & Scott, 472, *S. C.*: and see *Balls* v. *Stafford*, 4 Dowl. 327; 2 Scott, 426; 1 Hodges, 316, *S. C.*: but see *Hubbard* v. *Wilkinson*, 8 B. & C. 496, *infra*.

(*l*) *Green* v. *Glassbrook*, 1 Bing. N. C. 516.

(*m*) 7 & 8 G. 4, c. 71, s. 4.

(*n*) *Hubbard* v. *Wilkinson*, 8 B. & C. 496: and see the form of rule, Chit. Forms, 268: but see *Stultz* v. *Heneage*, and *Balls* v. *Strafford*, *ubi supra*.

(*o*) See *Symes* v. *Rose*, 5 Bing. 269; 2 Moo. & P. 426, *S. C.*: *Lover* v. *Titmin*, 5 Dowl. 388.

(*p*) *Freeman* v. *Paganini*, 2 Dowl. 776; 4 M. & Scott, 165, *S. C.*

(*q*) *Bull* v. *Turner*, 1 M. & W. 47; 1 T. & G. 367; 4 Dowl. 734, *S. C.*: and see *Douglas* v. *Stanburgh*, 3 A. & E. 316.

(*r*) *Johnson* v. *Wall*, 4 Dowl. 315.

(*s*) *Haines* v. *Nairn*, 2 Dowl. 43.

(*t*) *Hews* v. *Pyke*, 1 Dowl. 322; 2 C. & J. 359; 2 Tyr. 313, *S. C.*

How, on Judgment for Defendant.

In case of a judgment for the *defendant*, or if the plaintiff discontinue or be otherwise barred from recovering, or in case the sum in court be more than enough to pay the plaintiff; then, in order that the defendant may get it or the surplus out of court, *give a motion paper with an affidavit of the money having been paid in, and of the judgment having been signed, or with a certificate of the master of judgment having been signed and of the money having been paid in, to counsel to move for a rule to shew cause*(*u*) *why the money should not be repaid to defendant. If the rule be granted, draw it up with one of the masters, and serve a copy of it as in other cases* (see *post*, *Vol. II. Book IV. Ch.* 33). *The master will thereupon pay you the money.* He is not entitled to any poundage (*x*).

Under 1 & 2 V. c. 110, s. 7.

We have already seen that a defendant who was arrested and paid money into court in lieu of bail, previously to 1st October, 1838, is not entitled to have the money paid out to him, under 1 & 2 *V. c.* 110, *s.* 7(*y*).

(*u*) *Symes* v. *Rose*, 5 Bing. 269; 2 Moo. & P. 426, S. C.; *Grant* v. *Wilies*, 4 Dowl. 511: *Wild* v. *Rickman*, 1 H. & W. 670: *Lover* v. *Titmin*, 5 Dowl. 388.

(*x*) *Hunn* v. *Brine*, 6 Moore, 124: *Haines* v. *Nairn*, 2 Dowl. 43; and see *Stewart* v. *Bracebridge*, 2 B. & Ald. 770; 1 Chit. Rep. 529, S. C.

(*y*) *Ante*, 504, 505.

Book I.
Part II.

CHAPTER XIII.

PROCEEDINGS AGAINST BAIL TO THE ACTION, OR BAIL IN ERROR.

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1. *Bail to the Action, how far liable.*

1. Bail to the Action, how far liable.

Debt and Costs.

BY a general rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 21, "bail shall only be liable to the sum sworn to by the affidavit of debt, and the costs of suit, not exceeding in the whole the amount of their recognisance" (*a*); that is, not exceeding double the amount of the sum sworn to, and they are *together* liable only to this amount (*b*). Perhaps, since the 1 & 2 *V. c.* 110, it would be more correct to say that they are liable to the sum mentioned in the judge's order for arrest, and the costs of suit, not exceeding in the whole double the sum mentioned in the order (*c*). And the court or a judge will stay the proceedings against them on the recognisance (*d*), or order an *exoneretur* to be entered on the bail-piece (*e*), on payment of these two sums (the sum sworn to or mentioned in the judge's order, and costs not exceeding the amount of the recognisance (*e*)); and this, although the sum sworn to or mentioned in the order be less than the damages actually recovered, or the sum named in the process (*f*), or the defendant in the original action have gone abroad (*g*).

(*a*) R. H., 2 W. 4, r. 21. See the rule of E. T., 5 G. 2, r. 2, K. B.: R. H., 38 G. 3, Exch.: and the prior law in Tidd, New Pract. 158: *Jackson* v. *Hassell*, 1 Doug. 330: *Coles* v. *De Hayne*, 6 T. R. 246.

(*b*) *Vansandau* v. *Nash*, 10 Bing. 329; 2 Dowl. 767; 3 M. & Scott, 834, *S. C.*: and see *Blaney* v. *Holt*, 5 B. & Ad. 241; 3 Nev. & M. 529, *S. C.*

(*c*) See *Dahl* v. *Johnson*, 1 B. & P. 205.

(*d*) *Clarke* v. *Bradshaw*, 1 East, 86, 91, n.

(*e*) *Jacob* v. *Bowes*, 6 East, 312.

(*f*) *Clarke* v. *Bradshaw*, 1 East, 86: *Wheelwright* v. *Simmons*, 5 M. & Sel. 511.

(*g*) *Clarke* v. *Bradshaw*, 1 East, 91, n.: and see *Coles* v. *De Hayne*, 6 T. R. 346. The practice of the Court of Common Pleas, in this respect, was formerly different. (See *Calveray* v. *De Miranda*, Barnes, 76: *Dahl* v. *Johnson*, 1 B. & P. 205: *Howell* v. *Wyke*, 1 B. & B. 490: Tidd, 9th ed. 280). Where the plaintiff recovers on counts of the declaration on causes of

Costs of Proceedings against them.

If an action, however, have been commenced against the bail, they must, in addition to the debt sworn to, and costs in the original action, (not exceeding in the whole the amount of their recognisance), also pay the costs of the action against them (*h*). They are also thus liable to the costs of a *scire facias* issued against them, and this, since the 3 & 4 *W.* 4, *c.* 42, *s.* 34, whether they have pleaded to it or not (*i*).

Costs of Writ of Error by Principal.

But bail to the action are not liable to pay the costs of a writ of error brought by their principal (*k*). Formerly, indeed, if a writ of error were brought after the bail were fixed, and proceedings had against them by *scire facias*, and the bail applied to stay the proceedings against them pending the writ of error, the court would do so; but only on the terms of the bail undertaking to pay the condemnation money, the costs of the *sci. fa.*, and (if there were no bail in error) the costs of the writ of error, if judgment should be affirmed (*l*). But had the writ of error been allowed before the expiration of the time given to the bail to render their principal, the bail would have been entitled to have the proceedings against them stayed, pending the writ of error, on the terms of undertaking to pay the damages recovered, or to surrender the defendant within four days after affirmance of the judgment (*m*); which meant, of course, after the final determination of the cause, supposing two or more writs of error to be brought successively (*n*). Now, however, by rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 84, "to entitle the bail to a stay of proceedings pending a writ of error, the application must be made before the time to surrender is out."

Interest.

The bail to the action are not liable to the payment of interest on the sum recovered, subsequent to the judgment against the principal (*o*). But since 1 & 2 *V. c.* 110, *s.* 17, they are liable to interest on a judgment obtained against themselves, at £4 per cent., from the day of entering up judgment, or from the 1st October, 1838, according as judgment was entered up before or since that date.

How far liable, though not Justified.

It is necessary to add, that bail remain liable as long as their names remain on the bail-piece, even although they have not justified (*p*); and if, although they have not justified, proceedings be commenced against them on their recognisance, the court will not relieve them except upon payment of costs (*q*).

2. *Bail to the Action, how Discharged.*

2. Bail to the Action, how Discharged.

Under 1 & 2 V. c. 110, s. 7.

Under 1 & 2 *V. c.* 110, *s.* 7.] This has been already considered (*ante*, 504).

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action not contained in the affidavit of debt, the bail will not be liable to *all* of the costs. (See *post*, 632).

(*h*) *R.* v. *Lyon*, 3 Burr. 1461: *Periga* v. *Mellish*, 5 T. R. 363: *Hughes* v. *Poidevin*, 15 East, 254: *Abbott* v. *Rawley*, 3 B. & P. 13: 1 New Rep. 67: but see *post*, 629.

(*i*) See the cases prior to that statute: *Pocklington* v. *Peck*, 1 Str. 638: *Baldwin* v. *Morgan*, 2 Str. 826.

(*k*) *Yates* v. *Doughan*, 6 T. R. 288.

(*l*) *Buchanan* v. *Alders*, 3 East, 546: *Copons* v. *Blyton*, 1 New Rep. 67: *Ritson* v. *Francis*, 2 Str. 877.

(*m*) *Sprang* v. *Monprivat*, 11 East, 316: R. T., 1 A. r. 1 a: *Capron* v. *Archer*, 1 Burr. 340.

(*n*) *Kershaw* v. *Cartwright*, 5 Burr. 2819. See upon this subject, *ante*, 359, 362.

(*o*) *Waters* v. *Rees*, 3 Taunt. 503. See the statute, 3 & 4 W. 4, c. 42, s. 30, *ante*, 378, allowing interest: and see 1 & 2 V. c. 110, s. 17.

(*p*) *Waller* v. *Green*, Say. 308: *Fulke* v. *Bourke*, 1 W. Bl. 462: *Humphry* v. *Leite*, 4 Burr. 2107: *Bramwell* v. *Farmer*, 1 Taunt. 427: *R.* v. *Shff. of Middlesex*, *in Logan* v. *Louel*, 3 Moo. & P. 594; 6 Bing. 251, *S. C.*

(*q*) *Ante*, 590: *Gould* v. *Holstrom*, 5 East, 581: *Humphry* v. *Leite*, 4 Burr. 2107.

By Death.

By Death.] If the principal die at any time before the return of the *ca. sa.*, the bail are thereby discharged (*r*). But if he die after the *ca. sa.* is returnable (*s*), although before the return is filed (*t*), or even whilst the writ yet remains in the sheriff's office (*u*), the bail are fixed, and the court cannot relieve them. Where the principal dies before the return of the *ca. sa.*, the bail may apply to the court, or to a judge at chambers in vacation, to have an *exoneretur* entered on the bail-piece; or they may plead the death to any proceeding against them on the recognisance (*v*).

By Bankruptcy.

By Bankruptcy.] If the principal become bankrupt, and obtain his certificate before the bail are fixed, the bail are thereby discharged, in all cases where the certificate is a bar; but if the bail be fixed before the allowance of the certificate, they remain liable, and the court cannot relieve them (*x*). The certificate is equivalent to, and has the same operation as, an actual render. The Court of Common Pleas has also decided, that if a creditor prove his debt under the fiat, he cannot afterwards proceed against the bail (*y*). An *exoneretur* has been ordered to be entered on the bail-piece, where the defendant had become a bankrupt and obtained his certificate in a foreign country after the contracting of the debt, and it appeared that the plaintiff resided in the same country with him at the time of the bankruptcy (*z*); but the court refused to do so in another case, where it appeared that the plaintiff was resident in this country at the time of the defendant's bankruptcy abroad (*a*).

Application for Exoneretur in case of Bankruptcy.

If the certificate be obtained before the bail are fixed, the bail should apply to the court, or to a judge at chambers in vacation, to have an *exoneretur* entered on the bail-piece (*b*); for they cannot *plead* the bankruptcy and certificate of their principal in their own discharge (*c*). This application should be made before any proceedings are had against the bail, otherwise they will have to pay the costs of such proceedings (*d*). But such proceedings being taken would not be an answer to the application, and this though the application were made after the expiration of the fourteen days of the service of the process against the bail, the defendant having obtained his certificate within that period (*e*). Where there has been much delay, the court have in one instance altogether refused to relieve them (*f*). And the Court of Common Pleas refused such relief where the defendant obtained his certificate after issue and before judgment (*g*). The court, however, ge-

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(*r*) *Sparrow* v. *Lowgate*, W. Jon. 29.

(*s*) *Glynn* v. *Yates*, 1 Str. 511: *Parry* v. *Berry*, 2 Id. 717; 2 L. Raym. 1452, *S. C.*: *Filewood* v. *Popplewell*, 2 Wils. 65.

(*t*) *Rawlinson* v. *Gunston*, 6 T. R. 284.

(*u*) 2 Sellon, 55.

(*v*) Tidd, 9th ed. 1129.

(*x*) *Wooley* v. *Cobb*, 1 Burr. 244: *Mannin* v. *Partridge*, 14 East, 599: *Harmer* v. *Hagger*, 1 B. & Ald. 332: *Johnson* v. *Linsey*, 1 B. & C. 247; 2 D. & R. 385, *S. C.*: *Stapleton* v. *Macbar*, 7 Taunt. 589: *Thackeray* v. *Turner*, 8 Id. 28: *Walker* v. *Giblett*, 2 W. Bl. 811: *Payne* v. *Spencer*, 6 M. & Sel. 231: *West* v. *Ashdown*, 1 Bing. 164; 7 Moore, 566, *S. C.*

(*y*) *Aylett* v. *Harford*, 2 W. Bl. 1317: *Linging* v. *Comyn*, 2 Taunt. 246: see *Duncan* v. *Scott*, 1 Bing. N. C. 431: *Duncan* v. *Sutton*, 1 Scott, 338.

(*z*) *Ballantine* v. *Golding*, 4 T. R. 185, n.

(*a*) *Pedder* v. *M'Master*, 8 T. R. 609: see *Jones* v. *Chartres*, Hayes' Rep. Ex. Ir. 175.

(*b*) *Martin* v. *O'Hara*, Cowp. 824.

(*c*) *Donelly* v. *Dunn*, 2 B. & P. 45: *Beddowe* v. *Holbrooke*, 1 Id. 450, n., 448.

(*d*) *Manning* v. *Partridge*, 14 East, 599: *Harmer* v. *Hagger*, 1 B. & Ald. 332: *Thackeray* v. *Turner*, 8 Taunt. 28.

(*e*) *Jones* v. *Ellis*, 1 A. & E. 382.

(*f*) *Swayne* v. *Bland*, 4 D. & R. 373: and see *Clarke* v. *Hoppe*, 3 Taunt. 46.

(*g*) *Humphreys* v. *Knight*, 4 Moo. & P. 370; 6 Bing. 569, *S. C.*

nerally speaking, will order an *exoneretur* to be entered on the bail-piece in all cases where the defendant is entitled to be discharged out of custody; and therefore, where a defendant obtained a certificate under a commission of bankruptcy before trial, and did not plead it *puis darrein continuance*, the court relieved the bail on motion (*h*). If the validity of the fiat be disputed, it seems the court will order it to be tried on a feigned issue, before they direct an *exoneretur* to be entered (*i*); but they will not direct an issue to try whether the principal was a trader, &c., for on those points the certificate is conclusive (*k*).

By Discharge under Insolvent Act.

By Discharge under Insolvent Act.] If the defendant be discharged under an insolvent act, before his bail are fixed, the bail may apply to have an *exoneretur* entered on the bail-piece, in the same manner as if he had become a bankrupt and obtained his certificate (*l*). If the bail be fixed before defendant's discharge, and after such discharge they pay the debt, they may recover it of him notwithstanding such discharge (*m*).

By Render, or where by Act of Law it becomes impossible to render.

By Render, or where by Act of Law it becomes impossible to Render.] Bail may wholly discharge themselves of their responsibility by *rendering their principal;* and this may be done either before or after judgment.

Bail to the Sheriff, how Discharged by.

Bail to the sheriff may be discharged, either by bail above being put in and justified, or by bail above being put in and the principal thereupon rendered, which is deemed equivalent to perfecting bail; and this may be done either by the bail to the sheriff, or by the defendant himself, or by the sheriff, or perhaps by the defendant's attorney in discharge of any undertaking he may have given (*n*). It will be seen that the writ of *capias* issued since the 1 & 2 *V. c.* 110, is returnable *immediately after it is executed;* consequently the bail above may be put in, either by the bail to the sheriff or by the sheriff, or by the defendant himself, immediately after the writ is executed, and the defendant rendered thereon (*o*). Formerly, if the sheriff were ruled to bring in the body, a render afterwards would not prevent an attachment, unless the bail above also *justified.* But by *R. T.*, 33 *G.* 3, Q. B., bail may render their principal, at any time before the return of the rule to bring in the body, without justifying, the attorney for the defendant giving notice of such render to the plaintiff's attorney without delay, and making affidavit thereof (*p*), which rule extends as well to cases where the bail is put in by the sheriff (*q*), as to those where it is put in by the defendant or his sureties. Even after assignment of the bail-bond (*r*), and proceedings had thereon (*s*), bail above may be put in, and render the principal,

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(*h*) *Todd* v. *Marfield*, 3 B. & C. 222; 5 D. & R. 258, *S. C.*

(*i*) Tidd, 292: and see *Stacey* v. *Frederici*, 2 B. & P. 390: *Woolcott* v. *Leicester*, 6 Taunt. 75.

(*k*) *Harmer* v. *Hagger*, 1 B. & Ald. 332.

(*l*) MS., East, 1814: *Anon* v. *Bruce*, 2 Chit. Rep. 105: and see *Shakespeare* v. *Phillips*, 8 East, 433.

(*m*) *Powell* v. *Eason*, 1 M. & Scott, 68; 8 Bing. 25, *S. C.*

(*n*) See *ante*, 575.

(*o*) See *Hodgson* v. *Mee*, 5 Nev. & M. 302; 3 A. & E. 765, *S. C.*: a case on 2 W. 4, c. 39.

(*p*) 5 T. R. 368.

(*q*) *R.* v. *Shff. of Middlesex*, 7 T. R. 527.

(*r*) *Edwin* v. *Allen*, 5 T. R. 401

(*s*) *Meysey* v. *Carnell*, 5 T. R. 534.

without justifying, and the court will then stay the proceedings on the bail-bond, upon payment of costs (*y*). If, however, the plaintiff proceed against the sheriff, the render must, in general, be made before the expiration of the rule to bring in the body (*z*). And in a case in the Queen's Bench, where the render was after the usual time for putting in bail had expired, but after further time given, the render was held too late, and an attachment issued after notice thereof regular (*a*).

The sheriff shall have the benefit of a render made by the defendant or the bail below; and the bail below shall have the benefit of a render made by the sheriff or the defendant.

Bail above, how Discharged by.

Bail above may, as a *matter of right*, (*ex debito justitiæ*), at any time pending the suit, or before the return of a *ca. sa.* against their principal, surrender him in their discharge, and may plead this render in any action against them (*b*). The court, also, as a *matter of favour* (*ex gratiâ*), have allowed the bail a further time, after the return of the *ca. sa.*, to render their principal; which, however, being mere matter of favour, cannot be *pleaded*, but the bail may have the full effect of it upon motion (*c*). The additional time here mentioned is regulated thus:—By rule of all the courts of *T. T.*, 3 *W.* 4, *r.* 3, "where the plaintiff proceeds by *action* of debt on the recognisance of bail in any of the courts at Westminster, the bail shall be at liberty to render their principal at any time within the space of *fourteen days* next after the service of the process upon them, but not at any later period; and that upon such render being duly made, and notice thereof given, the proceedings shall be stayed upon payment of the costs of the writ and service thereof only" (*d*). If the plaintiff proceed against the bail by *scire facias*, the bail have until and upon the return day of the *sci. fa.* to render their principal, if the sheriff return *scire feci*, or it seems until and upon the *eighth* day after the return of the *sci. fa.*, when the return has been *nihil* (*e*). For-

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(*y*) *Ante*, 568: see *Brown* v. *Gilles*, 2 B. & Ald. 768; 1 Chit. Rep. 496, *S. C.*

(*z*) See *ante*, 553, 555.

(*a*) *R.* v. *Shffs. of London*, 1 Chit. Rep. 567: and see *R.* v. *Shff. of Middlesex*, 8 T. R. 29: but see *Thorold* v. *Fisher*, 1 H. Bl. 9: *Turner* v. *Bristow*, 2 B. & P. 38: *Weddell* v. *Berger*, 3 Id. 325: *Williams* v. *Waterfield*, Id. 334; by which it seems the practice of the Common Pleas is different.

(*b*) *Simmons* v. *Middleton*, 8 Mod. 341; 1 L. Raym. 156; 1 Wils. 270, *S. C.*: *Mannin* v. *Partridge*, 14 East, 599: *Armitage* v. *Rigbye*, 5 A. & E. 81. Where an action was commenced in the C. P., and removed by error into the Court of King's Bench, and the judgment was there affirmed; and there was then a writ of error to the House of Lords, pending which the defendant was rendered in the Court of King's Bench in discharge of his bail in error: upon an application to the Court of C. P. that an *exoneretur* should be entered as to the bail in the action, the Court held that the render was good, and that the bail there had a right to be exonerated, and accordingly made the rule absolute. (*Sherratt* v. *Floyer*, 2 Bing. 81).

(*c*) See *Wilmore* v. *Clark*, 1 L. Raym. 156: *Anon.*, 1 Salk. 101: *Armitage* v. *Rigbye*, 5 A. & E. 81.

(*d*) See the former practice, Tidd, New Pract. 159; and the rule of T., 1 A. r. 1, Q. B.: *Milner* v. *Petit*, 1 L. Raym. 720: *Fisher* v. *Branscombe*, 7 T. R. 355. Where, after commencing an action against the bail the plaintiff died, and his executor brought a fresh action, it was held that the bail had the same time to render in the second action as if the former had not been brought; (*Wilkinson* v. *Vass*, 8 Id. 422): the same where plaintiff discontinued and brought a fresh action. (*Hoare* v. *Mingay*, 2 Str. 915: and see *Meddowscroft* v. *Sutton*, 1 B. & P. 61). Sunday is reckoned as one of the days, if it be not the last day of the fourteen. (See *Creswell* v. *Green*, 14 East, 537: R. H., 2 W. 4, r. 8, *ante*, 93). The render, of itself, according to a recent case, does not operate as a stay of proceedings against the bail, and the plaintiff may proceed, unless the costs of the writ and service thereof are paid. (*Horn* v. *Whitcombe*, 5 Dowl. 328: but see *Burne* v. *Aguilar*, 3 East, 306: *post*, 629).

(*e*) See *Armitage* v. *Rigbye*, 5 A. & E.

merly, if the render were made after action brought, on the last of the days limited for it, it must have been made before the court rose (*f*); but now, by rule of all the courts of *R. H.*, 2 *W.* 4, *r.* 22, "bail shall be at liberty to render the principal at any time during the last day for rendering, so as they make such render before the prison doors are closed for the night."

Time to render, when enlarged.

Illness of Principal.

Lunacy.

Detention by Foreign Enemy.

Transportation, &c.

Impressment.

Bankruptcy.

The court will not, in general, enlarge the times above mentioned; the bail, by their recognisance, have bound themselves to render their principal or pay the debt and costs; and they shall not, in general, be excused from the performance of the condition of their recognisance merely because the render has become impossible without any default of theirs. This is hard upon the bail, perhaps, but it would be still harder upon the plaintiff, if he were to be delayed by a circumstance against which the bail themselves had impliedly guaranteed him. The court, therefore, have refused to enlarge the time for rendering, even on the ground that the principal could not be removed without endangering his life (*g*) (unless he be already in custody, and his illness be returned specially on the *habeas corpus*) (*h*); or that he had become a lunatic (except under very special circumstances) (*i*); or that he was unwarrantably arrested and detained by a foreign enemy (*k*). But if, from any act or law of our own state, it become impossible to render a defendant (*l*); as, if he have been actually sent out of the kingdom under the alien act (*m*); or be actually on board a convict ship, in order to be transported (*n*); or when a seaman, being out upon bail for a debt under 30*l.*, is impressed into the Queen's service (*o*), or the like (*p*); the court or a judge, upon application, will at once order an *exoneretur* to be entered on the bail-piece. So, if he become bankrupt, the court or a judge will, in the case of a country fiat, enlarge the time for surrendering him until after he has finished his last examination (*q*); but whether the time will be enlarged in the case of a town fiat is doubtful, the Court of Common Pleas having refused to enlarge the time in such a case (*r*); while, on the other hand, the Court of Exchequer have enlarged it, observing that there is no distinction in this respect, between a town and a country fiat (*s*). Also, where a defendant is in custody under a warrant of commissioners of bankrupt, the court or a judge will enlarge the time for ren-

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82: *Sanderson* v. *Brown*, 2 Nev. & P. 84: *Anon.*, 8 Mod. 340: *Wilmore* v. *Clark*, 1 L. Raym. 156: *Simmons* v. *Middleton*, 1 Wils. 270: *Mannin* v. *Partridge*, 14 East, 599. In actions by original, when that process was in use, the bail had until the *quarto die post* of the return of the *sci. fa.* to render the principal. (*Bailey* v. *Smeathman*, 4 Burr. 2134: *Simmons* v. *Middleton*, 1 Wils. 269: Tidd, New Pract. 159).

(*f*) See *post*, 640: and see *Lardner* v. *Bassage*, 2 H. Bl. 593: *Simmons* v. *Middleton*, 1 Wils. 270.

(*g*) *Wynn* v. *Petty*, 4 East, 102: *Grant* v. *Fagan*, Id. 190.

(*h*) *Winstanley* v. *Gaitskell*, 16 East, 389.

(*i*) *Cock* v. *Bell*, 13 East, 355. But a lunatic may be brought up by *habeas* from St. Luke's Hospital, and rendered. (*Pillop* v. *Sexton*, 3 B. & P. 550).

(*k*) *Grant* v. *Fagan*, 4 East, 189.

(*l*) See the notes in 13 Price, 525, 532.

(*m*) See *Folkein* v. *Critico*, 13 East, 457.

(*n*) *Wood* v. *Mitchell*, 6 T. R. 247: *Fowler* v. *Dunn*, 4 Burr. 2034.

(*o*) *Robertson* v. *Paterson*, 7 East, 405: and see *ante*, 449, 451, 474.

(*p*) See *Maude* v. *Jowett*, 3 East, 145.

(*q*) Id.: *Offley* v. *Dickens*, 6 M. & Sel. 348: *Glendenning* v. *Robinson*, 1 Taunt. 320.

(*r*) *Coombes* v. *Dod*, 2 Dowl. 766; 3 M. & Scott, 817, S. C.: *Shaw* v. *Cash*, 12 Moore, 257; 4 Bing. 80, S. C.: *sed vide* *Ruston* v. *Greene*, 2 Dowl. 617.

(*s*) *Ruston* v. *Green*, 2 Dowl. 617.

Imprisonment for Crime.

dering the defendant, though the bail have not justified, he being, in such a case, as it were in criminal custody, so that the bail could not render him (*t*). The court or a judge will enlarge the time for bail to render a defendant, who is under imprisonment in a county gaol upon a conviction for libel, until a week after the imprisonment under the sentence has expired; but not until a week after the term for which he was sentenced to be imprisoned (*u*).

Mode and Time for applying for Enlargement.

It must always be sworn that the application is made on behalf of the bail (*x*). And, it may be here observed, that, in general, the bail can make no motion until they justify; but when the defendant is already in custody, and the bail cannot make the render in due time, it is an exception to the general rule, and the bail may obtain time to render (*y*). In all other cases, the bail must render their principal within the time above mentioned, or pay the debt and costs.

To what Gaol rendered when not in Custody.

If the defendant *be not in custody*, the render may be to the prison of the court, (*i.e.* in the Court of Queen's Bench, the Queen's Bench Prison; in the Common Pleas and Exchequer, the Fleet Prison), or to the gaol of the county wherein the defendant was arrested; and for the latter purpose a judge's order must be obtained, which is to be lodged with the gaoler, and a written notice of the lodgment of such order, and of the defendant's being in custody of such gaoler, must be delivered to the plaintiff's attorney or agent (*z*). This is provided for by the 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 21, which enacts that "a defendant who shall have been held to bail upon any mesne process issued out of any his majesty's superior courts of record, may be rendered in discharge of his bail, either to the prison of the court, out of which such process issued, according to the practice of such court, or to the common gaol of the county in which he was so arrested; and the *render to the county gaol* shall be effected in the manner following; that is to say, the defendant, or his bail, or one of them, shall, for the purpose of such render, obtain an order of a judge of one of his majesty's superior courts of Westminster, and shall lodge such order with the gaoler of such county gaol; and a *notice* in writing of the lodgment of such order, and of the defendant's being actually in custody of such gaoler by virtue of such order, signed by the defendant, or the bail, or either of them, or by the attorney or agent of any or either of them, shall be delivered to the plaintiff's attorney or agent; and the sheriff or other person responsible for the custody of debtors in such county gaol shall, on such render so perfected, be duly charged with the custody of such defendant, and the said bail shall be thereupon wholly exonerated from liability as such." The Palace Court is not a superior court of record within the above act (*a*). It seems, that in case of an arrest in the Cinque Ports, Dover

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(*t*) *Gibson* v. *White*, 1 Dowl. 297; 2 C. & J. 85; 2 Tyr. 162, *S. C.*: and see *Waugh* v. *Ashford*, 1 Scott, 167; 3 Dowl. 123, *S. C.*: *Harris* v. *Alcock*, 2 C. & J. 346.

(*u*) *Campbell* v. *Ackland*, 1 C. & M. 73; 1 Dowl. 635, *S. C.*: and see *Rouch* v. *Boucher*, 10 Price, 104: *Ashmore* v. *Fletcher*, 13 Id. 630.

( ) *Harris* v. *Glossop*, 2 Chit. Rep. 101.

(*y*) *Golding* v. *Haverfield*, 13 Price's Rep. 593: Bagley's Pract. 169.

(*z*) 11 G. 4 & 1 W. 4, c. 70, s. 21, *post*, 630.

(*a*) *Scaith* v. *Browne*, 5 Dowl. 412, Q. B.

Castle is the county gaol to which to render the defendant under this act (*b*).

When in Custody in a civil Suit.

If the defendant *be in custody* in a *civil* suit, the bail might always, as a matter of course and of right, have had a *habeas corpus* to bring him up in order to render him (*c*). But now, by virtue of the above act, such *habeas corpus* is unnecessary, and the render may be made in the preceding manner, as where he is not in custody. This is provided for by the 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 21, which enacts that "a defendant who shall hereafter be in custody of the gaoler of the county gaol of any county in England, or in the principality of Wales, by virtue of any proceeding out of any of his majesty's superior courts of record, may be rendered in discharge of his bail in any other action depending in any of the said courts, in the manner hereinbefore provided for a render in discharge of bail; and the keeper of such gaol, or such sheriff or other person responsible for the custody of debtors as aforesaid, shall, on such render, be *duly* charged with the custody of such defendant, and the said bail shall be thereupon wholly exonerated from liability as such."

11 G. 4 & 1 W. 4, c. 70.

Rules of the Court of Exchequer, as to.

Upon this enactment the Court of Exchequer made a rule, in *M. T.*, 1 *W.* 4, *r.* 2, *s.* 12, ordering that "on application by a defendant or his bail, or either of them, for an order of one of the barons of this court, to render a defendant to a *county gaol*, it shall be specified on whose behalf such application shall be made, the state of the proceedings in the cause, for what amount the defendant was held to bail, and by the sheriff of what county he was arrested; which facts shall be stated in the order; and that on such order being lodged with the gaoler of the county gaol in which such defendant was so arrested, the defendant may be rendered to his custody in discharge of the bail; and that on such lodgment and render, a notice thereof and of the defendant's being actually in custody thereon, in writing, signed by the defendant or his bail, or either of them, or the attorney or agent of any or either of them, shall be delivered to the plaintiff's attorney or agent, and thereupon the bail for such defendant shall be wholly exonerated, without entering an *exoneretur*." Where a sheriff had put in bail above, in order to render, and had obtained a judge's order for rendering, at the instance of himself and the bail, which order was signed by himself and the sheriff's attorney, instead of the defendant or his bail or their attorney, the court would not rescind the order, which they said might be amended, by striking out all that shewed it to be granted at the sheriff's instance (*d*). Also, by another rule of the Exchequer, of *M. T.*, 1 *W.* 4, *r.* 2, *s.* 13, "if a defendant shall be in custody of the gaolor of the county gaol of any county of *England* or *Wales*, by virtue of any process issued out of any his majesty's superior courts of record, he may be rendered in discharge of his bail, in any action depending in this court, in like manner as is hereinbefore provided for a render

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(*b*) *Stride* v. *Hill*, 4 Dowl. 709.

(*c*) See *Betteswor th* v. *Bell*, 3 Burr. 1876. The *habeas* might have been issued in term or vacation, and be made returnable immediate, (Id.), and the judge, on the defendant being brought up, would either have committed him in the Queen's Bench to the custody of the marshal, or in the Common Pleas or Exchequer, of the warden, or remanded him to his former custody.

(*d*) *Green* v. *Jacobs*, 3 Tyr. 231.

in discharge of bail; and thereupon the bail shall be wholly exonerated from liability as such bail."

When in Custody, at Suit of the Queen, or on criminal Process.

If the defendant be in custody at the queen's suit, or on criminal process, application must be made to the Court of Queen's Bench for leave to sue out a *habeas corpus* to bring him up in order to render him. Thus, that court has granted a *habeas* to bring up a defendant who was in custody of the sheriff under a charge of felony, in order that he might be rendered in discharge of his bail (*e*); and the same, even if the principal were convicted and under sentence of transportation (*f*), provided he was not at the time actually on board the convict-ship in order to be transported (*g*). So, a *habeas* will be granted by that court for the same purpose, to bring up a principal, who has been committed to Newgate by the commissioners of bankrupt (*h*). But the Court of Common Pleas cannot so bring him up by *habeas*, or otherwise, but they will enlarge the time for his render, although not "till he has passed his last examination" (*i*). Even if the principal be in the house of correction, provided he be there for safe custody only, and not for punishment, the Court of Queen's Bench will grant a *habeas* to bring him up, to render him in discharge of his bail, and will then re-commit him to the custody of the sheriff (*k*); but they will not do so, if the principal be in the house of correction for punishment (*l*). So, a queen's debtor in the Fleet may be brought up by *habeas* to the Court of Queen's Bench, in order to render him in discharge of his bail in an action there (*m*). The court have also granted writs of *habeas*, for the same purpose, to bring up an impressed man in custody at the Savoy (*n*), and a lunatic confined in St. Luke's hospital (*o*). But when the principal, an alien, was in the custody of a messenger, for the purpose of being sent out of the kingdom under the alien act, the Court of Queen's Bench refused a *habeas*, as his passage had already been taken in a ship immediately about to sail, and if he were brought up, it was probable the ship would sail without him; but they intimated that as soon as he had actually sailed, they would allow an *exoneretur* to be entered on the bail-piece (*p*).

Where Defendant is in Custody in an inferior Court.

Where judgment had been obtained in an action in the Palace Court, where the defendant was in custody, the court would not, at the instance of the bail for the same defendant in another action in the Exchequer, issue a *habeas corpus* to the Palace Court, for the purpose of removing the cause there, with the body of the defendant, in order that the bail might render him in the action in the Exchequer (*q*). But the court gave the bail time to render until fourteen days after the

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(*e*) *Sharp* v. *Sheriff*, 7 T. R. 296: *Daniel* v. *Thompson*. 15 East, 78: see *Currie* v. *Kinnear*, 1 B. & B. 23; 3 Moore, 259, *S. C.*

(*f*) *Vergen's case*, 2 Str. 1217: *Joyce* v. *Pratt*, 4 Moo. & P. 55, 56; 6 Bing. 377, *S. C.*

(*g*) *Fowler* v. *Dunn*, 4 Burr. 2034: *vide supra.*

(*h*) *Taylor's case*, 3 East, 332: but not by C. P. (*Hodgson* v. *Temple*, 1 Marsh. 166: *Waugh* v. *Ashford*, 1 Scott, 167; 3 Dowl. 126, *S. C.*)

(*i*) *Waugh* v. *Ashford*, 3 Dowl. 123; 1 Scott, 167; 1 Bing. N. C. 294, *S. C.*

(*k*) *Gunn* v. *Cromer*, MS., T. 1825.

(*l*) See *Brandon* v. *Davis*, 9 East. 154.

(*m*) *Boise's bail*, 1 Str. 641: *Chitty's case*, 1 Wils. 248.

(*n*) *Bond* v. *Isaac*, 1 Burr. 339.

(*o*) *Pillop* v. *Saxton*, 2 B. & P. 550.

(*p*) *Folkein* v. *Critico*, 13 East, 457: *vide supra.*

(*q*) *Lawes* v. *Hutchison*, 3 Dowl. 506; 1 C., M. & R. 766.

expiration of the custody in the Palace Court, no cause being shewn against so much of the rule for such time(*s*).

Special Bail must be put in before the Render.

Special bail must be put in before the render can be made(*s*).] This, as has been before remarked, (*ante*, 575), may be done either by the defendant, or by the bail below, or by the sheriff: or even if the defendant put in bail for the purpose of justifying special bail, may also be put in by the bail below or the sheriff, within the time limited for that purpose, for their own security, if they suspect that the bail put in by the defendant will not render him in the event of their not justifying; and the bail thus put in by the bail below, or sheriff, may immediately take and render the defendant, upon his own bail failing to justify(*t*). It has been holden also, that bail who have justified may, even after final judgment, cause the names of two others to be added to the bail-piece, for the purpose of rendering the principal, upon leave of the court, or a judge's order being obtained for that purpose(*u*). As the putting in of bail, in such a case, however, is mere matter of form(*x*), and, as it is not necessary that the bail so put in should justify(*y*), any person, however in other cases unqualified, such as an attorney or attorney's clerk(*z*), or the like, will be sufficient for that purpose. In the Court of Queen's Bench, bail who had been rejected were still competent to render the defendant, so long as they remained on the bail-piece(*a*); though it was otherwise in the Common Pleas, where they must have entered into a fresh recognisance, before they could have rendered the defendant(*b*); and now, by rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 20, "bail, though rejected, shall be allowed to render the principal, without entering into a fresh recognisance"(*c*); and the same where one only of the bail justifies, he and the other may render the principal(*d*). Also, where bail were excepted to, and two others added, and only one of the added bail justified, the court held that the former two might render the principal, their names still remaining on the bail-piece(*e*). Although the putting in of bail, in this case, is mere matter of form, yet in point of form it must be strictly regular; therefore, where one bail only was put in, a render by that one was holden bad, and the plaintiff was allowed to proceed upon the bail-bond(*f*). But, it seems, there is no occasion in the Court of Queen's Bench, or in the Exchequer, for a notice of putting in bail, who are so put in merely for the purpose of rendering the defendant, though it is otherwise in the Common Pleas(*g*). (*See as to the mode of putting in bail*, ante, 577, 578).

Render, how made in Q. B.

The mode of rendering a defendant, when at large, to the

(*r*) *Lawes* v. *Hutchison*, 3 Dowl. 506; 1 C., M. & R. 766, *S. C.*

(*s*) *Hodgson* v. *Mee*, 5 Nev. & M. 302; 3 A. & E. 765, *S. C.*: see *Harrison* v. *Davies*, 5 Burr. 2683.

(*t*) *Birchere* v. *Colson*, 2 Str. 876; 1 Barnard, 369: see *Taylor* v. *Evans*, 8 Moore, 398; 1 Bing. 367, *S. C.*

(*u*) *Davidson* v. *Fowler & Al.* MS., H. 1820; 2 Chit. Rep. 74, *S. C.*

(*x*) MS., E. T. 1817.

(*y*) *Mitchell* v. *Morriss*, 2 W. Bl. 1179; Id. 758: *Wiggins* v. *Stephens*, 5 East, 533: *Wale* v. *Walker*, 1 H. Bl. 638: *Seaver* v. *Spraggon*, 2 New Rep. 85: and *ante*, 621.

(*z*) *Jackson* v. *Trinder*, 2 W. Bl. 1180: *Bell* v. *Gale*, 1 Taunt. 163, *per Heath*, J.: R. H., 2 W. 4, r. 13, *ante*, 575.

(*a*) *Sayer* v. *Verdenhalm*, 6 M. & Sel. 218; 1 Chit. Rep. 446.

(*b*) *Bell* v. *Gate*, 1 Taunt. 163; and see 3 Moore, 240, n. (*a*); 1 Chit. Rep. 446 a.

(*c*) *R.* v. *Shff. of Middlesex*, in *Logan* v. *Louel*, 6 Bing. 251; 3 Moo. & P. 594, *S. C.*

(*d*) *Mills* v. *Head*, 1 New Rep. 138, n.

(*e*) *R.* v. *Shff. of Essex*, 5 T. R. 633.

(*f*) *Scryven* v. *Dryther*, Cro. El. 672; Barnes, 46, 172.

(*g*) See *Wilson* v. *Griffin*, 2 C. & J. 683; Tidd, 9th ed. 253.

Queen's Bench prison, is thus:—*Take the defendant to the court, if sitting; or, which is much more usual, to the judge's chambers*(*h*)*; and upon giving the judge's clerk a memorandum of the state of the cause, and (if before final judgment) the sum sworn to, or (if after final judgment) the amount of the debt and damages, or damages, as the case may be, he will make out the render and commitment, and deliver the defendant to the tipstaff, who will thereupon convey him to the Queen's Bench prison, and the judge will exonerate the bail. Pay the judge's clerk and the tipstaff their fees*(*i*)*; and pay the tipstaff also his fee for a certificate that the defendant is in the marshal's custody, which he will give you*(*k*).

How in C P. and Exch.

In the Common Pleas and Exchequer the mode is thus:—*Take the defendant to the court, if sitting; or, which is more usual, to the judge's chambers; get the master or his clerk to attend there with his book; the defendant will then be rendered, and delivered into the custody of a tipstaff for the purpose of being taken to the Fleet prison, and the judge will exonerate the bail. Pay the master, the judge's clerk, and the tipstaff, their fees.* The render may be made by the party himself without an attorney(*l*). In the Queen's Bench, under the commitment shall be added the state in which the cause or causes stand at the time of such surrender; if before declaration, "the sum sworn to on the arrest;" if a declaration hath been filed or delivered, then to the sum sworn to shall be also added "*declaration filed or delivered*," "*issue joined*," or "*interlocutory judgment signed*," as the case is: if after final judgment in debt, "*the debt and damages*;" in other cases "*the quantum of the damages*" (*m*).

When and where Bail may arrest their Principal.

It may be necessary to add, that if the defendant do not come voluntarily to be rendered, the bail may seize him; even bail put in by the sheriff's officer, without the defendant's privity, may seize and render him (*n*). Bail may even justify breaking and entering a house (the outer door being open) in which the principal resides, in order to seek for him, for the purpose of rendering him (*o*). They may take him, although a bankrupt, and attending before the commissioners for the purpose of being examined, and during the forty-two days after his surrender, when in other cases he is privileged from arrest (*p*). They may also, it seems, take him on a Sunday (*q*). When taken, one of the bail must constantly stay with him (unless he consent, in writing, to remain in the custody of some other person; in which case, he is usually lodged in the house of an officer) until he is rendered(*r*).

Notice of Render must be given.

Also, when the render is thus made, the defendant or his attorney must, without delay, *give notice of such render to the plaintiff's attorney, and shall make affidavit thereof before the bail in that action shall be discharged*; and in default thereof

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(*h*) But this does not seem necessary, unless the defendant desire it. (*Davis* v. *Fowler*, 2 Chit. Rep. 74).

(*i*) See *Re Salisbury*, 5 B. & Ald. 266.

(*k*) See the form of the memorandum, Chit. Forms, 268; of the minute of the render and commitment. Id. 269.

(*l*) *Nethersole's bail*, 2 Chit. Rep. 269.

(*m*) R. E., 8 G. 3.

(*n*) *R.* v. *Butcher*. Peake, 169: *Birt* v. *Roberts*. 1 M. & M. 177: *Pyewell* v. *Stow*, 3 Taunt. 525: but see *Taylor* v. *Evans*, 1 Bing. 367: 8 Moore, 398, *S. C.*

(*o*) *Sheers* v. *Brooks*, 2 H. Bl. 120.

(*p*) *Ante*, 528: MS., E. T. 1817.

(*q*) *Anon.*, 6 Mod. 231: and *ante*, 531, 199: but see *Brooks* v. *Warren*, 2 W. Bl. 273, *contra*.

(*r*) 1 Sel 170. But see *Pyewell* v. *Stow*, 3 Taunt. 425, from which it seems, that a person employed by the bail in assisting to take the principal will be warranted in detaining him, even although the bail should not be present at the time.

such render shall be void (*s*). And by *R. T.*, 1 *A. r.* 1, Q. B., if the bail be impleaded by action of debt upon the recognisance, then, upon notice of the render being given to the plaintiff or his attorney, all further proceedings against the bail shall cease. This, of course, supposes the render to have been made within the time allowed for that purpose by the practice of the court; for otherwise the plaintiff may treat it as a nullity. Where there was a delay of twenty-six days in giving the notice of render, the court, nevertheless, under circumstances, relieved the bail (*t*). If the plaintiff proceed in the action, after notice of the render, because no tender was made to him of the costs already incurred, nor any rule obtained to stay the proceedings, the subsequent proceedings, according to one case, will be irregular, the above rule of court of itself operating as a stay of proceedings (*u*); but, according to a more recent decision, this is incorrect (*x*). So, if the principal be rendered before any proceedings are had against the bail, but, in consequence of notice thereof not being given, the plaintiff proceeds upon the bail-bond or recognisance, the court will, at any time, even after execution levied against the bail (*y*), set aside the proceedings and allow an *exoneretur* to be entered, upon payment of costs (*z*); and in some recent cases proceedings have been set aside even without payment of costs (*a*). Where the sheriff arrested the defendant on the 13th November, on a writ returnable the 15th, and suffered him to go at large without a bail-bond, and afterwards returned *cepi corpus;* and bail above were put in on the 17th December, and on the same day the defendant was rendered, but no notice of the render was given until the 13th January; and an action was, on the 19th December, brought against the sheriff for the escape; the court, nevertheless, stayed the proceedings upon payment of costs up to the time when notice of render was given, and the costs of the motion (*b*).

Exoneretur, how entered.

Also, after the render is thus made, *take the above affidavit of service of the notice of render to the judge's clerk or the master who has the bail-piece, and he will give it to you, keeping the affidavit as his voucher. Take the bail-piece and the certificate given to you by the tipstaff as before mentioned, to one of the masters, who will enter an* exoneretur (*c*) *upon the bail-piece, keeping the certificate as his voucher. Next, take the bail-piece and file it with one of the masters. And, lastly, in the Queen's Bench, though perhaps not absolutely requisite* (*d*), *enter the render and*

(*s*) See R. T., 1 A. r. 2, Q. B.

(*t*) *Brookhouse* v. *Shff. of Derbyshire*, 5 B. & C. 244, *infra.*

(*u*) *Byrne* v. *Aguilar*, 3 East, 306.

(*x*) *Horn* v. *Whitcombe*, 5 Dowl. 328, Exch.; but the case in 3 East was not cited.

(*y*) *Lepine* v. *Barratt*, 8 T. R. 222: *Thorne* v. *Hutchinson*, 4 D. & R. 712; 3 B. & C. 112, *S. C.*

(*z*) *Hughes* v. *Poidevin*, 15 East, 254: *Abbott* v. *Rawley*, 3 B. & P. 13.

(*a*) *Creswell* v. *Hearne*, 1 M. & Sel. 742: *Smith* v. *Lewis*, 16 East, 168. See the form of notice of render, Chit. Forms, 269: and of affidavit of service. Id.

(*b*) *Brookhouse* v. *Shff. of Derbyshire*, 5 B. & C. 244. See after an attachment against the sheriff, *R.* v. *Shff. of Middlesex*, 2 D. & R. 225.

(*c*) In the Exchequer this entry is unnecessary to exonerate the bail. (*Ante*, 625: Chap. Pract. 147).

(*d*) MS., E. 1819: *R.* v. *Shff. of Middlesex*, 1 Chit. Rep. 364: *R.* v. *Shff. of Middlesex*, in *Phillips* v. *Dore*, 2 B. & Ald. 607; 1 Chit. Rep. 359, *S. C.:* and see *Hutchins* v. *Kenrick*, 2 Burr. 1049: *Watson* v. *Sutton*, 1 Salk. 272. In actions by original, when that process was in existence, the render to the Queen's Bench Prison was made in the same manner as is above mentioned, excepting that you filed the affidavit of the service of notice with the clerk of the rules; and, instead of taking the certificate given you by the tipstaff to the master's office, you took it to the filazer with whom the bail was put in, and he got the master to enter an *exo-*

committitur *in the marshal's book, which is kept in the master's office; you will see the form of the entry there.* The above affidavit of service and the certificate are not required in order to make the render a discharge of the *sheriff* (*e*); they are only necessary in order to discharge the *bail;* and you cannot get an *exoneretur* entered without them. The *exoneretur* is essentially necessary, except in the Exchequer on a render to a county gaol (*f*), to complete the discharge of the bail; and, until this be made, they still remain liable, even although the defendant be in prison (*g*); but it is not, of course, necessary in order to discharge the sheriff. Where, however, the attorney omitted to get the *exoneretur* entered, and proceedings were subsequently had against the bail, the court set aside the proceedings upon payment of costs; and ordered the *exoneretur* to be entered and the bail-piece filed (*h*). So, where the bail-piece had been delivered to the plaintiff's attorney to be filed, who had neglected to file it, the court held that the plaintiff could not proceed against the bail for want of an *exoneretur* being entered on the bail-piece (*i*).

Render to Gaol of County wherein Arrested, how made.

The mode of rendering a defendant, *when at large*, to the *gaol of the county* wherein he was arrested is thus:—*An order must be previously obtained from a judge, which is granted as of course without affidavit* (*j*), *upon the application of the defendant, or his bail, or one of them, and is drawn up by the judge's clerk upon a memorandum, stating the name of the cause, on whose behalf the order is applied for, the state of the proceedings in the cause, the amount for which he was held to bail, or the debt or damages recovered by the verdict, by the sheriff of what county he was arrested, and the gaol into which the party is to be rendered* (*k*). *The order thus obtained is lodged with the gaoler of the county in which the defendant was arrested, and the defendant being delivered or surrendering himself to custody at the same time, upon a service of a notice of such order, and of the defendant being in actual custody thereon, to plaintiff's attorney or agent, (which notice may be signed by the defendant or his bail, or one of them, or by the attorney or agent for any or either of them), the render is perfected, and the bail are wholly exonerated from liability* (*k*). It appears, however, that it is still considered necessary in the Queen's Bench and Common Pleas, (though it is expressly dispensed with in the Exchequer, by the rule of *M. T.*, 1 *W.* 4, *r.* 2, *s.* 12, *ante*, 625), *to enter a formal* exoneretur *on the bail-piece, which is done at the master's office, upon an affidavit of the render and service of the notice of render on the plaintiff's attorney, which affidavit should be taken to the judge's chambers, or the master's office, when the bail-piece has been lodged and filed there* (*l*). When

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neretur in his book, keeping the certificate as his voucher.

(*e*) MS., E. 1819: *R.* v. *Shff. of Middlesex*, in *Phillips* v. *Dore*, 2 B. & Ald. 607; 1 Chit. Rep. 359, *S. C.*

(*f*) In the Exchequer this entry is unnecessary to exonerate the bail. (*Ante*, 625: Chap. Pract. 147).

(*g*) *Fitzgerald* v. *Countess of Clanricard*, Comb. 263: *Wild* v. *Harding*, 8 Mod. 282, 340: and see *R.* v. *Shff. of Essex*, 5 T. R. 633: *Williams* v. *Williams*, 1 Salk. 98: *R.* v. *Shff. of Middlesex*, 6 Bing. 251; 3 Moo. & P. 594, *S. C.*

(*h*) *Weaver* v. *Chandler*, Say. 7: and see *Knight* v. *Winter*, Barnes, 68.

(*i*) *Wild* v. *Harding*, 8 Mod. 280.

(*j*) Jerv. Rules, 10, n. (*r*).

(*k*) See the stat. 11 G. 4 & 1 W. 4, c. 70, s. 21: and see the rule of the Exchequer of M. T., 1 W. 4, r. 2, s. 12, *ante*, 625, which rule is acted on in practice by the other courts. See the form of the order, Chit. Forms, 270.

(*l*) Price's New Prac. 223: Bagley's Prac. 164: Chap. Prac. 144, 146. See forms, Chit. Forms, 270.

there are several defendants in a country cause, all of whom have the same bail, they may be surrendered under one order; but if the bail are different, each set of bail must have a separate order to surrender their principal (*m*). The render must be made within the time limited for a render to the Queen's Bench prison.

How, when Defendant is in Custody.

The mode of rendering the defendant when *in custody in a county gaol*, by virtue of any process sued out of any of the superior courts, is also in the manner above mentioned (*n*).

Where Defendant is taken on an Escape Warrant.

If the defendant have escaped, and be retaken under an escape warrant, and lodged in the gaol of the county, &c., in which he is taken, his bail may have a writ directed to the sheriff of such county, commanding him to detain and keep such prisoner in custody in discharge of his bail; and the delivery of such writ to the sheriff shall be deemed an effectual render, and the sheriff shall afterwards be liable if the prisoner escape (*o*).

How, where Defendant is in Custody at Queen's Suit

Where the defendant is already in custody at the Queen's suit, or on a *criminal* account, you must have him brought up by *habeas corpus*, as mentioned *ante*, 626. As to the mode of suing out the *habeas*, see *Vol. II. Book IV. Part I. Ch.* 3 (*p*). As soon as the defendant is brought up under this writ, the render is then made as directed, *ante*, 627, 628.

Discharge of Bail by Variance between the Declaration and Writ, or Affidavit, &c.

Discharge of Bail by Variance between the Declaration and Writ, or Affidavit, &c.] We have already seen (*ante*, 495, 501) how far the bail will be discharged by a variance between the writ and affidavit to hold to bail. In actions commenced by the process prescribed by 2 *W.* 4, *c.* 39, it seems that a variance between the cause of action stated in the writ and the declaration, or the want of such statement in the writ, would not only discharge the bail, but also render the proceedings irregular (*q*). But the defendant could not adopt both remedies at once; therefore, if he applied to set aside the declaration for irregularity, the court would not set it aside, as well as discharge the bail, for a proper declaration might be afterwards delivered (*r*). It would seem that the cases decided on 2 *W.* 4, *c.* 39, are still authorities, with this qualification, that, as the bailable proceedings under the 1 *&* 2 *V. c.* 110, are merely collateral to the action, the declaration will not be *irregular*, because of differing from the *capias*, provided it agrees with the writ of summons by which the action is commenced; but the bail will now be discharged in all such cases on the ground of variance, whether the order to arrest be made before or after declaration. If the writ were in trespass on the case and the declaration on debt, or if the writ were in *assumpsit*, and the declaration in trover, or the like (*s*), it would be a variance. If the writ be to answer the plaintiff generally, and not in a special character, "*as* administrator," his declaring in a special character will not discharge the bail; *aliter*, if the writ be to answer the plaintiff in such special

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(*m*) Bagley's Pract. 164.

(*n*) See 11 G. 4 & 1 W. 4, c. 70, s. 22, and the rule of the Exchequer of M. T., 1 W. 4. r 2, s. 12, *ante*, 625. See the form, Chit. Forms, 270.

(*o*) 1 A. c. 6, s 3.

(*p*) See the form of the writ, Chit. Forms, 271.

(*q*) See *ante*, 521.

(*r*) See *Ward* v. *Tummon*, 1 A. & E. 619.

(*s*) See *Tetherington* v. *Goulding*, 7 T. R. 80: *De La Cour* v. *Read*, 2 H. Bl. 278: *King* v. *Skeffington*, 1 C. & M. 363; 3 Tyr. 318, *S. C.*

character, and he declare generally (*t*). If the plaintiff declares for a different cause of action from that mentioned in the affidavit to hold to bail, he thereby discharges the bail *in toto* (*u*). As, if the affidavit be *in assumpsit* and the declaration in trover (*x*); or the affidavit be upon a bill of exchange and the declaration in covenant (*y*); or if the declaration vary from the affidavit in the cause of action, or in the number of defendants (*z*); or in the name of the defendant (*a*); or if the plaintiff declare in his own right upon an affidavit in *autre droit* or *vice versâ* (*b*): in these cases the bail are discharged of their liability, and the court, or a judge, upon application, will order an *exoneretur* upon the bail-piece, and will not allow the declaration to be amended, so as to re-charge the bail with their liability (*c*). So, if the plaintiff puts into his declaration a cause of action distinct from that in which the bail became security, or, in other words, from that in the affidavit of debt, and recovers on that cause only, the bail are not liable; though, if he recovers both on the original and added cause, the bail are liable as far as regards the original cause (*d*): and where, after an arrest for goods sold, the plaintiff added in his declaration a special count for not delivering a bill of exchange, and recovered on that count *only*, it was holden that the bail were discharged (*e*). But where a defendant was arrested in an entire sum for goods sold and money lent, and the declaration contained no count for goods sold, the bail were held not to be discharged (*f*). Where the declaration contains counts on causes of action not included in the affidavit of debt, and the plaintiff recovers both on the original and added causes, the bail are not liable to the costs of the counts on the latter; and it lies on the plaintiff to have the costs separated in taxation; and, if they are taxed generally, none are recoverable against the bail (*g*). A trifling variance in the declaration in the names of the parties does not seem a ground for discharging the bail (*h*). And where a defendant was holden to bail by a wrong christian name, but put in and justified bail above by his right name, and the plaintiff declared against him by such right name, the bail were not exonerated (*i*). And the same, where the affidavit of debt was on a note payable to A. and by him indorsed to plaintiff, and the declaration was on a note payable to A., by him indorsed to C., and by C. to plaintiff (*k*). But, when the affidavit to hold to bail was against A., the writ against A. and B., and the declaration against A., who alone put in bail, the Court of Common Pleas held it to be irregular (*l*). Formerly, if an original writ issued into one county, and the *venue* was laid in another, the bail

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(*t*) See the cases, *ante*, 513. But in the Court of Common Pleas, according to some cases, the practice is different. (See *ante*, 513).

(*u*) 2 Saund. 72 a.

(*x*) *Tetherington* v *Goulding*, 7 T. R. 80: *Kerr* v. *Sheriff*, 2 B. & P. 358.

(*y*) *De La Cour* v. *Read*, 2 H. Bl. 278.

(*z*) See *Grindall* v. *Smith*, 1 Moo. & P. 24: *Christie* v. *Walker*, 1 Bing. 68; 8 Moore, 33, *S. C.*

(*a*) *Ante*, 495.

(*b*) *Ante*, 495.

(*c*) *Levet* v. *Kibblewhite*, 6 Taunt. 483: see *Gent* v. *Abbott*, 8 Id. 304.

(*d*) 2 Saund. 2, 72: *Wheelright* v. *Jutting*, 7 Taunt. 304; 1 Moore, 51, *S. C.*: and see *Caswell* v. *Coare*, 2 Taunt. 107: *Taylor* v. *Wilkinson*, 5 Nev. & M. 189, 1 H. & W. 451; 3 A. & E. 784, *S C.*: *Green* v. *Elgie*, 3 B. & Adol. 437.

(*e*) *Thompson* v. *Macerone*, 4 D. & R. 619; 3 B. & C. 1, *S. C.*

(*f*) *Gray* v. *Harvey*, 1 Dowl. 114.

(*g*) *Taylor* v. *Wilkinson*, 1 Nev. & P. 629; 6 A. & E. 533, *S. C.*

(*h*) —— v. *Rennels*, 1 Chit. Rep. 659.

(*i*) *Clark* v. *Baker*, 13 East, 273.

(*k*) *Luce* v. *Irwin*, 6 Dowl. 92.

(*l*) *Forbes* v. *Phillips*, 2 New Rep. 98: and see *ante*, 144, 495, 514.

were discharged (*m*), but this practice was put an end to by *R. H.*, 2 *W.* 4, *r.* 40.

How taken advantage of.

An objection on this ground cannot be taken advantage of by plea to an action, or to a *scire facias* against the bail on their recognisance; it must be taken advantage of by application to the court or a judge to have an *exoneretur* entered on the bail-piece, or to relieve the bail from any excess (*n*). The application should be made at the earliest opportunity. Where it was made after time to plead given, it was holden to be too late (*o*). Bail cannot move for an *exoneretur* before proceedings had against them, merely on the ground of the plaintiff's having declared for a different cause of action from that expressed in the writ (*p*); the only course in such a case is, to get the declaration set aside for irregularity (*q*).

Discharge of Bail by giving Time to Principal.

Discharge of Bail by giving Time to Principal.] Any indulgence shewn by the plaintiff to the principal without the consent of the bail or one of them (*r*), which puts them in a different situation from that in which they placed themselves by entering into the recognisance, would discharge their liability. Thus:—a *cognovit* by the principal, by the terms of which he is to have a longer time for the payment of the debt and costs than he could have had if the plaintiff had proceeded regularly and gone to trial in the action, will discharge the bail, if the bail did not consent thereto (*s*). And this, as well in the case of bail to the sheriff as of bail above (*t*). But a *cognovit* by the principal, by which such time is not given, (as, if it be agreed that judgment is to be entered up immediately, or that the debt is to be paid by instalments, within the time in which the plaintiff would have been entitled to judgment and execution, had he gone to trial on the original action), will not discharge the bail, though taken without their knowledge or consent (*u*). Where the plaintiff, with the consent of the bail to the sheriff, took a *cognovit*, with a stay of execution for a month, it was held that, although the bail continued liable, the debt not having been paid, yet the plaintiff could not take proceedings against them without giving them notice that the *cognovit* was unsatisfied (*x*). And where the defendant with the consent of the bail gave a *cognovit* with a stay of execution, and he omitted to pay when the time elapsed, plaintiff not having given the bail notice of this, it was held that he could not proceed against them half-a-year afterwards upon defendant's death (*y*). So, if, without notice to the bail, the plaintiff

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(*m*) *Yates* v. *Plaxton*, 3 Lev. 235, 245: R. E., 2 G 2.

(*n*) See *Taylor* v. *Wilkinson*, 5 Nev. & M. 189; 1 H. & W. 451, *S. C.*

(*o*) *Knight* v. *Dorsey*, 1 B. & B. 48; 3 Moore, 305, *S. C.*: and see *Vernon* v. *Turley*, 4 Dowl. 660; 1 M. & W. 316, *S. C.*

(*p*) *Ward* v. *Tummon*, 4 Nev. & M. 876.

(*q*) Id.: see *Coppin* v. *Potter*, 1 Bing. N. C. 443; 1 Scott, 372.

(*r*) *Semb.*, *Howard* v. *Bradberry*, 3 Dowl. 92.

(*s*) *Thomas* v. *Young*, 15 East, 617: *Bowsfield* v. *Tower*, 4 Taunt. 456: *Croft* v. *Johnson*, 5 Id. 319: *Charleton* v. *Morris*, 6 Bing. 427; 4 Moo. & P. 114, *S. C.* "It would be very extraordinary that, if the plaintiff parted with the power of taking the defendant until default made in payment of the instalments, the power of taking him should still subsist in the bail; that power is entirely derived from, and dependent upon, the power of the plaintiff to take him." (*Per Heath, J.*, 4 Taunt. 458).

(*t*) *Farmer* v. *Thorley*, 4 B. & Ald. 91: *Clift* v. *Gye*, 9 B. & C. 422: *ante*, 566.

(*u*) *Stevenson v. Roche*, 9 B. & C. 707: *Ladbrook* v. *Hewett*, 1 Dowl. 488.

(*x*) *Clift* v. *Gye*, 9 B. & C. 422: and see *Charleton* v. *Morris*, 6 Bing. 427; 4 Moo. & P. 114, *S. C.*

(*y*) *Surman* v. *Bruce*, 10 Bing. 434; 4 M. & Scott, 184, *S. C.*

take the joint bills of the defendant and another person for his debt and costs(*z*), or agree to take a composition for his debt and costs(*a*), the bail are thereby discharged. But where the drawer of a bill of exchange having been arrested, his brother agreed with the plaintiff that upon the defendant's agreeing to give goods to a certain amount within a month, and a bill of exchange for the remainder, this action and another against the acceptor should cease and the bill be destroyed, but if the agreement was not performed, the plaintiff might proceed within the time; two bills of exchange for the part of the debt were sent to the plaintiff, which he kept and gave credit for, but the goods were not sent; the defendant soon after became bankrupt; the plaintiff then took proceedings against the bail: it was held that the bail were not discharged either by time being given, or by the plaintiff's keeping the two bills(*b*). A mere honorary obligation on the part of the plaintiff not to press a defendant for payment of a debt and costs will not discharge the bail(*c*). The Court of Common Pleas have refused to allow an *exoneretur* to be entered, merely because a court of equity had stayed the proceedings in the action by injunction, but said that the bail might again apply, if any proceedings were taken against them(*d*); and the same, where the application was made on the ground of the plaintiff's having proceeded in equity by bill for discovery and relief for the same cause(*e*).

Time of Application.

The application by the bail for relief on the ground of time having been given to the principal, should always be made in a reasonable time after the bail knew of the agreement to give time(*f*).

Discharge of Bail by other Causes.

Discharge of Bail by other Causes.] If the plaintiff do not declare within the time limited for that purpose by the practice of the court, the bail are discharged(*g*). If the cause be referred to arbitration, the bail are thereby discharged, unless a verdict be taken for the plaintiff's security(*h*). Or, if a judgment be not obtained against the principal, or if the principal pay the debt and costs, the bail, of course, are discharged. So, if the principal (or where there are two defendants, then if both) be taken on the *ca. sa.*(*i*); or, if the plaintiff, instead of suing out a *ca. sa.* against the principal, sue out an *elegit* and extend lands under it, or sue out a *fi. fa.* and levy the whole amount of his debt under it(*k*), the bail are thereby discharged. Also, although bail are liable so long as their names continue on the bail-piece(*l*), yet if they have not justified, they may have their names struck out of the bail-piece, upon application to

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(z) *Willison* v. *Whittaker*, 7 Taunt. 53: *aliter*, if agreed that the plaintiff may still proceed in the action, notwithstanding the bills. (See *Melville* v. *Glendinning*, 7 Taunt. 126: *Vernon* v. *Turley*, 4 Dowl. 660; 1 M. & W. 316, *S. C.*)

(a) *Semb.*, *Thackeray* v. *Whittaker*, 8 Taunt. 28; 1 Moore, 457, *S. C.*: see *Brickwood* v. *Annis*, 5 Taunt. 614; 1 Marsh, 250, *S. C.*; where the composition was taken after a judgment against the bail.

(b) *Vernon* v. *Turley*, 4 Dowl. 660; 1 M. & W. 316, *S. C.*

(c) *Ludbrooke* v. *Hewett*, 1 Dowl. 488.

(d) *Horsley* v. *Walstab*, 7 Taunt. 235.

(e) *Murphy* v. *Cadell*, 2 B. & P. 137.

(f) *Vernon* v. *Turley*, 4 Dowl. 660; 1 M. & W. 316, *S. C*: see *Knight* v. *Dorsey*, 1 B. & B. 48; 3 Moore, 305, *S. C.*

(g) See *Sykes* v. *Banwens*, 2 New Rep. 404.

(h) 2 Saund., 72 b: and see *Archer* v. *Hale*, 1 Moo. & P. 285; 4 Bing. 464, *S. C.*

(i) *Higgen's case*, Cro. Jac. 320: *Gee* v. *Fane*, 1 Lev. 226.

(k) MS., E 1820: and see 2 Sellon, 44: *Gubbs* v. *Backwell*, 2 Lutw. 1273: *Stevenson* v. *Roche*, 9 B. & C. 707: *post*, 637.

(l) See *ante*, 619.

the court or a judge; and afterwards, if any proceedings have been had against them, the court or a judge will stay them upon payment of costs(*m*).

Where by Act of Law it becomes impossible to render.

If the defendant become a peer(*n*), or a member of the House of Commons(*o*), pending the action, the court or a judge will allow an *exoneretur* to be entered(*p*). And this was allowed although a *cognovit* had been given, with the express consent of the bail, and the plaintiff, had he not taken the *cognovit*, might have compelled a render before the defendant acquired the privilege(*q*). So, if the defendant be actually on board a convict ship, in order to be transported; or a seaman impressed in the queen's service; or an alien, and be sent out of the kingdom under the alien act; or if, from any other act or law of our own state, it become impossible to render the defendant; the court or a judge will allow an *exoneretur* to be entered on the bail-piece(*r*). But in the case of an alien, the bail must state in their affidavit upon which the application is grounded, that they are not indemnified, and have no money in their hands, sufficient to answer the plaintiff's demands(*s*). And where the bail, in such a case, defended the action, and after verdict applied for an *exoneretur*, upon their paying 1,000*l.*, (the sum recovered by the verdict), which had been deposited with them as a security by the defendant, the court held that they should also pay the costs of the action(*t*). But the court or a judge will not allow an *exoneretur* to be entered where the defendant is merely detained by a foreign enemy(*u*); or has become a lunatic(*x*); or where the plaintiff recovers under a bailable amount(*y*).

Striking out material Witness from Bail-piece.

Upon an affidavit before trial, that one of the bail is a material witness for you in the cause, the court or a judge, upon application, will grant a rule that his name be struck out of the bail-piece, upon your adding and justifying another in his stead(*z*), or the bail may be made a competent witness, by the defendant's depositing in the hands of the officer of the court a sum equal to the sum sworn to, and the costs of the action, and the judge will then make an order for striking his name out of the bail-piece(*a*).

Exoneretur, when to be Entered.

Exoneretur, when to be entered.] After an *exoneretur* has been ordered to be entered, any proceedings against the bail, even before the *exoneretur* is actually entered, will be irregular(*b*).

3. *Proceedings against Bail to the Action.*

Ca. Sa. against the Principal.

Ca. Sa. against the Principal.] A writ of *ca. sa.* against the principal must be sued out and returned, before any proceed-

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(*m*) *Ante*, 619. 590; Say. 109: *Humphry* v. *Leite*, 4 Burr. 2107: *Jones* v. *Tub*, 1 Wils 337; Say. 58, *S. C.*

(*n*) *Trinder* v. *Shirley*, 1 Doug. 45.

(*o*) See *Langridge* v. *Flood*, 4 East, 190: *Phillips* v. *Wellesley*, 1 Dowl. 9.

(*p*) See *ante*, 465.

(*q*) *Phillips* v. *Wellesley*, 1 Dowl. 6.

(*r*) *Ante*, 625: see *D'Argent* v. *Wilson*, 1 East, 330: *Chapman* v. *Snow*, 1 B. & P. 132.

(*s*) *Merrick* v. *Vaucher*, 6 T. R. 50, 52.

(*t*) *Coles* v. *De Hayne*, 6 T. R. 246.

(*u*) See *Grant* v. *Fagan*, 4 East, 189.

(*x*) *Ibbotson* v. *Galway* (*Lord*), 6 T. R. 133; Lofft, 617: and see *Cock* v. *Bell*, 13 East, 355.

(*y*) See *Thwaites* v. *Piper*, 4 D. & R. 194: *sed vide* Tidd, 9th ed. 294.

(*z*) *Young* v. *Wood*, Barnes, 69: R. E., 5 G. 2, r. 1 b.

(*a*) *Baillie* v. *Hole*, 1 M. & M. 289; 3 C. & P. 560, *S. C.*

(*b*) *Bond* v. *Isaac*, 1 Burr. 409.

ings can be had against the bail (*c*); for the bail are not bound to render their principal, until they know, from the species of execution the plaintiff may think proper to adopt, whether he intends to proceed against the person of their principal or not. And for the purpose of affording the bail this information, the writ must be entered in the book (*d*) kept in the sheriff's office for that purpose, otherwise the court will set aside any proceedings that may be had against the bail (*e*). In strictness, also, the *ca. sa.* should be filed with the masters as soon as it is returned; but in practice this is seldom done; and it seems that, if filed at any time before replication to a plea of no *ca. sa.*, it will be sufficient (*f*). If no *ca. sa.* be actually sued out and returned, and an action of debt or *scire facias* be brought against the bail, the bail may plead this matter; but the court, it seems, will not quash the *sci. fa.*, or stay the proceedings on motion (*g*).

Direction, Teste and Return of.

The *ca. sa.* must be directed to the sheriff of the county where the *venue* was laid (*h*). We have already noticed, (*ante*, 404), as to when it may be *tested*. If a defendant consents that a plaintiff shall have judgment as of a term previous to the trial, the *ca. sa.* may, it seems, be *tested* as of that previous term (*i*). It must have eight days at least between the *teste* and return (*k*); and, indeed, until it has been decided that eight are sufficient, it would, perhaps, be safer to have fifteen days between the *teste* and the return, according to the former practice, when the action was by original. It is questionable whether the writ, where it is not intended to be *executed*, (as is generally the case when you are desirous of fixing the bail), can be made returnable "immediately after the execution thereof," or on any particular day out of term, as may be done in other cases by virtue of the 3 & 4 *W.* 4, *c.* 67, *s.* 2 (*l*). A *ca. sa.* being made returnable before it issued, and having issued into a wrong county, are irregularities of which the bail may take advantage by motion (*m*). An application by the bail to set aside the *ca. sa.*, and subsequent proceedings for irregularity, must be made within a reasonable time; and where the writ was lodged on the 24th of October, and proceedings were commenced against the bail on the 3rd of November, an application on the 13th of November was held

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(*c*) See *Thackray* v. *Harris*, 1 B. & Ald. 212.

(*d*) The court will not take judicial notice of this book. (*Russell* v. *Dixon*, 6 Bing. 442; 4 Moo. & P. 196, *S. C.*)

(*e*) *Hutton* v. *Reuben*, 5 M. & Sel. 323; 2 Chit. Rep. 102, *S. C.*

(*f*) 2 Sellon, 46: see *Hunt* v. *Cox*, 3 Burr. 1360; 1 W. Bl. 393, *S. C.*: *Rawlinson* v. *Gunston*, 6 Tr. R. 284: and *ante*, 453.

(*g*) See R. E., 5 G. 2, r. 3: *Philpot* v. *Manuel*, 5 D. & R. 615.

(*h*) 2 Saund. 72 a

(*i*) *Havenden* v. *Crowther*, 1 Dowl. 170.

(*k*) This is submitted as the present practice. The *ca. sa.* must have been so returnable if the original action were by bill; or, if the action were by original, the *ca. sa.* must have been returnable on a general return day, and have had 15 days at least between the *teste* and return. (R. H., 2 W. 4, r. 77: R. E., 5 G. 2, r. 3 a: see 13 C. 2, c. 2, s. 7: *Bell* v. *Mann, Executor of Russell*, 2 L. Raym. 1177: 2 Saund. 72 b.

(*l*) *Ante*, 404, 405. It has been decided, that if a writ of *capias ad satisfaciendum* be sued out against the principal in *vacation*, returnable *immediately* after the execution thereof, pursuant to the 3 & 4 W. 4, c. 67, s. 2, with the intention of fixing the bail, and a judge's order be afterwards obtained in the same vacation, for the return of that writ in a certain number of days, under the 15th section of 2 W. 4, c. 39, the bail ought either to have notice given them of the order, or else the order, with the writ, should be entered in the public book, *four* clear days at least before the writ is made returnable by the order; and for want of this, proceedings, afterwards taken against the bail, were set aside as irregular. (*Kemp* v. *Hyslop*, 4 Dowl. 687; 1 Tyr. & G. 77; 1 M. & W. 58; 1 Gale, 438, *S. C.*)

(*m*) *La Porte's bail*, 4 Dowl. 639; 2 Bing. N. C. 456, *S. C.*

too late(*n*). If the *ca. sa.* be not sued out within a year after the signing of the judgment, the judgment should first be revived by *scire facias*, before any proceedings are had against the bail; yet it seems the bail cannot take advantage of any irregularity in this respect(*o*). So, if there be any irregularity in the judgment against the principal, the bail cannot take advantage of it(*p*). But if there be any irregularity in the proceedings against the bail; if, for instance, there be any irregularity in the *teste* of the *ca. sa.*(*q*), the bail may of course take advantage of it. See farther as to the form of the writ, the mode of suing it out, &c., *ante*, 450, 451.

Entering Ca. Sa. at Sheriff's Office.

The *ca. sa.* must lie the last four days before the return (exclusive of the day of lodging it and the return day) in the sheriff's office(*r*), otherwise the proceedings will be irregular(*s*). The days must be searching days, and Sunday, or any other non-juridical day (*t*), is not reckoned, even although it be not the last day of the four(*u*). It seems that Whit Monday, Tuesday, and Wednesday may be reckoned among the four days(*x*). In London and Middlesex, the *ca. sa.* must also be entered the same number of four clear days in the public book kept at the sheriff's office for that purpose(*y*). An entry in the private book will not do(*z*).

Return to the Ca. Sa.

The sheriff returns *non est inventus* as a matter of course, without making any attempt to arrest the defendant; the *ca. sa.* being intended merely as a notice to the bail of the plaintiff's intention to proceed against them(*a*). But if the defendant happen to be in the sheriff's custody at the time, even although at the suit of another person, he cannot return *non est inventus*; or, if he do, the subsequent proceedings against the bail in such a case will be set aside(*b*); at least, if the plaintiff knew of the defendant's being in custody at the time, though by a different name(*c*).

Ca. Sa. not Issuable pending Error.

This writ, we have seen, (*ante*, 359), must not be sued out pending a writ of error brought upon the judgment in the original action, otherwise the court will set aside the proceedings. Or, if the writ of error be to the House of Lords, the suing out the *ca. sa.*, or proceeding against the bail, would be punishable by the House as a contempt (*d*).

Ca. Sa. for Residue fixes Bail.

After levying a part of the sum recovered under a *fi. fa.*, a *ca. sa.* may be issued for the residue, so as to fix the bail (*e*).

(*n*) *Pocock* v. *Cockerton*, 6 Dowl. 21.

(*o*) *Cholmondeley* v. *Bealing*, 2 L. Raym. 1096; 6 Mod 304; Holt, 90, *S. C.*: *Campbell* v. *Cumming*, 2 Burr. 1187: *sed quære*, if the bail cannot take advantage of it, for the proceedings without the *sci. fa.* are in such a case said to be a *nullity*. (*Mortimer* v. *Piggott*, 2 Dowl. 615: see *La Porte's bail*, 4 Dowl. 639).

(*p*) *Hayward* v. *Ribbans*, 4 East, 310.

(*q*) *Gawler* v. *Jolley*, 1 H. Bl. 74.

(*r*) R. E., 5 G. 2, r. 3: *Anon.*, 2 Salk. 599.

(*s*) *Cock* v. *Brockhurst*, 13 East, 588: *Furnell* v. *Smith*, 7 B. & C. 693: *Wilson* v. *Farr*, 4 B. & Ald. 537.

(*t*) *Scott* v. *Larkins*, 7 Bing. 109; 4 Moo. & P. 748; 1 Dowl. 200, *S. C.*; 7 B. & C. 800; 1 D. & R. 50.

(*u*) *Howard* v. *Smith*, 1 B. & Ald. 528: *Goodwin* v. *Lugar*, 6 M. & Sel. 133; 2 Chit. Rep. 192, *S. C.*: *Furnell* v. *Smith*, 7 B. & C. 693: *Scott* v. *Larkins*, 4 Moo. & P. 748; 7 Bing. 109, *S. C.*

(*x*) *Armitage* v. *Rigbye*, 5 A. & E. 76. In that case they were reckoned among the four searching days for the *scire facias*.

(*y*) R. H., 2 W. 4, r. 77: 5 M. & Sel. 323: 2 Chit. Rep. 102.

(*z*) *Hutton* v. *Reuben*, 5 M. & Sel. 323; 2 Chit. 102, *S. C.*: see in Exchequer, *Smith* v. *Parker*, 1 M. & Y. 483; but this was before R. H., 2 W. 4, r. 77.

(*a*) *Hunt* v. *Cox*, 3 Burr. 1360.

(*b*) *Burks* v. *Maine*, 16 East, 2: *Ward* v. *Brumfit*, 2 M. & Sel. 238: *Briggs* v. *Richardson*, 2 Dowl. 158: and see *Forsyth* v. *Marryatt*, 1 New Rep. 251.

(*c*) *Briggs* v. *Richardson*, 2 Dowl. 158.

(*d*) 1 P. Wms. 685.

(*e*) *Stevenson* v. *Roche*, 9 B. & C. 707.

Ca. Sa to fix new Bail.

If, after the *ca. sa.* is returned *non est inventus*, the bail render the defendant, and the defendant be again bailed, there must be another *ca. sa.* to fix the new bail (*f*).

Amendment of Ca. Sa.

An amendment of the *ca. sa.* will be allowed, even as against bail, but the court, as a condition of amending, may give the bail an opportunity of freeing themselves, by allowing a certain time to render (*g*).

Filing Bail-piece, and Entry of Recognisance on Roll.

Filing Bail-piece and Entry of Recognisance on Roll.] After the *ca. sa.* has been returned and filed, the next steps requisite are, to file the bail-piece, (if not already done, see *ante*, 606), and to enter the recognisance on the roll, and carry in and docket it. In strictness, the roll should be carried in before any proceedings are had against the bail: but as the bail can take advantage of an omission in this respect only by plea of *nul tiel* record, it is seldom in practice made up and carried in until the bail are called upon to plead (*h*).

Recognisance, how Entered.

Formerly, the recognisance of bail by bill in the Queen's Bench was entered on the roll after the declaration, with a memorandum of the term it was of; and this was done by the plaintiff's attorney (*i*); but the recognisance of bail by original was entered after a recital of the process (*k*), and this was done by the filazer (*l*). In the Common Pleas it was entered by the filazer, and he docketted it. It was always the practice in the Queen's Bench to enter the recognisance as taken in court, though it were actually taken by a judge at his chambers, or by a commissioner in the country (*l*). In the Common Pleas, when it was so taken by a judge, or by a commissioner, it might have been so entered accordingly (*m*). In the Queen's Bench it was not, nor is it now a record, till entered. In the Common Pleas it was and still is a record, immediately upon the first caption, and bound the lands before it was filed at Westminster (*n*). As regards the form of the entry of recognisance of bail, under the present process, it would seem that it should commence in all the courts with a statement of the writ. And by a general rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 1, *s.* 80, "a *scire facias* upon a recognisance, taken in Serjeants' Inn, or before a commissioner in the country, and recorded at Westminster, shall be brought in Middlesex only, and *the form of the recognisance shall not express where it was taken.*"

Get a roll of the date of the capias, *and get a number for it from one of the masters. Then enter the recognisance, &c., upon it* (*o*). *Then let your entry be docketted, and your roll carried in and filed in the Treasury* (*p*).

(*f*) *Thackray* v. *Harris*, 1 B. & Ald. 212.

(*g*) See *Englehart* v. *Dunbar*, 2 Dowl. 202; where *Patteson*, J., allowed an amendment in the *teste* on payment of costs, without giving the bail an opportunity of freeing themselves. In *Bradley* v. *Bailey*, 3 Dowl. 111, the Court of C. P. allowed an amendment on payment of costs on an action brought against the bail, and giving a week's time to render. See, as to amendment of writs of execution generally, *post*, Vol. II. title, "Amendment."

(*h*) 2 Sellon, 45, 1099; 2 Saund. 72 b.

(*i*) R. E., 5 G. 2, r. 3 a, K. B.

(*k*) Tidd, New Pract. 157.

(*l*) *Shuttle* v. *Wood*, 2 Salk. 564, 600; 6 Mod. 42, *S. C.*: and see *Coxeter* v. *Burke*, 5 East. 461: Tidd, 9th ed. 277.

(*m*) Id.: and see *R.* v. *Burgh*, 3 Y. & J. 101; 1 C. & J. 245, *S. C.*, in *error*: Tidd, 9th ed. 278.

(*n*) See *supra*, notes (*i*), (*k*), (*l*), (*m*).

(*o*) See the form, Chit. Forms, 272.

(*p*) See the form of the docket paper, Chit. Forms, 273.

Scire Facias against.] The plaintiff has the option of proceeding against the bail, either by *scire facias* or action of debt.

Form of.

The *scire facias* states the recognisance, the judgment, and that the principal has not paid the damages, &c., nor rendered himself, and then commands the sheriff to make known to the bail that they be at Westminster, &c., on &c., to shew &c. (*q*). The *scire facias* would be irregular if it stated the bail to have been put in on a day previous to the issuing of the writ of *capias* (*r*). It is not necessary to have a separate *sci. fa.* against each of the bail (*s*); but if you have a joint *scire facias* against both of the bail, you must bring them both into court before declaring against either (*t*). And where a plaintiff issued a joint *scire facias* against A. and B., bail of C. and D., upon which A. only was summoned, B. was not found, and A. entered an appearance for himself only, it was held that a declaration against A. alone was irregular (*t*).

Venue in.

By the rule of *H. T.*, 2 *W.* 4, *r.* 80, just noticed, "a *scire facias* upon a recognisance taken in Serjeants' Inn, or before a commissioner in the country, and recorded at *Westminster*, *shall be brought in Middlesex only;* and the form of the recognisance shall not express where it was taken."

Teste and Return Day of.

The *sci. fa.* may be sued out and tested on the return day of the *ca. sa.* (*u*), or at any time afterwards (*v*). It must be tested in term (*x*), and returnable on a day certain in term (*y*). And if it be intended to have only one writ, there need be only four days exclusive between the *teste* and return, though it is usual now to allow a longer time, where you cannot summon the bail on, but merely give them notice of the *sci. fa.* (*z*), and of course, sufficient time must be allowed to leave the *sci. fa.* four clear searching days, before the return day in the sheriff's office. But if there be an *alias*, then there must be fifteen days between the *teste* of the first writ, and the return of the *alias* (*a*), without regard being had to the number of days between the *teste* and return of each (*b*). The *alias sci. fa.* also, if issued, should be tested on the return day of the first *scire facias* (*c*). It is an immaterial objection to a *sci. fa.* that it is tested on the 3rd November, and returnable on the 15th November, "next coming" (*d*).

As to the manner of suing out and proceeding upon a *scire facias* in general, see *Vol. II. Book III. Part I. Ch.* 3.

(*q*) See the form, Chit. Forms, 274; and of an *alias sci. fa.*, Id. 275.

(*r*) *Peacock* v. *Day*, 3 Dowl. 291.

(*s*) 2 Saund. 72 b, c.

(*t*) *Sainsbury* v. *Pringle*, 10 B. &. C. 751.

(*u*) *Sandland* v. *Claridge*, 2 Dowl. 115; 1 C. & M. 672, *S. C.*: *Armitage* v. *Rigbye*, 5 A. & E. 81; 6 Nev. & M. 773.

(*v*) *Stewart* v. *Smith*, 2 L. Raym. 1567; 2 Str. 866, *S. C.*: *Shivers* v. *Brooks*, 8 T.R. 628: *Sandland* v. *Claridge*, 1 C. & M. 672; 2 Dowl. 115, *S. C.*

(*x*) *Seaton* v. *Heap*, 5 Dowl. 247.

(*y*) *Eden* v. *Wills*, 2 L. Raym. 1417; 2 Stra. 694, *S. C.*: R. E., 5 G. 2 a.

(*z*) *Bell* v. *Jackson*, 4 T. R. 663.

(*a*) *Anon.*, 7 Mod. 40: *Anon.*, 2 Salk. 599.

(*b*) *Elliott* v. *Smith*, 2 Str. 1139: *Combe* v. *Cuttill*, 10 Moore, 534; 3 Bing. 162, *S. C.*; 2 Sellon, 53.

(*c*) *Goodwin* v. *Peek*, 2 Salk. 599: Comyn, 53, *S. C.*: *Anon.*, 6 Mod. 86, R. T., 8 W. 3 a. When the proceedings by original writ in personal actions were in existence, the *scire facias* therein should have been tested on the *quarto die post* of the return of the *ca. sa.*, (*Stewart* v. *Smith*, 2 Str. 866), and made returnable on a general return day, wheresoever &c.; (2 Lil P. R. 499: *Eden* v. *Willis*, 2 L. Raym. 1417; 2 Stra. 694, *S. C.*); and must have had fifteen days between the *teste* and return, (R. T., 8 W. 3, r. 1 a: E., 5 G. 2, r. 3 a); or if there were an *alias*, then fifteen days between the *teste* and return of each writ. (Id.) The *alias* must have been tested on the *quarto die post* of the return of the first *sci. fa.*

(*d*) *Peacock* v. *Day*, 3 Dowl. 291.

Proceedings on.

Obtaining Leave to sign Judgment against Bail not Summoned.

It should be here observed, that by *R. G., H., 2 W. 4, r.* 81, "no judgment shall be signed for non-appearance to a *scire facias, without leave* of a court or a judge, unless the defendant has been *summoned;* but such judgment may be signed, by leave, after *eight* days after the return of *one scire facias.*" The object of this rule is to make it the plaintiff's duty to give notice of the *scire facias* to the bail, by *summons* if the bail reside in Middlesex, or by *notice* if they reside elsewhere; and if neither of these things can be done, the plaintiff must shew by affidavit, that he has attempted to summon the bail or give them notice, and shew what endeavours he has made for that purpose, otherwise the court or a judge in their discretion will not allow him to sign judgment for the bail's non-appearance (*e*). And the Court of Exchequer have refused to allow the plaintiff to sign judgment upon the sheriff's return of *nihil* to a *scire facias* against bail, without an affidavit that the bail had had notice of the *scire facias* being lodged at the sheriff's office (*f*). And they have refused it, although one of the bail residing in Middlesex was summoned, the other, who was resident out of that county, not having had notice of the *sci. fa* (*g*). The eight days mentioned in the above rule are substituted for the second *scire facias*, by analogy to the eight days after the return of the second writ of *scire facias*, which, as above observed, were allowed to the bail, *ex gratiâ*, to render their principal (*h*); and accordingly, if not summoned, (which can only be done when they reside in Middlesex), they may render at any time within eight days from the return of the *sci. fa.* (*i*), or even later, if they have not received notice of the *sci. fa.* (*k*), which notice must be given in all cases, where they do not reside in Middlesex (*l*).

Bail, how Summoned in Middlesex.

When you do *summon* the bail, (and which can only be when they reside in Middlesex (*m*)), then, in order to fix them and get a judgment, you should *personally serve them with summonses, at any time before the rising of the court on the return day:* and they may be so personally summoned as late as possible, just before the rising of the court, and so as to even preclude the possibility of their afterwards rendering the defendant before such rising (*n*). It seems to be still necessary, whether you actually summon the bail or not, that the *scire facias should be left in the sheriff's office the four clear searching days before the return, as heretofore* (*o*).

Notice to Bail in other Counties.

If you cannot summon the bail, (*ex. gr.* when they do not reside in Middlesex (*p*)), then, after having left the *ca. sa.*

(*e*) *Per Patteson*, J., Q. B., 6th June, 1832: Jervis's Rules, 2nd ed., 87, n.; *Higgins* v. *Wilkes*, 1 Dowl. 447: *Wimall* v. *Cook*, 2 Dowl. 173: and see *Armitage* v. *Rigbye*, 5 A. & E. 76, where the defendant went abroad. See as to the endeavours he must make to serve a writ of summons in order to obtain a *distringas*, *ante*, 126.

(*f*) *Lochwood* v. *Orme*, 5th June, 1832: Jervis's Rules, 87, n.

(*g*) *Newton* v. *Maxwell*, 2 C. & J. 635: and see *Newton* v. *Flight*, Jervis's Rules, 88, n.

(*h*) See *Armitage* v. *Rigbye*, 5 A. & E. 82; 6 Nev. & Man. 773: *Sanderson* v. *Brown*, 2 Nev. & P. 84; 7 Ad. & E. 264; 6 Dowl. 9, *S. C.*

(*i*) *Sanderson* v. *Brown*, 2 Nev. & P. 84; 7 Ad. & E. 264; 6 Dowl. 9, *S. C.*

(*k*) *Newton* v. *Flight*, Jervis's Rules, 88, n.

(*l*) *Wimall* v. *Cook*, 2 Dowl. 173: *Sanderson* v. *Brown*, *ubi supra.*

(*m*) See *Armitage* v *Rigbye*, 5 A. & E. 81.

(*n*) *Wright* v *Page*, 2 Bla. Rep. 837: *Clarke* v. *Bradshaw*, 1 East, 86: *Lewis* v. *Pine*, 2 Dowl. 133; 1 C. & M. 771, *S. C.*: *Smith* v. *Crane*, 8 Moore, 8.

(*o*) See *post*, Vol. II. Book III. Part I. Ch. 3.

(*p*) See *Wimall* v. *Cook*, 2 Dowl. 173.

and *scire facias* in the sheriff's office, *prepare a notice* (*q*), *stating the issuing of the* ca. sa. *and* sci. fa., *and when they were left at the sheriff's office, and the purpose for which they were left. Serve, or use your best endeavours to serve, the notice as long a time as possible before the return day. Get the sheriff to return* nihil *to the* sci. fa. *Make an affidavit of the facts, and at the expiration of eight days from the return of the* nihil, *apply to the court or a judge for leave to sign judgment.* Such application ought to be made in a reasonable time after the expiration of the eight days from the return (*r*). *The rule to enter up the judgment, if granted, is absolute in the first instance.* If a judge's order has been improperly obtained, allowing a judgment to be signed on a *scire facias*, where the bail have not been summoned or had notice of the proceedings, they should apply to the court to set aside the order, or they will not, it seems, be allowed to impeach it on a motion by them to set aside the proceedings (*s*).

Practical Directions to obtain the Judgment for Non-appearance.

Rule to appear.

Before judgment against the bail on the *scire facias* can be signed, there must be a rule to appear (*t*). By *R. H.*, 2 *W.* 4, *r.* 82, "a notice in writing to the plaintiff, or his attorney or agent, shall be a sufficient appearance by the defendant on a *scire facias*."

Appearance.

Statute of Limitations, as to Sci. Fa.

By the Law Amendment Act, 3 & 4 *W.* 4, *c.* 42, *s.* 3, "all actions of *debt* or *scire facias*, upon any recognisance, shall be commenced and sued within *ten* years after the end of the then present session, or within twenty years after the cause of such actions or suits, but not after."

Action against Bail.

Action against Bail.] The plaintiff has the option of bringing one action against both of the bail, or separate actions against each (*u*): and the latter, of course, should be adopted, where it is doubtful if one of the bail can be served with process, or there be some other good reason for suing separately. In general, however, the court discourage the practice of bringing several actions.

Process, when sued out, and Form of.

Process may be sued out against the bail on the return day of the *ca. sa.* (*x*), or afterwards. It should bear *teste* the day on which it was issued, as in other cases. It must be recollected, that the defendants cannot be holden to bail (*y*); and the process must be by summons as in ordinary cases. Since the stat. 2 *W.* 4, *c.* 39, it will suffice merely to describe the action in the writ as "an action of debt" (*z*).

Venue.

The *venue* must be laid in Middlesex, for the same reason as stated *ante*, 639, with respect to the *scire facias*. The rest of the proceedings in the action are the same as in ordinary cases.

Execution against Bail.

Execution against Bail.] The execution may be by *fi. fa.*, *elegit*, *levari facias*, or *ca. sa.*; and this latter writ may issue in the first instance, or after a *fi. fa.*, at the plaintiff's option (*a*). If the proceedings against the bail have been by

Form of.

(*q*) See the form, Chit. Forms, 277.

(*r*) *Wood* v. *Mosley*, 1 Dowl. 513.

(*s*) *Ladbrooke* v. *Hewitt*, 1 Dowl 488.

(*t*) Chit. Sum. Pract. 207. See the form, Chit. Forms, 260. It is written on plain paper, and taken to one of the masters.

(*u*) 2 Saund. 72 b.

(*x*) *Shivers* v. *Brooks*, 8 T. R. 628.

(*y*) *Ante*, 469.

(*z*) See the former rule, R. E., 15 G. 2.

(*a*) *Elliot* v. *Smith*, 2 Str. 1139: *Goodchild* v. *Chaworth*, Id. 822; 3 Salk. 386: and see *Troughton* v. *Clarke*, 2 Taunt. 113, 114.

action of debt, and both the bail were joined, the execution must of course be against both jointly, in order to accord with the judgment (*c*); but if by *scire facias* against both, the execution may be either jointly against both, or severally against each; for the purport of the *scire facias* is, to have execution according to the form and effect of the recognisance, and the recognisance is joint and several (*d*).

For Residue.

If the principal be taken in execution, it seems the plaintiff cannot take his bail (*e*). But, after levying a part under a *fi. fa.*, against the principal, a *ca. sa.* for the residue may be issued against him, and the bail be fixed for the residue (*f*).

Subsequent Execution against Principal.

If the plaintiff be not satisfied the amount of his debt by the execution against the bail, he may still have execution against the principal (*g*); unless the bail have been taken on a *ca. sa.;* in which case the plaintiff is for ever after precluded from proceeding against the principal, even although the bail become bankrupt, and be discharged upon obtaining their certificate; or although the plaintiff discharge the bail upon their paying part of the debt, with an understanding that he should be at liberty to proceed against the principal for the residue (*h*).

4. *Bail in Error, how far liable.*

4. Bail in Error, Liability of.

The bail in error bind themselves, by their recognisance, to prosecute the writ of error with effect, and also to satisfy and pay the debt, damages, and costs, awarded by the former judgment, and also the costs and damages to be awarded for the delaying of execution, if the said former judgment should be affirmed (*i*). Therefore, if the judgment be affirmed, or the writ of error be discontinued, or the plaintiff *nonprossed*, (even before the record has been certified (*j*)), the bail are liable.

Extent of Liability.

As to the extent of their liability, it must be observed, that the words, "costs and damages to be awarded for the delaying of execution," must be understood to mean such damages and costs as are given by the court of error; therefore, the bail are liable only for the amount of the judgment given by the court of error, and for interest on that sum from the time of affirmance; but not to any interest previous to the affirmance, except such as is included in the judgment in error (*k*).

How Discharged.

As the engagement of the bail in this case is absolute, to pay the debt, &c., if judgment should be affirmed, &c., they cannot be discharged of their responsibility by the rendering of the principal (*l*), or by his bankruptcy and certificate (*l*), or even if the principal be taken upon a *ca. sa.* for the same debt and damages and costs in error (*m*). So, if the bail themselves become bankrupt before affirmance, their certificate will be no

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(*c*) See *ante*, 639.

(*d*) 2 Saund. 72 b: *Sainsbury* v. *Pringle*, 10 B. & C. 751. See forms of *fi. fa.*, Chit. Forms, 284; of *ca sa.*, Id. 287.

(*e*) *Higgins's case*, Cro. Jac. 820: but see *Astree* v. *Palfreyman*, T. Jones, 75: *Perkins* v. *Pettit*, 2 B. & P. 440.

(*f*) *Stevenson* v. *Roche*, 9 B. & C. 707.

(*g*) *Higgins's case*, Cro. Jac. 320: *Freeman* v. *Executor of Freeman*, Id. 549: *Felgate* v. *Mole*, 1 Sid. 107: see *Fisher* v. *Carruthers*, Barnes, 202.

(*h*) *Allen* v. *Snow*, 2 M. & Sel. 341.

(*i*) 3 J. 1, c. 8: see *ante*, 363, 365.

(*j*) *Roe* v. *Whitehead*, Barnes, 409: *Dickenson* v. *Heseltine*, 2 M. & Sel. 210.

(*k*) *Frith* v. *Leroux*, 2 T. R. 57; 2 Doug. 753, *S. C.*: see *Doe* v. *Reynolds*, 1 M. & Sel. 247.

(*l*) Lofft, 238: *Southcote* v. *Braithwaite*, 1 T. R. 624.

(*m*) *Perkins* v. *Pettit*, 2 B. & P. 440.

bar to proceedings against them on their recognisance(*n*). Bail in error, however, who do not justify, may have their names struck out of the bail-piece, upon application to the court(*o*); after which, of course, no proceedings can be had against them. But, whilst their names remain on the bail-piece, they may be proceeded against; and the court will not stay such proceedings, but upon payment of costs(*p*). And in a case where the plaintiff in error *nonprossed* his writ, after the bail were excepted to, and notice given of justifying the same bail, but before they justified, and the defendant then sued the bail on their recognisance, the court refused to allow an *exoneretur* to be entered(*q*).

5. *Proceedings against Bail in Error.*

5. Proceedings against Bail in Error.

No Ca. Sa. necessary.

It is not necessary to sue out a *ca. sa.* against the principal, in order to proceed against the bail in error, as it is in the case of proceeding against bail to the action. The recognisance, however, must be entered, and the roll carried in and docketted, in the manner mentioned *ante*, 638 (*r*).

Scire Facias.

Scire facias against.] The defendant in error has his option to proceed against the bail either by *scire facias* or action of debt, in the same manner as the plaintiff may against bail to the action. The *scire facias* in this case is tested and made returnable, as mentioned *ante*, 635. It must be brought in Middlesex, whether the recognisance were taken in court or at a judge's chambers, or before a commissioner (*s*). It is necessary to observe, that, if the plaintiff in error have joined in the recognisance, (which, however, is not usual), the *scire facias* must be either against him and both of the bail, or against each of them severally; for, if it be brought against two of them only, it may be a ground of demurrer or plea in abatement(*t*).

As to the mode of suing out the *sci. fa.*, and proceeding on it, see *Vol. II. Book III. Part I. Ch.* 3. And for other matters relating to the writ, see *ante*, 639, 640.

Action against.

Action against.] The proceedings in this action are the same as in debt against bail to the action (*u*). The *venue* must be laid in Middlesex.

If the recognisance were entered into by the principal as well as the bail, the action must be brought against all three, if living, or against each separately; if brought against two only, the defendants may plead the matter in abatement, but cannot, in general, demur (*x*); and it is no ground for setting aside the proceedings(*y*).

As to execution, see *ante*, 641 (*z*).

(*n*) *Hockley* v. *Merry*, 2 Str. 1043.

(*o*) *Jones* v. *Tub*, 1 Wils. 337; Say. 58, *S. C.*: *ante*, 613, 631.

(*p*) *Gould* v. *Holmstrom*, 7 East, 580.

(*q*) *Dickenson* v. *Heseltine*, 2 M. & Sel. 210.

(*r*) See the forms, Chit. Forms, 288.

(*s*) R. H., 2 W. 4, r. 80, *ante*, 639.

(*t*) 2 Saund. 72 c.

(*u*) See *ante*, 641.

(*x*) 1 Saund. 291 n. (1); 2 Saund. 72.

(*y*) See *Knowles* v. *Johnson*, 2 Dowl. 653.

(*z*) See as to the forms, Chit. Forms, 294.

BOOK I.

PART III.

Book I.
Part III.

PROCEEDINGS UPON FEIGNED ISSUES AND SPECIAL CASES.

1. *Proceedings upon feigned Issues.*
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    - *Subsequent Proceedings*, 648.

2. *Proceedings upon a Special Case without proceeding to Trial*, 649.
3. *Proceedings upon a Case stated from a Court of Equity*, 649.

1. *Proceedings upon Feigned Issues.*

By whom ordered.

By whom Ordered.] A FEIGNED issue may be ordered either by a court of law or a court of equity, or by a judge of a court of law under the Interpleader Act, 1 & 2 *W.* 4, *c.* 58. Where a matter comes before a court of law for its decision, either upon motion or argument, if a material fact in the case be denied, and the court think it of too much importance to be judged of summarily upon affidavits, they may order it to be tried in a feigned issue (*a*). This is also the usual and ordinary method of trying doubtful matters of fact arising in causes before a court of equity.

In what Cases ordered.

In Equity.

In what cases Ordered.] It is perfectly discretionary in a chancellor or other judge of a court of equity, to direct a fact to be tried in a feigned issue, or to decide upon it himself without the assistance of a jury. It is usual, however, where a material fact in a cause in equity is strongly controverted, particularly in causes relating to title in lands, &c., to direct that fact to be tried by a jury upon a feigned issue, in some of the superior courts of law, in order that their verdict may inform and satisfy the conscience of the court. Where the question *devisavit vel non* is in issue in equity, it is always tried upon a feigned issue. The other cases in which this proceeding is usually directed by a court of equity, are, to try

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(a) See *Rex* v. *Mayor and Jurates of Rye*, 2 Burr. 798: *Hoskins* v. *Berkeley, Lord)*, 4 T. R. 402.

the existence of a modus, or of a real composition for tithes, or to try if a party or other person be heir at law of a person deceased, or to try the validity of a fiat of bankrupt. This issue is usually ordered to be made up in the Court of Queen's Bench or Common Pleas, and to be tried before the lord chief justice of such court, either at the sittings in Middlesex or London; it is sometimes ordered to be tried in a particular county at the assizes. The interlocutory order also directs who is to be plaintiff and who defendant.

Form of Order in Equity.

The cases in which a feigned issue is now commonly ordered by a court of law, or a judge thereof, are where there are adverse claims, or at the instance of the sheriff under the Interpleader Act, and which will be found noticed *post, Vol. II. Book IV. Part I. Ch. 9.* Other cases also occur on applications to set aside warrants of attorney for fraud or the like.

At Law.

The Issue.] The issue is the same in form as in ordinary cases (*b*) (excepting, perhaps, that there is no occasion to state that the defendant was summoned by any writ); after the usual commencement, it sets forth a declaration in *assumpsit* upon a wager of 10*l*., whether the fact is so or so; then a plea, denying the fact to be as is stated in the declaration; and, lastly, the award of the *venire facias* (*c*). Where two or more facts distinct in themselves, but forming only one transaction, are to be tried, then, in making up the issue, you insert a count and plea as to each fact, and then the award of the *venire facias;* so that they may be tried at the same time by the same jury, and that the verdict of the jury as to each fact may appear distinct and separate upon the *postea* (*d*). In this, however, and in all other respects, the issue must pursue the rule of court or order by which it has been directed.

The Issue.

Get a copy of the rule or order for the issue, and leave it with a barrister or special pleader, with instructions to prepare a draft of the issue. When settled, leave a copy of it with the opposite attorney, who will also have it settled by counsel. If you and he cannot agree upon the form of it, you should first get an appointment for a meeting between the counsel or pleader on each side, who settled the issue; and if they cannot agree upon it, then, in the case of an order in a court of equity, take the order, and the draft of the issue, to the master mentioned in the order, and he will settle the issue; for which purpose the parties may attend before him by counsel. In the case of a rule or order at law, if the counsel cannot agree, the course is to attend before a judge, and he may decide on the form of the issue, or refer it to a master. When finally settled, give a copy of the issue to the opposite attorney; and you may indorse the notice of trial upon it, as in ordinary cases.

In equity, if the plaintiff will not make up the issue, the defendant may move the court of equity that the matter directed to be put in issue may be taken *pro confesso;* which the court will order accordingly (*e*), unless the plaintiff shew some reasonable and satisfactory cause for his not having done so. Or if it be made up, but in such a manner that the matters

Proceedings where Issue not made up, or erroneous.

(*b*) See *ante*, 199.
(*c*) See the form, Chit. Forms, 295.
(*d*) See 2 Ves., jun., 287, 292.
(*e*) Pr. Reg. 264.

intended by the court to be tried are not put in issue or found by the jury, the court will order a new trial.

Nisi Prius Record, &c.

Nisi Prius Record, &c.] The record of *nisi prius* must be made up, sealed, and passed, as in ordinary cases (*f*).

Jury Process.

The jury process is also sued out as in ordinary cases; but if a special jury be desired (*g*), or a view be necessary (*h*), the motion for these purposes must, in the case of an issue by order of a court of equity, be made to that court.

Trial.

Trial.] The cause must next be entered for trial with the marshal, as directed *ante*, 258. But if the defendant be desirous of bringing the cause to trial, and he have any reason to think that the plaintiff wishes to delay it, the court, upon application, will allow him to take down the record by proviso (*i*). Or, if the plaintiff do not proceed to trial by the time directed, the defendant, in the next subsequent term, may, on an issue directed to a court of equity, move that court, that the matters in issue at common law may be taken *pro confesso*. This that court will order, unless the plaintiff shew some reasonable and satisfactory cause for his default, and enter into an undertaking to try peremptorily by a time appointed by the court. Also, it seems, costs for not proceeding to trial on an issue directed by a court of equity may be obtained, upon motion, in that court, in the same manner as in a court of law.

At what Time.

How conducted.

The trial is the same as in ordinary cases; excepting that on an issue directed by a court of equity, the interlocutory decree usually directs that particular matters therein mentioned shall be admitted or allowed in evidence; that the depositions of such witnesses as shall be dead at the time of the trial, or in such a state of health as not to be capable of attending, shall be read; and it also, in some cases, orders that the plaintiff or defendant shall attend to be examined (*k*). These, and other matters ordered by the interlocutory decree, are strictly to be observed at the trial. Where the Court of Chancery has ordered that a third party shall be at liberty to attend the trial, the counsel for such party will not be permitted to call witnesses, or address the jury (*l*).

Nonsuit.

If the plaintiff wish, he may elect to be nonsuit in this, as in ordinary cases (*m*).

Putting off Trial.

An application may be made to a judge at *Nisi Prius* to put off the trial of an issue directed by the Lord Chancellor (*n*).

Postea, &c.

Postea, &c.] The *postea* is indorsed on the *Nisi Prius* record, as in ordinary cases; but it is not necessary or usual to enter up judgment, unless, perhaps, where the jury have found a special verdict. After the trial of an issue out of a court of equity, the judge before whom it was had certifies the finding

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(*f*) See *ante*, 246.

(*g*) 2 P. Wms. 68.

(*h*) Pr. Reg. 68.

(*i*) *Humpage* v. *Rowley*, 4 T. R. 767.

(*k*) See 15 Ves., jun., 176.

(*l*) *Wright* v. *Wright*, 5 Moo. & P. 316; 7 Bing. 459, n., *S. C.*

(*m*) Bul. N. P. 326: *Barnes* v. *Headley*, 1 Camp. 164.

(*n*) *Buxton* v. *Lawton*, 4 Camp. 163.

of the jury, and adds in his certificate the mention of any special circumstance he may think proper, such as, that the verdict was against evidence, or the like.

Costs.

Costs.] If the feigned issues have been ordered by a court of equity, the costs are entirely in the discretion of that court, and are not in any case awarded by the court of law(*o*). But, if ordered by a court of common law, the costs of the issue invariably follow the verdict(*p*). Where a court of common law, however, permit parties to try a feigned issue, they may, it seems, as a condition of their granting it, oblige the parties to consent that the costs shall be in the discretion of the court(*q*). See as to the costs of feigned issues under the Interpleader Act, *post*, *Vol. II. Book IV. Part I. Chap.* 9.

New Trial of.

In what Court moved for.

New Trial of.] If the party against whom the issue is found be dissatisfied with the verdict, the application for a new trial must in general be made in the court which directed the issue, as well where the point relates to the admissibility of evidence as on other ground(*r*). But where, on the trial of an issue out of Chancery leave is given by the judge to move for a new trial, the motion may, it seems, be made in the court of law(*s*). And in an action brought by order of the Court of Chancery the motion may be made either in Chancery, or in the court in which the action is depending(*t*). Formerly, where the issue had been directed by the Master of the Rolls, the application might have been made to the Chancellor(*u*); but now the application must be made to the judge who directed the issue(*v*). Such an application may be made, in respect of an issue directed from the Equity Exchequer, at any time during the succeeding term, or the sittings after; but it should be made, in the first instance, before the lord chief baron sitting alone in equity, if it arise out of a cause pending before him(*x*).

In what Cases granted.

As to the cases in which a new trial will be granted: it may be laid down as a general rule, that the court of equity will grant a new trial, in all cases in which it would be granted in the court of law, and in some cases also in which the court of law would refuse it. Thus, if the judge certify that the verdict was contrary to the weight of evidence, the court of equity will order a new trial, in order that justice may be done between the parties, and the conscience of the court be satisfied(*y*); but it is said that this, or any misbehaviour of the jury, must be certified by the judge who tried the cause, before it can be made the ground of an application to the court of equity for a new trial(*z*). So, if the judge have mis-directed the jury(*a*), or have improperly rejected

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(*o*) See 13 Ves., jun., 87; 1 Atk. 611; 1 Bro. C C. 420.

(*p*) *Herbert* v. *Williamson*, 1 Wils. 324: *Hoskins* v. *Berkeley*, (*Lord*), 4 T. R. 402: see *Earl Fitzwilliam* v. *Maxwell*, 7 Taunt. 31.

(*q*) *Hoskins* v. *Berkeley*, (*Lord*), 4 T. R. 402: and see *Thomas* v. *Powell*, 1 Burr. 603.

(*r*) *Bowker* v. *Nixon*, 6 Taunt. 444: *Stom* v. *Marsh*, 8 D. & R. 71: *Carstairs* v. *Stein*, 4 M. & Sel. 192.

(*s*) *Holworthy* v. *Richards*, 2 Chit. Rep. 270

(*t*) *Carstairs* v. *Stein*, 2 Rose, 178: Tidd, 9th ed., 913.

(*u*) 11 Ves, jun., 50.

(*v*) Gen. Order, XLVII., 23rd Nov. 1831, Chit. ed., p. 19.

(*x*) *Pulley* v. *Hitton*, 11 Price, 380.

(*y*) Amb. 210.

(*z*) Pr. Reg. 263.

(*a*) Amb. 323.

evidence, and such rejection be productive of injustice to either party, the court will grant a new trial. But where, upon application for a new trial, upon the ground of the judge's having improperly rejected evidence, it appeared upon the whole that justice had been done, the court refused to grant it (*b*). If the party against whom the issue is found were surprised by the production of evidence which he had no reason to expect,—as if one plaintiff obtain an order *ex parte* to strike out the name of another plaintiff, and then make him a witness at the trial, and have a verdict (*c*), the court will, in general, grant a new trial (*d*). Where new evidence had been obtained after verdict, the court of equity granted a new trial, although the judge certified in favour of the verdict (*e*); but in a case where this additional evidence had been known to the party before the trial, and kept back by him, a new trial was refused, although the court was dissatisfied with the verdict (*f*). In a late case (*g*), a new trial was granted in the Exchequer of an issue directed in a tithe suit, it appearing that the verdict had been obtained by surprise, and against the opinion of the judge who tried it, the verdict being also contrary to the opinion of the equity judge.

In cases where the title to the inheritance or freehold is the subject of the issue, the court of equity, on an issue out of that court, for the more solemn determination of the cause, will sometimes order a second trial, without setting aside the first verdict (*h*); and if the second verdict be contrary to the first, they will, in general, upon motion, order a third trial, which is ordinarily conclusive (*i*). But, in a case where two contrary verdicts had been obtained, and, upon application for a third trial, it appeared that the party now applying had, since the second verdict, removed a bank of earth, in which were some old posts, supposed to be the bottom of park pales dividing the land in question, and of which the jury, of course, could no longer have a view, the court refused to order a third trial (*i*). Where a new trial is granted, the verdict on the first trial will not be directed to be received in evidence (*j*).

Judge's Report to be produced.

If the motion for a new trial be made in the court of equity, that court should be furnished with the report of the judge who tried the cause; and which may be obtained from him, upon application to him by the court of equity for that purpose.

Arrest of Judgment on.

The defendant cannot move in arrest of judgment on a feigned issue, directed by a court of equity (*k*).

Subsequent Proceedings.

Subsequent Proceedings.] On an issue out of a court of equity, after the expiration of the time allowed to move for a new trial (*l*), a petition must be presented to the court of equity for leave to set down the cause to be heard upon the equity

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(*b*) 11 Ves., jun., 52, 53; and see 9 Id. 155.

(*c*) 2 Ch. Ca. 80.

(*d*) But see *Richards* v. *Symes*, 2 Atk. 319.

(*e*) 2 Ves. 552.

(*f*) 1 Ves., jun., 133.

(*g*) *Willis* v. *Farren*, 3 Y. & J. 264, 381.

(*h*) *Baker* v. *Hart*, 3 Atk. 542: Pr. Reg. 263.

(*i*) Pr. Reg. 263.

(*j*) *O'Connor* v. *Malone*, Dom. Proc., 10th June, 1839; 3 Jurist, 522.

(*k*) *Moseley* v. *Davis*, 11 Price, 162.

(*l*) See *ante*, 331.

reserved; and a copy of the interlocutory order, and of the record of *Nisi Prius* and *postea* thereon, must be left with the petition (*m*). As to subsequent proceedings on issues under the Interpleader Act, see *post*, *Vol. II. Book III. Part I. Chap.* 9.

Writ of Error on.

A writ of error will not lie on a feigned issue; and where, on a feigned issue directed by the Court of Queen's Bench to try the existence of certain customs, the plaintiff had a verdict, subject to the opinion of the court on a special case, the question being, whether the customs, as stated in the declaration, had been sufficiently proved at the trial; the court having given judgment for the plaintiff, error was brought in the Exchequer Chamber on the ground that the customs, as stated in the declaration, were not legal customs. The Court of Exchequer Chamber quashed the writ, on the ground that it did not lie (*n*).

2. *Proceedings upon a Special Case without proceeding to Trial.*

2. Proceedings upon a Special Case without proceeding to Trial.

We have seen, *ante*, 319, 320, the proceedings upon a special case, where the cause has been carried down to trial. By the recent act, 3 & 4 *W*. 4, *c*. 42, *s*. 25, if the parties will consent thereto, it is not necessary to incur the expense of the trial, and the special case may be framed and argued without it. The enactment is as follows:—"That it shall be lawful for the parties in any action or information, *after issue joined*, by *consent and by order* of any of the judges of the said superior courts, to state the *facts* of the case, in the form of a *special case*, for the opinion of the court, and to *agree* that a *judgment* shall be entered for the plaintiff or defendant by *confession*, or of *nolle prosequi*, immediately after the decision of the case, or otherwise, as the court may think fit; and judgment shall be entered accordingly." Before this enactment parties could not, even by consent, have stated a case for the court.

Order for and Proceedings on.

Supposing, therefore, both parties can agree upon the facts, and are willing to have the question argued in the form of a special case, *let them, after issue joined, attend before a judge, who will make the desired order for that purpose* (*o*). *The special case should then be settled between the counsel of the parties* (*o*). If the form of it cannot be *agreed on*, *then*, *in order to proceed*, *the course seems to be to get the judge's order discharged*. The special case is not entered on the record. If misstated, perhaps the court or a judge will allow an amendment. *The course as to proceeding to the argument of the special case will, it should seem, be nearly the same as that adopted with reference to demurrers* (*p*), *but the practice on this subject is not settled. After the argument and decision on the case, the judgment for the plaintiff will be in form as a judgment by confession after issue joined* (*q*); *or if it be a judgment for defendant, it will n form as a judgment on a* nolle prosequi.

3. *Proceedings upon a Case stated from a Court of Equity* (*q*).

3. Proceedings upon a Case stated.

Where a point of law arises in the course of a suit in equity,

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(*m*) See a form of the petition, Harrison's Chancery Practice, 428.

(*n*) *Snook* v. *Maddock*, 5 A. & E. 239.

(*o*) See the form, Chit. Forms, 296.

( ) *Post*, Vol. II. Book II. Part II.

(*q*) As to the proceedings on a special case, see *ante*, 319.

from a Court of Equity.

the chancellor, or other judge of the court of equity, may, if he wish to have the opinion of a court of law upon it, direct a special case to be made out and sent to a particular court of law, there to be argued, and returned with the opinion of such court certified upon it. This has always been the practice of the Court of Chancery; but until the case of *Daintry* v. *Daintry* (r), the courts of common law would not certify their opinion to the Master of the Rolls (s). A case, however, cannot be sent by the committee of appeals of the privy council for the opinion of the courts of law (s).

How Framed.

The case is framed by or under the direction of the court of equity, which also directs to what court of law the case shall be sent (t). If merely directed upon a particular point, you must get the case settled by counsel on both sides; and it is generally provided by the order that in case counsel cannot agree upon the case, it shall be referred to the master to settle; but whether settled by the counsel or by the master, it must in all cases be signed by counsel before it can be set down for argument (u). As soon as the case is ready, *set down the case for argument, have copies of it delivered to the judges, and proceed in the manner directed in the case of a special verdict or special case* (*ante*, 316, 319). When the case comes to be argued, the counsel who has to maintain the affirmative is heard first; then the counsel on the other side; and, lastly, the former counsel is heard in reply. Whatever number of parties there may be to a suit in equity, out of which a case is directed, the court will hear only one counsel on behalf of each separate interest, though the parties who have a common interest be placed adversely to each other in the suit (x).

Grounds of the Opinion stated.

After the case has been argued, the judges will sometimes state the grounds of the opinion they intend to certify, openly in court; and they afterwards certify their opinion to the court of equity. Latterly the grounds of the opinion are in most cases stated by the chief justice or chief baron in open court.

Sending the Case back to the same or another Court.

If the judge in the court of equity be dissatisfied with this opinion, or if the point be of such importance that he may wish to have the opinion also of another court upon it, he may direct it to be sent to the judges of another court of law. There is only one instance in which a case has been sent back to the same court (y).

Proceedings after Argument.

Where the opinion of the court has been certified, you petition for leave to set down the cause for hearing upon the equity reserved, in the same manner as in the case of an issue (z).

(r) 6 T. R. 313.

(s) See 1 Doug. 344, n.

(t) Newl. Ch. Pr. 181.

(u) *Mostyn* v. *Champneys*, 1 Scott, 57; 3 Dowl. 105.

(x) *Bettison* v. *Rickards*, 2 Marsh. 413; 7 Taunt. 105, S. C.

(y) 10 Ves. jun. 500: *Utterson* v. *Vernon*, 3 T. R. 539: *Utterson* v. *Vernon*, 4 Id. 570: Newl. Ch. Pr. 181.

(z) See the form of the petition, Harrison, Ch. Pr. 426.

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